IN THE COURT OF APPEAL **CA-2022-000759**
ON APPEAL FROM THE DIVISIONAL COURT
Stuart-Smith LJ and Thornton J.
[2022] EWHC 568 (Admin)

B E T W E E N :

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

Appellant

-and-

(1) THE SECRETARY OF STATE FOR INTERNATIONAL TRADE/UK EXPORT FINANCE (UKEF)
(2) CHANCELLOR OF THE EXCHEQUER

Respondents

-and-

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

Interested Parties

APPELLANT'S SUPPLEMENTARY SKELETON ARGUMENT

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*References to the Core Bundle are given as **[CB/x]**, to the Supplementary Bundle are given as **[SB/x]** and to Supplementary Bundle Volume 2 are given as **[SB2/x]**, where "**x**" refers to the page number*

1. The Respondents were given permission to address the issues in their Respondents' Notice as part of their substantive appeal skeleton, rather than within 14 days of filing that notice (as required by CPR PD52 para 9). Consequently, the Appellant has not yet had the opportunity to respond to those arguments. This supplementary skeleton argument is filed to deal with the additional points raised in the Respondents' Notice. It also deals with the Respondents' re-characterisation of their case.

Respondents' re-characterisation of their case

2. The Respondents have re-characterised their case in two key respects: (1) they appear to suggest that a quantification of Scope 3 emissions was in fact taken into account; and (2) they accept that the Project will result in an increase in aggregate GHG emissions but submit that it is nonetheless somehow compatible with the Paris Agreement ("**PA**").

3. The starting point is the role of the Climate Change Report ("**CCR**") and the PA in the decision-making. Thornton J. held **[CB/11/201, 212]**:

> "*279. Assessment of the climate risks was a material consideration in the decision making. UKEF's submission to the Secretary of State for International Trade stated that "UKEF has a requirement to consider Climate Change risks as part of its consideration of support for the Project and a Climate Change Report has been prepared… I recommend you read it in full… I have also taken account of its findings in coming to my decision." In his witness statement, UKEF's CEO described the Climate Report as a "key consideration" in the decision making.*
>
> See further §280-282, 332 and Appellant's appeal skeleton argument §7-9.

4. The CCR stated that financing the Project was compatible with the UK's obligations under the PA, including its obligations in relation to Mozambique. That determination was reached, however, without any quantification of Scope 3 emissions on the erroneous basis that such a quantification could not be carried out and conflating Scope 3 and avoided emissions: DGD §87 **[CB/15/367]**; Part 18 Response, §33 **[SB/65/599]**.

5. Thornton J. found that that was unreasonable and accordingly, unlawful: Judgment, §244, 330-335 **[CB/11/193, 212-213]**.

6. The Respondents seek to resile from that factual position before this Court.

7. **First**, they appear to suggest that the relevant decision-maker was in fact Mr. Louis Taylor, the Chief Executive of UKEF (a civil servant), and the operative decision was taken by him on 1 July 2020: RSkel §3 and 9. This is incorrect.
    a. Mr. Taylor did not have delegated authority outside of the approval granted by the First Respondent. She had made clear that she would take "*the final view on future fossil fuel-related transactions before [Mr. Taylor] use[d] [his] delegated authority*" **[SB/39/335]**; see also EriCC Minutes 30 April 2020 **[SB2/37-42]**. The First Respondent granted Mr. Taylor delegated authority to approve UKEF financing on the basis of the briefing of 1 June 2020 **[SB/39/335-345]**. The briefing expressly advised her to pay "*particular attention*" to the CCR (§14), which was annexed to it, given the concerns raised by colleagues concerning UK compliance with the PA.[1]

    b. The Chancellor of the Exchequer's consent was also legally required prior to the financing being agreed and that was given on 12 June 2020. This is not in dispute: Response to Part 18 Request, §18(c)(ii) **[SB/65/595]**.

[1] See, e.g., concerns raised by UKEF's specialist climate advisor, Dr Caldecott **[SB/37/324-300]**.

c. The relevant decisions are those properly set out by the Respondents in their DGD §23.3-23.8 **[CB/15/349]**: see Judgment, §4, 88, 333 **[CB/11/113, 143, 212]**.

d. That was the way the case was approached below and was the position as found by the Divisional Court: Judgment, §3-4 and §325 [**CB/11/113, 210-211**].

8. **Secondly**, the reason the Respondents want now to argue that Mr. Taylor took "*the operative decision*" appears to be that they intend to try to argue, contrary to the evidence and their previous position, that a quantification of Scope 3 emissions was taken into account in the decision making: §325 **[CB/11/210-211]**. Thus, they state that Mr. Taylor took "*his final decision…[with] very rough*" quantified estimates of the Scope 3 emissions": RSkel §1 and 9. This is wrong and impermissible because:

a. The relevant decisions are those set out above, which the Respondents accept were taken without any quantification of Scope 3 emissions.

b. It is directly contradicted by the Respondents' pleadings in this case. In that regard:

i. The Respondents state that they considered that nothing more than a "*high-level qualitative assessment [was] appropriate*" DGD §75.2 **[CB/15/364]**, see also §81, 87. Further, that UKEF reached that view "*because it [was] not known where the Project's gas [would] be used, how and for what purpose, and when [which] meant that any Scope 3 assessment would be inaccurate and therefore likely to be misleading*": DGD §87 **[CB/15/367]**. UKEF's position was that it was not possible to quantify Scope 3 emissions because it was not known where the LNG would be used.

ii. The Respondents confirmed the lack of any relevant quantification of Scope 3 emissions in their response to the Part 18 request: "*no quantitative assessment of Scope 3 emissions was produced*"; it was only after "*the Prime Minister, HM Treasury, and the Secretary of State for International Trade, had already given their approval to UKEF to provide export support in relation to the Project*" that, in response to a request from the PM for "*a proposal on offsetting the emissions generated,*" a "*very rough*" estimate of Scope 3 emissions "*for internal use only*" was produced: **[SB/65/598-600]**.

iii. Thornton J ruled as a matter of fact that a quantification of Scope 3 emissions was not taken into account in the Decision: Judgment, §322-325 **[CB/11/210]**.

c. Irrespective of the above, we now know, as a matter of fact, that Mr. Taylor saw those "*very rough*" estimated figures only about one hour before exercising his delegated power to underwrite at 18.08 on 30 June 2020: **[SB/65/600]**.

9. The Court of Appeal must take the factual basis as set out by the Respondents in their pleadings, in the evidence and found as fact by the Court below, that is, that the Decision as to the compatibility of the Project with the UK's obligations under the PA was reached without any quantification of the Scope 3 emissions and, that the reason for that approach, was that the Respondents had believed quantification to be impossible. Those conclusions were wrong, as a matter of fact, as was subsequently accepted by the Respondents and was found by Thornton J.

10. **Thirdly**, before the Court of Appeal the Respondents explicitly argue *for the first time* that the Respondents agreed to the funding on the basis that:

    a. The project would increase aggregate global GHG emissions and this was nevertheless compatible with the PA because the PA somehow allows developed countries to, as it puts it, "*assist*" developing (climate vulnerable) countries even if that has the consequence of increasing global emissions (and climate impacts), that is, where it is incompatible with the low emissions pathway: RSkel §1.
    b. It was not necessary to assess the extent by which global emissions would be increased (Scope 3 emissions) – nor presumably the period over which the increased emissions would take place, nor their aggregate effect – since this would not be determinative of whether the Decision was consistent with the PA. Put another way, that however great the increase in aggregate global emissions the project was to cause and irrespective even of the time period over which such an increase was to take place, the Decision would have been consistent with the PA: RSkel §61.2.

11. Notably, this is inconsistent with the question as set out in the CCR (referred to by Thornton J. at Judgment §281: see §2 above). Further, as Thornton J. held, it appears unlikely that this is what the relevant Ministers understood when they took their decisions, namely that the Project would lead to a net reduction in emissions and for that reason was compatible with the UK's obligations under the PA: Judgment §318-320 **[CB/11/209-210]**.

12. Whether the Project will result in a net increase or decrease in global emissions, over what period of time and by how much is fundamental to an assessment of whether the Project aligns

with the low emissions pathway, as set out in Article 2(1) and 4(1) of the PA. Central to this case is the Respondents flat denial of that contention; they say before this Court that nothing in the PA required them to consider those questions in order to determine whether the provision of financing was compatible with their obligations under it.

13. That legal position does not accord, however, with the approach adopted in the CCR, where the Respondents asked themselves the question: *'is it compatible with the Paris Agreement i.e. to reduce emissions well below 2ºC with effort to limit to 1.5ºC' (Qn 14).'* **[SB/35/303]** In the Summary of the International Impacts section of the CCR, the conclusion states **[SB/35/282]**:

> "*Globally, long-term gas demand is predicted by Wood Mackenzie to more than double from 2017 to 2040. It is therefore UKEF's view that although the Project's Scope 3 (along with its Scope 1 and 2) emissions will contribute to global GHG emissions the net effect may be a* ***decrease*** *in future GHG emissions provided that the Project LNG is used to replace and/or displace the use of more polluting fossil fuels.*" [2]

14. UKEF considered three 'scenarios', concluding the mid-case one was most likely: "*On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the gas from the Project will at least replace some and/or displace some more polluting fuels, with a consequence of some net reduction in emissions*." **[CB/35/304]**.

15. The first recorded use of the CCR was when it was presented for approval to the meeting of ERiCC on 29 May 2020. Paragraph 5 of the minutes set out the conclusion from the CCR, which is set out above [**SB2/43-44]**.

16. Accordingly, the CCR appeared to conclude that the Project was more likely than not to lead to a net (rather than 'relative') reduction in global emissions over its lifetime (40 years).[3] At the very least the position was ambiguous. The ambiguity appeared to be cleared up in the Respondents' Summary Grounds of Defence in which they stated "*that there was scope for the Project to replace or displace more polluting hydrocarbon sources*" (SGD §47.1 **[CB/20/435]**), that "*there would at least be some displacement of more polluting fuels, with a consequence of some reduction in GHG emissions*" and that "*it was concluded that the net effect would be a decrease in future emissions*." (SGD §47.3 **[CB/20/435]**).

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[2] Stuart-Smith LJ accepts at Judgment, §202-203 **[CB/11/181-182]** that that paragraph could be read as meaning that the Project would result in a net reduction in aggregate global emissions.

[3] This was accepted by Stuart-Smith LJ, see footnote 2.

17. Accordingly, the Appellant argued its case in its skeleton before the High Court and orally at the permission hearing on the basis that that is what the decision makers had understood when they took their decision, namely that the net effect of the Project would be an overall "*decrease in future emissions*." The understanding of "net" was that it meant "*net overall effect*" on emissions. Neither party at that point, appeared to believe that it meant "*relative effect, as compared with business as usual*," that is that the net effect would not be to reduce overall emissions but only to reduce them relative to the predicted position absent displacement of coal or oil with LNG.

18. Counsel for the Respondents repeatedly confirmed this at the renewal hearing see Annex A to this skeleton, for example:

> "*MR HONEY: … Your Ladyship has seen, albeit at speed, the way in which matters were considered in the climate change report, which was of course to consider the general picture, but, in particular, to consider this specific proposal and its consequences, both in relation to its alignment to Mozambique's NDC, what it will do for the country, and also where the LNG was likely to go: India, China and Indonesia are identified in the report, where it was judged that that would be offsetting -- replacing and displacing more emitting fuels so that overall there would be a net reduction in greenhouse gas emissions.*" (Page 39(D) **[SB/59/457]**)

19. In the DGD the Respondents repeated that: "*UKEF concluded that it was more likely than not that, over its operational life, 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*." (§75.3) **[CB/15/364]** Further, the Respondents stated that the Decision was not "*capable of causing an increase in emissions*." (§67) **[CB/15/362]**

20. On the second day of the main hearing, Thornton J. asked Counsel for the Respondent whether she had correctly understood him to have said that the Project would be "*likely to increase greenhouse gas emissions*?" Sir James Eadie responded: "*"I do not want to give the wrong answer to that question. It is the point that has been repeatedly put to me."*

21. In the course of their submissions, reference was made to an overall or net increase in emissions and also to a net reduction. Despite this confusion, Stuart-Smith LJ considered that when the Chancellor of the Exchequer and the Secretary of State for Trade took their decision, they would have understood that the Project would result in a significant increase in aggregate global GHG emissions. At Judgment §198, referring to a passage in the CCR, he stated **[CB/11/181]**:

> "*There is no suggestion in this passage that the Scope 3 emissions would be anything other than "very high" or that the potential for displacement of coal in certain markets might prevent the overall conclusion that use of the Project LNG would lead to a substantial increase in aggregate global GHG emissions when compared with what the position would be if the Project did not go ahead.*"

22. While this is nowhere stated in the CCR or in the submissions to ministers, nor justified or explained by reference to the PA, the Appellant understands that that is now the position taken by the Respondents before this Court (RSkel §37). Accordingly, the Respondents appear now to be saying that at the relevant time the Respondents believed that the Project was compatible with the UK's obligations under the PA even though it would lead to a substantial increase in aggregate global GHG emissions over an unspecified period.

23. The Appellants note the following:

24. **First**, as found by Thornton J. at Judgment §322-325 **[CB/11/210]** it is more likely than not that the Decision was not taken on the basis set out above having regard to the relevant parts of the CCR that would have been read by the Ministers and the likely understanding that they would have reached. Indeed, in their SGD, their DGD and at the permission hearing, the Respondents argued that the Project would result in a net reduction in global emissions and even at the main hearing were unsure as to the position offering statements both as to an overall increase and as to a net reduction. The relevant question in the CCR was whether the Project was consistent with "*a pathway towards limiting global warming to well below 2°C*", which was the correct question to determine consistency with the PA: Judgment, §268, 270, 328 **[CB/11/198, 211]**. That was answered in the affirmative, which could not have been the case had the conclusion been that the Project would lead to an aggregate increase in global emissions.

25. **Secondly**, as a matter of law, it is also wrong. Had the Respondents concluded that the financing of the Project was compatible with the UK's obligations under the PA despite the consequence of the Project being an overall net increase in aggregate global emissions, that would have been wrong (and untenable). The PA mandates a reduction in emissions to meet the temperature goal set out in Article 2(1)(a) and achieve "*a balance between anthropogenic*

emissions by sources and removals by sinks" (net zero) by 2050.[4] (ASkel §22-28, 29-30, 39-41, 45-47, 59).

26. **Thirdly**, this change in position by the Respondents and lack of clarity – including lack of evidence – highlights the essential difficulty the Respondents face in this case; in order for them to have reached a rational decision as to whether financing the Project was compatible with the UK's obligations under the PA, they had to have carried out sufficient analysis to determine what the likely impact of the Project would be on global carbon budgets over the period of the Project and evaluated what that meant for achieving the temperature goal. [ASkel §83-88]

27. Thornton J. was correct therefore to find that without an assessment of Scope 3 GHG emissions over time, no rational assessment of PA compatibility could have been carried out, the Decision was vitiated by illegality: Judgment, §244, 330-335 **[CB/11/193, 212-213]**.

28. The Respondents argue however, that for this Court to uphold the decision of Thornton J., namely that UKEF could not rationally have come to a conclusion on PA compatibility without having regard to a quantified estimate of Scope 3 emissions would "*go beyond…the expert advice given to UKEF at the time that the methodologies for reliably estimating Scope 3 emissions were still being developed*" RSkel §2.3, see also RSkel §61.4. This is incorrect and contrary to the findings of both Judges below. The expert advice given to UKEF prior to the decision was that the failure to quantify Scope 3 emissions was a '*big gap in the analysis*' and undermined the credibility of the assessment: Judgment §294, 303. The House of Commons Environmental Audit Committee concluded that Scope 3 emissions are essential for calculating the full emissions impact of a project and had recommended that UKEF report the Scope 3 emissions of the fossil fuel projects, pointing to the 'Greenhouse Gas Protocol for Project Accounting' as providing a methodology for doing so, which the Interested Party's expert also described as "*well known and established*": Judgment §37, 255, 260, and 305. The reference to methodologies '*being developed*' relates to Committed Cumulative Carbon Emissions (CCCE) and relates to

[4] The PA Decision CP2.1 §17 (by which the Parties adopted the PA) provided that for parties to meet a pathway to 2 ˚C emissions required to be reduced to no more than 40 gigatonnes by 2030 and that for a pathway to 1.5 ˚C above pre-industrial emissions would need to be reduced according to quantifications to be identified by the IPCC in a special report in 2018. The IPCC Special Report, SR1.5 provided that an emissions would need to decline by about 45% from 2010 levels by 2030 reaching net zero around 2050: https://www.ipcc.ch/sr15/chapter/spm/. The UN Environment Programme (UNEP) report November 2019 found that unless global greenhouse gas emissions fell by 7.6 per cent each year between 2020 and 2030, the world will miss the opportunity to meet the 1.5°C temperature goal of the Paris Agreement.

the assessment of carbon lock-in, not quantification, as clear from the comments made by UKEF's own advisor, Dr Caldecott (see Judgment §60, 68, 181 and 217).

Framing of case

29. Finally, the brief summary of the case set out at RSkel §1 is not correct; it does not reflect either the information put before the Ministers who agreed the financing, nor does it reflect how the Respondents argued their case before the Divisional Court.

30. Crucially, this is not a challenge to the overall reasonableness of the Decision; it is a challenge to the legality of that Decision on the basis of two fundamental errors. **First**, that the Decision was taken on the basis of a conclusion that the funding was compatible with the UK's obligations under the PA and, **connectedly**, that that conclusion was reached without the Respondents having quantified the GHG emissions that would be produced by the LNG development but rather having conflated Scope 3 and avoided emissions. Thornton J. found that the Claimants were correct on both grounds. By contrast, Stuart-Smith LJ concluded that the PA contained inherently irreconcilable provisions, namely the need for development and the reduction of climate change emissions, such that it was permissible to provide financing for fossil fuel projects even if that undermined or even prevented the temperature goals from being met: Judgment, §231, 239 **[CB/11/189, 192]**.

31. The latter argument has now been picked up and developed by the Respondents. The Respondents' new position is that the "*PA contains a number of different aims and objectives which are in tension, if not mutually irreconcilable – in particular the aim of decreasing GHG emissions as against the aim of allowing developing countries to seek to eradicate poverty recognising that peaking will take longer for developing countries*": RSkel §33, 39.2.

32. It is not in dispute that the PA provides for developing countries' territorial emissions to peak later (as opposed to digging up new gas reserves for the global market, as is the case here). That is explicit in Article 4(1). However, it is wrong to draw from that, or from the reference to "*climate resilient development*" in Article 2(1)(c), that the aims and objectives of the PA are "*mutually irreconcilable*", that is, that a party to the Treaty cannot meet its obligations because those obligations are mutually incompatible.

33. Such an interpretation is impermissible as contrary to the principle of effectiveness; "*effet utile*" or *ut res magis valeat quam pereat*; it would deprive the obligations set out in Article 2(1) of the

PA (and indeed the other provisions of the PA – and its parent Treaty, the UNFCCC) of effectiveness and run counter to the entire object and purpose of the PA. These fundamental principles of Treaty interpretation are embodied in the concepts of good faith and the object and purpose as mandatory requirements for the interpretation of treaties in Article 31(1) VCLT.[5] According to the International Law Commission's commentary on the VCLT:

> "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

(Quoted in R Gardner, Treaty Interpretation (2008) p 160).

34. In *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, AB*-1999-8, WT/DS98/AB/R, p 24, paras 80-81, the Appellate Body held:

> "We have also recognized on several occasions, the principle of effectiveness in the interpretation of treaties (*ut res magis valeat quam pereat*) which requires that a treaty interpreter: '…must give meaning and an effect to all the terms of the treaty. An interpretor it is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'
>
> In light of the interpretive principle of effectiveness, it is the ***duty*** of any treaty interpreter to 'read ***all*** applicable provisions of the treaty in a way that gives meaning to all of them harmoniously'. An important corollary of this principle is that the treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole." (Emphasis in the original)

35. The approach now contended for by the Respondents would denude the PA (and the UNFCCC) of meaning. Their new position is that they did not need to consider whether the Project was consistent with the low emissions pathway, a question that was in the CCR

[5] For the principle of effectiveness in the context of international treaties and agreements, see for example, *In Territorial Dispute (Libya/Chad)* (Judgment) ICJ Rep 21, §51-52, citing the *Lighthouses Case between France and Greece*, Judgment, 1934, P.C.I.J., Series A/B. No. 62, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution* 276 (1970), I.C.J. Reports 1971, p. 35, para. 66; and Aegean Sea Continental Shelf, I.C.J. Reports 1978, p. 22, para. 52)). See further Award in the Arbitration regarding the *Iron Rhine (Belgium v Netherlands)* (2005) 27 RIAA 35, 64 and Dispute between Argentina and Chile concerning the *Beagle Channel* (1977) 21 RIAA 53, 231. See also in the context of the ECHR: *Nada v Switzerland* App No 10593/08, Judgment 12 September 2012, [182] the Grand Chamber emphasized that the Convention "*must be interpreted and applied in a manner that renders its guarantees practical and effective*"; see further *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008 and concurring judgment of Judge Serghides in *Merabishvili v Georgia* (App. No. 72508/13) [2017] ECHR 72508/13 §23-38. In the WTO context, the Appellate Body has affirmed that: "*A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness (ut res magis valeat quam pereat)*." (*Japan – Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8,10 & 11/AB/R (1996).

pursuant to advice from their internal experts (and that was approved of by Thornton J. (Judgment, §268, 270 **[CB/11/198]**)). Rather, they say now say that in determining whether the financing of the Project was consistent with the UK's obligations under the PA:

a. they did not need to have <u>any</u> regard to the "*magnitude of the Scope 3 emissions*" because "*the assessment was far more multi-faceted*.": RSkel §53.

b. That it is an "*inherently unlikely*" and "*unattractive proposition*" that the PA can have been intended to prevent developed countries lending to developing countries to enable them to exploit their fossil fuel resources: RSkel §51.[6] (n.b. this point is also not relevant on the facts; UKEF is not lending to Mozambique but to Total and doing so to secure UK contracts)

c. That the PA "*makes it clear that fossil fuel projects which will bring important economic benefits to a developing country…are consistent with its aims*", referring to the fact that the PA allows emissions in developing countries to peak later and that finance flows should be consistent with "*climate resilient development*": RSkel §52.

36. Accordingly, the Respondents' position appears to be that the PA contains no obligations in relation to the financing by developed countries of fossil fuel projects in developing countries, irrespective of where the fossil fuels will be used, how great the consequent emissions and the impact that would have on the temperature goals in Article 2(1)(a) and 4(1). This would be to render the PA (and the UNFCCC under which it was adopted) ineffective and in parts wholly meaningless. The correct approach is that set out by Thornton J at Judgment, §248-253 and 261-270.

37. It would also undermine the objective of 'climate resilient development' in Article 2(1)(c). As the IPCC has made clear, the impact of climate change will exacerbate poverty including in Africa (Claimant's DC skeleton argument §29 **[CB/14/299]**), with deleterious impacts on the development of already vulnerable countries such as Mozambique. The economic and social impacts of climate change are already extreme and will be catastrophic, jeopardising the lives, welfare and living environment of many people all over the world [Judgment §250]. The

[6] Note that footnote 13 of RSkel is not correct. The position is that developing countries may develop their resources for their <u>internal</u> use where alternative options are not available and developed countries may assist with that, again in so far as alternative resources are not available. Developed countries are under an obligation to assist developing countries meet (and increase) their climate change commitments: Article 4(1)(3)-(5), 9 of the PA.

magnitude of this is far greater than the assumed benefits of the project. The PA states that its goals, including its temperature and finance goals must be achieved on the basis of equity and eradication of poverty; far from being irreconcilable goals, they are inherently linked; development goals cannot be met without the achievement of climate mitigation as provided for in the PA. As made clear in the Decision adopting the PA:

> "*climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries…accelerating the reduction of global greenhouse gas emissions…and emphasising the need for urgency…*
>
> *Acknowledging the need to promote universal access to sustainable energy in developing countries, in particular in Africa through enhanced deployment of renewable energy….*
>
> *[D]ecides that, in the implementation of the Agreement, financial resources provided to developing countries should enhance the implementation of their policies, strategies, regulations and action plans and their climate change actions with respect to mitigation and adaptation to contribute to the achievement of the purpose of the Agreement as defined in Article 2.*"

38. The alignment of finance flows with a low emissions pathway and climate resilient development is a central means by which the PA objectives are to be met (see Judgment, §263 **[CB/11/197]**). This is explained in numerous UN, OECD and other international reports and analyses, which emphasise that sustainable development and climate change are inseparable,[7] as well as the UN 2030 Agenda for Sustainable Development adopted on 27 September 2015, which specifically refers to the PA.[8] Thus, the PA expressly requires developed countries to assist developing countries, including by way of finance to meet and exceed their NDCs and transition (Articles 4(5), 7(13) and 9, see Judgment §267 **[CB/11/198]**).

39. The UK recognised this in its Green Finance Strategy of July 2019, in which it stated that all overseas aid would be aligned with the PA **[SB/16/119]**. Further, in its policy: Aligning UK international support for the clean energy transition, adopted in December 2020 at the opening of the Climate Ambition Summit and effective from March 2021, (Guidance at **[SB/58/440-445]**) it ended all UK financial support for unabated gas generation, whether that is Official Development Assistance (ODA), investment, financial and trade promotion activity overseas, including by UKEF, or in the context of the UK's voting position at the boards of Multilateral Development Banks **[SB/58/442]**. The only exception is when a country has credible NDC and long-term decarbonisation pathway to net zero by 2050 in line with the Paris Agreement;

[7] United Nations Report: Making Finance Flows Consistent with the Paris Agreement, February 2020. OECD Report calling for alignment of development finance with climate-goals 3 December 2019

[8] The 2030 Agenda for Sustainable Development, SDG 13. See also §72.

where support does not delay or diminish the transition to renewables;[9] where the risk of the asset being stranded has been assessed and managed; and where the project intends to follow best practice in environmental and social standards. The policy states that: '*Exceptional support will only be allowed if all of these conditions are demonstrated*.' It is then expressly stated that support for gas production, distribution and power generation into the global market will not be allowed. **[SB/58/444]**

40. Thus the UK's policy reaffirms the 2050 net zero target for all recipient countries and places an absolute prohibition on funding support for gas exported to the global market.[10] It follows that contrary to the submissions made by the Respondents in this case, the UK does not take the view that equity, as reflected in the PA, demands that it support the generation of fossil fuel export revenue by developing countries (*contra* Interested Parties' DC skeleton argument §70-71 **[CB/13/265]**).

41. Indeed, the Respondents' interpretation before this Court would not constitute a strengthened response to the threat of climate change (Article 2 PA) but rather, a licence to undermine the temperature goals on the basis that this was necessary to enable another (allegedly inconsistent) objective of the PA.

42. Finally, whilst the Respondents and Interested Parties might seek to portray this case as one about development funding, it is not. This case is about funding by UKEF under s. 1 of the Export and Investment Guarantees Act 1991. Indeed, even in the context of UKEF funding, DfID and the FCO were against it, as was BEIS (Judgment §87-89).

43. Despite this, the Interested Parties state that the Claimant is arguing for a "*stark and inequitable position*", namely that the "*PA prohibits an LDC from seeking to eradicate poverty within its sovereign territory by the development of its sovereign natural fossil fuel resources" and that in so doing, the Claimant is "**urg[ing] the Court to 'pull up the ladder' and to leave LDCs poverty stricken** and without the ability to exploit the types of resources which the developed world has historically exploited for its own economic development."* §19 IPSkel (emphasis added) **[CB/9/98]**.

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[9] If the role of gas is not established in an NDC and long-term decarbonisation pathway to net zero by 2050, it will need to be demonstrated that: the project cannot viably be replaced by renewable energy sources; that it contributes to domestic energy security; and that it is consistent with a realistic transition pathway to net zero by 2050 at the latest, including demonstrating that mitigation measures have been considered, preferably at asset level.

[10] "Internationally we …have committed to align our finance with the Paris Agreement." (Consultation Paper p6, 8 February 2021)

This submission rests on a wholesale misunderstanding of the meaning, object and effect of the Paris Agreement; it is an inaccurate (and offensive) characterisation of the Claimant's case. It also ignores the commercial objectives of the Interested Party in the Project and the impact on the most vulnerable people in the world, including in Mozambique, of climate change, for which the Interested Party bears at least some responsibility.

Respondent's notice/tenability: RSkel §11-36

44. The Respondents accept that whether they were correct in concluding that the financing of the Project was compatible with the UK's obligations under the PA is a justiciable question. However, they argue that in answering that question, the Court must decide not whether the Respondents properly directed themselves as to the law but rather, whether they reached a 'tenable' view of the law. In determining tenability, they submit that the Court should apply a very low intensity of review. These arguments are largely already dealt with by the Appellant in the appeal skeleton argument, §64-74.

45. By their Respondents' notice of 19 April 2022, the Respondents go further, however, and ask the Court to overturn the approach of the judgment of the Court in *Heathrow Airport Ltd v HM Treasury* [2021] STC 1203, [2021] EWCA Civ 783 ("*Heathrow*") – and indeed by extension, a very large number of other decisions of the House of Lords and Supreme Court that where necessary to resolve the issue before it. They say that: "*tenability ought to be the appropriate standard of review in <u>all</u> cases in which a court is invited to scrutinise a decision in which the relevant decision-maker has voluntarily chosen to take into account unincorporated international law"* and that "[*t]he approach of Green LJ and Whipple J. was wrong insofar as it envisaged the courts applying the correctness standard of review and substituting their own judgment on questions of international law in a greater number of cases."*

46. They argue:

    a. That misdirection as to the law should no longer be a ground of judicial review where the misdirection relates to international law (contrary to well-established and binding House of Lords and Supreme Court authority).

    b. In the case of a misdirection of international law, the only basis for judicial review should be "*a particularly low intensity tenability review*," such that a Court should not

strike down a decision based on an error of law if it considers that the decision-maker's approach could be said to be "*just about tenable*" – even if wrong.

c. That the only exceptions to this should be where the decision maker was concerned with questions "*involving the fundamental rights of individuals and/or customary international law arising to jus cogens status and explained as exceptions driven by extreme public policy considerations*": RSkel §21.

47. The Respondents say that because the PA is an unincorporated treaty, the Court must afford UKEF deference in it assessment of the UK's obligations under the PA by applying a standard of review based on "tenability" and by calibrating the relevant treaty provisions according to a sliding scale of further deference based on the abstraction of the provisions ("*softness or hardness to the edges of the rule or provision in question*" RSkel §26). Through these twin devices, the Respondents seek to convert a question of law into a mere factual consideration that UKEF took into account in reaching its Decision. That allows the Respondents to submit that the interpretation of a treaty is in essence no different to the interpretation of economic data (i.e. both are factual considerations) such that the court is confined to a review based on rationality grounds: RSkel §19. By this route, they attempt to characterize the interpretation of a treaty as a polycentric-type dispute that reasonable decision-makers could approach in different ways by giving different weight to different factors: §19.

48. It is important to be clear that there is only one approach to a legal question that is consistent with the status of that question as a legal question and that approach rests upon the premise that there can only be one correct answer to the question posed. The methodology of legal reasoning cannot yield multiple plausible answers to a legal question: the tools of legal interpretation and analysis are designed to find a single right answer.

49. What the Respondents have conspicuously failed to offer is an account of how a court in practice should approach a question of law in accordance with the methodology they propose (i.e. the standard of tenability coupled with a scale of further deference depending on the abstraction of the relevant treaty provision). The reason for this omission is not difficult to discern; this approach is unworkable and potentially embarrassing.

50. First, it is obvious that a court must initially come to its own view about the correct interpretation of the treaty provision in question by using the standard tools of legal reasoning, in particular, applying Articles 31 and 32 of the Vienna Convention on the Law of

Treaties. A court could not feasibly come to a view on what is "tenable" unless it has a benchmark to assess the plausibility of the interpretation advanced by the decision-maker.

51. Second, once the court has established its benchmark in this way, it must then determine whether the decision-maker's interpretation is consistent with the court's own interpretation or, if it is not consistent, whether it is within the range of interpretations that are tenable by reference to the court's benchmark. If the decision-maker's interpretation is consistent with the court's own interpretation, then it will be characterized as a "correct" interpretation. If it is not consistent, then it will be characterized as "incorrect" either explicitly by the court or by implication. That means that one of the principal justifications for this approach is illusory: even on the application of a tenability standard, the court will inevitably pass judgment on whether the decision-maker has acted consistently with the UK's obligations under an unincorporated treaty. Even the Respondents commence their submissions on UKEF's positive conclusion on the compatibility of the Project with the UK's obligations under the PA with the following statement: "*That conclusion was correct, and certainly tenable.*" : RSkel §37 and 47. Tenability cannot be addressed before correctness.

52. Third, in determining whether the decision-maker's interpretation is within the range of interpretations that are tenable by reference to the court's benchmark, the court will be compelled to rule on the degree of incorrectness that is permissible for an interpretation to remain tenable. There are simply no judicial or manageable standards to make such a determination. It is an inquiry that is antithetical to legal reasoning.

53. The Respondents' approach would lead to a situation where different Ministries of Government might take different "tenable" views of the UK's international treaty obligations and the Courts would be impotent to intervene in a meaningful way to resolve which view is the correct one. This is by no means an unlikely scenario given the conflicting views that were taken by UKEF and the Foreign Secretary in relation to the Project in the present case.

54. The Respondents' approach is precluded by high authority. In *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777, Lord Sumption, who gave judgment on behalf of a unanimous Supreme Court, stated:

> If 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. §35

55. Lord Sumption expressly rejected a "*general rule that the English courts should not determine points of customary international law but only the 'tenability' of some particular view about them*" [35]. The Respondents are thus now precluded from asking the Court of Appeal to adopt that general rule. The Respondents' approach is also inconsistent with *Heathrow Airport Ltd v HM Treasury & anr* [2021] STC 1203, [2021] EWCA Civ 783 ("*Heathrow*"); *R v Secretary of State for the Home department ex parte Launder* [1997] 1 WLR 839 §866-867; *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326; 341-342, 367, 375-376; *Kuwait Airways v Iraqi Airways* [2002] 2 AC 883; *Republic of Ecuador v Occidental Exploration and Production Co* [2006] 2 WLR 70.[11]

56. In *Benkharbouche*, the question was whether customary international law required state immunity in an employment context to acts of a private law character. The source of the international norm was thus customary international law and not a treaty. This is significant because the ascertainment of a norm of customary international law requires an assessment of state practice and *opinio juris* and often a delicate conclusion must be drawn as to whether there is sufficient degree of uniformity in the practice among states to justify the recognition of the existence of a customary norm. Lord Sumption expressly declined, however, to adopt a tenability standard to this exercise: §35. When the source of an international norm is a treaty, the difficulties that attend the recognition of a norm of customary international law do not arise. There is no doubt about the existence of the norm or its binding quality. A court's task is merely to interpret it in accordance with Articles 31 and 32 Vienna Convention on the Law of Treaties. Any rationale for applying a tenability standard is thus vastly diminished when it comes to the interpretation of a treaty provision as opposed to the ascertainment of the existence of a customary norm.

57. Lord Sumption recognized that a tenability standard "*was tentatively endorsed by Lord Brown of Eaton-under-Heywood in R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2009] 1 AC 756, 851-852, para 68. Thus the court may in principle be reluctant to decide contentious issues of international law if that would impede the executive conduct of foreign relations*" : §35. This "reluctance", however, is more accurately described as an established ground of justiciability based on the separation of powers (as in *R (Abbasi) v Secretary of State for Foreign*

[11] And others, for example *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418 p. 500-501 per Lord Oliver and *Republic of Ecuador v Occidental Exploration and Production Co* [2006] 2 WLR 70; *Al-Waheed v Ministry of Defence Mohammed (Serdar) v Ministry of Defence and another (No 2) (Qasim and others intervening)* [2017] UKSC 2

and Commonwealth Affairs [2003] UKHRR 76) than as an alternative standard of review for a question of international law.

58. In any event, it is respectfully submitted that Lord Brown's tentative endorsement of the tenability standard in *Corner House Research* was premised upon a mistaken view of the significance of an English court's interpretation of a treaty provision. Lord Brown was concerned that if the English court where to provide an interpretation of Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), it would usurp the role of the dispute resolution procedure created by the OECD Convention, which in any case eschewed resolution by an international court but rather envisaged the creation of a working group tasked to reach a consensus view on the disputed issues. Lord Brown was also concerned that the Government would be hampered in putting forward or agreeing to alternative interpretations of the OECD Convention at the international level if an English court were to provide an interpretation of its provisions. [65-68]

59. An interpretation of a treaty provision by an English court is not binding upon the State parties to that treaty or upon any court, tribunal or other body established under the treaty to resolve disputes arising under it. An interpretation of a treaty by an English court only has force on the domestic plane vis-à-vis persons or entities operating on the domestic plane. At the international level, it will be for the international court, tribunal or other body to accord whatever weight it deems fit to an English judgment interpreting the treaty provision in question, or to ignore it altogether. In the words of Professor Nollkaemper:

> The traditional position on 'outward' effects of decisions of national courts is that unless international law provides otherwise, such decisions do not produce legal effects in the international legal order. The dualistic nature of the relationship between international and national law renders such decisions in principle facts, not law… It also follows that international courts are not bound by decisions of national courts. This is obviously so when a decision of a national court in itself violates international law… But the situation is no different when a national decision does not 'violate' international law as such. An international court will determine whether or not a particular national decision that interprets or applies an international obligation conforms to international law, but will not *a priori* grant authority to such a decision. (A. Nollkaemper, *National Courts and the International Rules of Law* (2011) p 244-5.)

60. In light of this reality, it cannot possibly be said that an English court somehow usurps the role of any court, tribunal or body established by the treaty by providing its own interpretation of one or more of its provisions. The international legal system is a

decentralized legal system without a central authority to legislate, interpret the law or enforce it. The effectiveness of international law relies in significant part upon the activities of domestic institutions within States as the subjects of the international legal order:

> The volume of national case law on such matters of international law easily outnumbers the decisions of international courts and tribunals. In any event in this respect national case-law has a more profound effect for the actual application of international law, and the protection of the international rule of law, than do the decisions of international courts and tribunals. (A. Nollkaemper, *National Courts and the International Rules of Law* (2011) p 8.)

61. When an Executive decision-maker decides that a decision would be compatible with the UK's obligations in the PA and an English court reviews that question of law by interpreting the PA for itself, that is an example of the decentralized international legal system at work. The effectiveness of international law would be fatally undermined if domestic courts refused to interpret and apply international norms in deference to the possibility of adjudication or resolution at the international level, which is seldom feasible or realistic in practice.

62. The Respondents make several arguments for why they say "*the starting point of the analysis*" should <u>not</u> be that an "'*error of law is correctable*'" §15.

63. <u>First</u>, the Respondents say that the "*starting point is dualism*": §15. Dualism, and the constitutional principles that underpin it, is the starting point for the question of justiciability, as the Respondents themselves say §14. That is where it ends as Lord Sumption's statement of principle in *Benharbouche* confirms. Once the Executive decision-maker decides to do something on the basis of a determination that it is compatible with the UK's obligations under an unincorporated treaty, the legal analysis that informed the decision-maker's determination becomes justiciable as a question of law in judicial review. There is no constitutional principle associated with dualism that operates to convert a question of treaty interpretation—a question of law—into something else (i.e. a relevant factual consideration). There is only one legal approach to the interpretation of a treaty and that is set out in Articles 31 and 32 VCLT and that applies whether or not the treaty is incorporated in domestic law.

64. <u>Second</u>, the Respondents maintain that if a court could correct an error of international law made by a decision maker that would "*transmute a non-domestically binding international legal provision into enforceable domestic law*" and "*in effect involve the Executive creating domestic law*" [18]. The Respondents are mistaken; an unincorporated treaty is not incorporated into English law by virtue of an English court applying an established ground for judicial review based on

an error of law in English public law; nor does an English court incorporate French law into English law when it rules upon the interpretation of a contract governed by French law in accordance with an English choice of law rule. An English court may be called upon to decide questions of foreign law in countless scenarios and it cannot be maintained that each time it does so it incorporates the foreign legal norm into English law. There has, furthermore, never been a suggestion that an English court should be satisfied with a tenable interpretation of the foreign legal norm in question.

65. An Executive decision-maker cannot be permitted to approbate and reprobate in relation to the status of a treaty provision. It cannot at once proclaim that it has rendered a decision that is compatible with the UK's international obligations (a legal conclusion *par excellence*) and then in judicial review proceedings maintain that it is not a legal conclusion that can be reviewed as such because the treaty obligations are not incorporated. For a claim for judicial review based upon an error of law, what counts is that the decision-maker misdirected herself on a legal question; the source of the legal norm is irrelevant. As the Respondents submit, "*the decision maker could choose not to take into account the international law; or decide that the decision should be made whether it breached international law or not*" §16 and the decision-maker will be politically accountable on that basis. But a decision-maker cannot avoid accountability through a subterfuge by purporting to act in accordance with the UK's international obligations and then avoiding proper scrutiny of that legal conclusion as a question of law.

66. Third, the Respondents say that the legal review of an interpretation of an unincorporated treaty provision would "*provide perverse incentives for the Executive to avoid domestic legal risk by not considering the international legal aspects of a decision*": §18. To the contrary, the perverse incentives would be created by the Respondents' proposed approach to the review of an interpretation of an unincorporated treaty. An Executive decision-maker would feel entitled to make a representation that a decision is compatible with the UK's treaty obligations despite being advised that such an interpretation is likely to be wrong in law but not irrational enough to fall foul of a tenability standard. This would undermine confidence in the British Government both domestically and internationally (as well as public confidence in the Courts and the truth of Ministerial statements as to the compatibility of their decisions with international law). It is essential for the Courts to exercise their constitutional function of determining whether a decision-maker has properly directed himself as to the law as a basic requirement of the rule of law and the principle of democratic accountability. The Respondents' submission also assumes that judicial review places the Executive and the

Judiciary into a relationship of antagonism. But one of the functions of judicial review is to ensure that a decision-maker reached a decision based upon a correct understanding of the law and to allow that decision-maker to revisit that decision if that were not the case. The court's judgment on the correct interpretation of the law may then provide essential guidance to other Executive decision-makers in the future. Judicial review on questions of law is not a zero-sum game in which the Executive should be motivated "*to avoid domestic legal risk*".

67. Fourth, the Respondents' sliding scale of deference to the Executive decision-maker based upon the abstraction of the treaty provision is designed to link its approach with the notion of variable intensity in a rationality review. This approach rests upon a concept of relative normativity: only treaty provisions that can be described as "*hard-edged and prescriptive*" are to be treated as having normativity: §28, whereas those "*towards the aspirational and high-level political end of the spectrum*": §32 are not. This is completely antithetical to how international law works. States can make aspirational and high-level political declarations in joint communiques, memoranda of understandings and other informal documents. But a treaty is a binding legal instrument and each of its provisions has normative force in accordance with the principle of *pacta sunt servanda*, which is expressly encapsulated in Article 26 VCLT: "*Every treaty in force is binding upon the parties to it and must be performed in good faith.*" The reason that the conclusion of PA was justly celebrated as a turning point in global efforts to address climate change was precisely because States had finally agreed to make reciprocal binding commitments to reduce their greenhouse emissions rather than end that international conference (COP 21) with yet another declaration of intent. There is no distinction in terms of normative force between the provisions of any treaty and it would be insidious for the English courts to invent and implement a hierarchy of treaty norms based on relative normativity, as this is tantamount to a declaration that the UK's treaty obligations are not to be taken seriously. In domestic law there is also a full spectrum of abstraction in terms of how legal norms are formulated, ranging from precise rules regulating the circulation of motor vehicles to general constitutional principles addressing parliamentary democracy. The courts do not, however, seek to impose a sliding scale of normativity in respect of domestic norms, nor do they accord more or less deference to an Executive decision-maker by reference to the abstraction of the norm in question. There is no reason to approach international law differently.

68. Fifth, the Respondents cite the fact that "*the PA expresses a preference for disputes to be resolved by consensus rather than litigation*" and note that the route to litigation is conditioned by the

state parties' consent (as it always is at the international level) such that neither the option of arbitration or ICJ proceedings "*will likely to be used in practice*": §36. The Respondents further point to the fact that "*there is no established jurisprudence reflecting a consensus on the meaning of the key provisions of the PA*": §34. Far from providing a justification for judicial abstention, these factors rather point to the importance of the English court engaging properly with questions of interpretation arising from the PA, rather than forging a path to a legal void as the Respondents suggest. There is unlikely to be interpretative assistance forthcoming from the international fora mentioned in Articles 14 and 15 of the PA and at the same time there is no impediment, subject to justiciability, for an English court to provide guidance at a domestic level on the UK's obligations under the PA. The English court simply will do its part to ensure that the PA is not relegated to irrelevancy as far as the UK is concerned. In doing so, the English court does not usurp the role of any dispute resolution procedure or forum under the PA nor does it undermine the UK's ability to agree to interpretations of the PA at the international level should that possibility arise in the future. The only risk is that the English court's judgment will be considered to be persuasive at the international level due to the quality of its reasoning. The leading texts on international law are littered with references to English court judgments on issues of international law for that reason alone; they do not, as a matter of international law, have any unique claim to authority.

The standard of review cases at RSkel §20

69. The Respondents rely on several cases at RSkel §20 for the uncontentious proposition that the standard of review of an exercise of a statutory power depends on the context: eg, *OFT v IBA Health Ltd* [2004] 4 All ER 1103 ("*OFT*"); *Kennedy v Charity Commission* [2015] AC 455; *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223.

70. At RSkel §20.1 the Respondents refer to *R (Friends of the Earth) v Secretary of State for Transport* [2021] All ER 967. That case was concerned with a very different question, namely whether the act of the UK Government in ratifying the PA amounted to a statement of policy that it would comply with its provisions. The Court held that it did not and that it therefore fell to be treated as a consideration to which a decision-maker may have regard if he considered it right to do so in his judgment and discretion, which judgment is only reviewable on grounds of irrationality (§108). So judged, the Secretary of State did not act irrationally in deciding that the UK's obligations under the PA were sufficiently taken into account if he had regard to the UK's obligations under the Climate Change Act 2008 (§129, 132). Rationality was therefore the

standard of review not only for the question of whether PA obligations should be considered at all, but also for the question of how they should be considered.

71. None of those authorities are relevant or assist the Respondents in its contention that a Decision based on an error of law (albeit international law), should be upheld as lawful if the error could be said "*tenably*" or "*just tenably*" to be correct.

72. The Court is not concerned with the overall balance struck between competing interests; nor with the overall rationality of the Decision itself. The issues before the Court are whether (a) the decision maker was wrong to conclude that financing of the Project was compatible with the UK's obligations under the PA; including (b) whether it was reasonable for the decision maker to reach that conclusion having regard to the material that it had and did not have before it.

73. As to the latter, even where a statutory question is expressed as depending on the subjective belief "*there is no doubt that the court is entitled to inquire whether there was adequate material to support that conclusion (see the [2004] 4 All ER 1103 at 1132 Metropolitan Borough of Tameside case [1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047 per Lord Wilberforce*)": *OFT* at §93 per Lord Carnwath. Courts should not "*impose exceptional restraint on themselves because they are dealing with cases that arise out of facts found…Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado*'": *ibid* §96, citing Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 38-39.

The correct approach to the interpretation of Treaties

74. There is no dispute between the parties that international treaties must be interpreted in accordance with the requirements of the Vienna Convention on the Law of Treaties, in particular Article 31 (and, where there is ambiguity, Article 32): *Al- Malki v Reyes* [2019] AC 735 §10-12: ASkele §21 **[CB/6/35]**. As submitted by Counsel for the Respondents below, while the case concerned the Vienna Convention on Diplomatic Immunity and Privileges that had been implemented in domestic law by the 1964 Act, the relevant principles of interpretation could be taken from it, because the 1964 Act scheduled certain provisions of the international convention to the Act and the Supreme Court was explaining how such Treaties "*required to be interpreted by the Court*."

The Respondents' interpretation of PA

75. The applicable and correct interpretation of the obligations under the PA was that set out by the Respondents in their CCR at question 14: Judgment, §281 **[CB/11/201]**. The Appellant submits that Thornton J. was correct.

76. The Respondents' understanding remains opaque. As noted by both judges [Transcript Day 2 pp. 80-81 **[SB2/49-50**] the Respondents have never explained how they interpreted the relevant legal provisions in concluding that the financing was compatible with the PA, and refused all disclosure on this question: Article 2(1)(c), 3, 4(3) to 5 and 9, 11. Their position now is that the relevant provisions are aspirational, high-level political statements and that the PA "*contains aims and objectives which are in tension if not mutually irreconcilable*": RSkel §31-32. Thus, the Respondents ask the Court not to determine the tenability of their legal analysis of the PA. Rather, they ask the Court to determine whether they were "*tenably correct*" in believing that the PA did not prevent them from financing the Project even though the project would lead to an overall increase in global emissions: RSkel §37. In short: was it tenable for the Respondents to consider that providing finance for a fossil fuel Project that would cause an aggregate increase in global emissions and as such be inconsistent with the low emissions pathway was nonetheless consistent with the UK's obligations under the PA. The Appellant submits that such a view is not just wrong; it is untenable.

Conclusion

77. For the reasons given above, and in the Appellant's appeal skeleton argument, the Appellant respectfully invites the Court to allow the appeal.

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KATE COOK
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3 Verulam Buildings

GAYATRI SARATHY
Blackstone Chambers

8 November 2022.

IN THE COURT OF APPEAL **CA-2022-000759**
ON APPEAL FROM THE DIVISIONAL COURT
[2022] EWHC 568 (Admin)

B E T W E E N :

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

Appellant

-and-

(1) THE SECRETARY OF STATE FOR INTERNATIONAL TRADE/UK EXPORT FINANCE (UKEF)
(2) CHANCELLOR OF THE EXCHEQUER

Respondents

-and-

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

Interested Parties

ANNEX A: RESPONDENTS' POSITION REGARDING THE EFFECT OF THE PROJECT ON GHG EMISSIONS

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1. The UKEF CCR stated:

> "*The Project has developed an Air Emissions and GHG Management Plan that identifies measures that will be implemented to reduce GHG emissions.*" **[SB/35/278**]
>
> "*On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the project will at least result in some displacement of more polluting fuels, with a consequence of some net reduction in emissions.*" **[SB/35/280, 304]**

2. The Defendants' PAP Response stated:

> *"54. In relation to climate change, in an answer on 23 July 2020, [Mr Stuart Graham Stuart MP, the Minister for Exports in the Department for International Trade] said:*
>
> > *'… There is scope, however, for the Project to replace / displace more polluting hydrocarbon sources, such as oil and coal, which would* ***result in lower net emissions than using these energy sources****.'"* **[CB/26/560]**

3. The Defendants' Summary Grounds of Resistance stated:

> *"47.1. UKEF concluded, in essence, that the Project would have a significant impact in climate change terms* ***due to increased GHG emissions****, but also that it would contribute to the overall global energy mix for the transition to a low carbon future and that there was scope for the Project to replace or displace more polluting hydrocarbon*

sources (such as oil and coal in countries like China, India and Indonesia), ***which would result in lower net emissions than using these energy sources.*** *…*

47.3. UKEF concluded that it was more likely than not that, over its operational life, 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****. …*

… **[CB/20/434-436]**

70. Secondly, the Claimant contends that the "rationale" set out in UKEF's climate change report "makes no sense". This is based on the same misunderstandings of both the way UKEF operates and the circumstances of Mozambique. As explained in the climate change report, there was nothing irrational about UKEF's conclusions on climate change and the PA. ***The IMF judged that the Project would help reduce GHG emissions ... and US EXIM judged that the Project would be likely to result in a net reduction of GHG emissions*** *…"* **[CB/20/441]**

4. At the permission hearing, Leading Counsel for the Defendants stated as follows:

"*MR HONEY: … I will show your Ladyship the detail of this in a moment, but just draw attention to the conclusion at the section headed "International climate change impact", which is that it is* ***more likely than not that there will be a net reduction in emissions****."* (Page 33(G) **[SB/59/451]**)

"MR HONEY: … Where it, as your Ladyship will see from that bullet point scenario, scenario three, displaces and replaces some. … This is considered the most likely scenario … A combination of replacement and displacement of coal and oil power generation ***will lead to a net reduction in future GHG emissions*** *…"* (Page 36(D) **[SB/59/454]**)

"*MR HONEY: … The conclusion at the end of that paragraph is that it is* ***likely to result in a net reduction in GHG emissions****."* (Page 36(E) **[SB/59/454]**)

"MR HONEY: … And the key conclusion is then on 347, where the conclusion is reached that it will at least replace some and ***lead to net reduction in emissions****."* (Page 37(A) **[SB/59/455]**)

"MR HONEY: … Your Ladyship has seen, albeit at speed, the way in which matters were considered in the climate change report, which was of course to consider the general picture, but, in particular, to consider this specific proposal and its consequences, both in relation to its alignment to Mozambique's NDC, what it will do for the country, and also where the LNG was likely to go: India, China and Indonesia are identified in the report, where it was judged that that would be offsetting -- replacing and displacing more emitting fuels so that ***overall there would be a net reduction in greenhouse gas emissions****."* (Page 39(D) **[SB/59/457]**)

5. The Defendants' Detailed Grounds of Resistance stated:

"*20. UKEF recognised the significant environmental impact that the Project would have; but also noted that there is scope for the Project to replace or displace more*

polluting hydrocarbon sources, such as oil and coal, which would ***result in lower <u>net</u> emissions than using these energy sources****. …* **[CB/15/347]**

67. It would be surprising and unworkable if individual decisions of individual public bodies – including those such as UKEF whose functions are not primarily environmental – had to be tested against obligations of the kind that are found in the PA. ***That would be the case even if the decisions in question were capable of causing an increase in emissions, which this Decision is not.*** *And there is certainly no policy stating or otherwise requiring that UKEF's decisions will comply with other countries' obligations under the PA, as the Claimant's case assumes under Ground 1(a). …* **[CB/15/362]**

75.1. UKEF concluded, in essence, that ***the Project would have a significant impact in climate change terms due to increased GHG emissions****, but also that it would contribute to the overall global energy mix for the transition to a low carbon future and that there was scope for the Project to replace or displace more polluting hydrocarbon sources (such as oil and coal in countries like China, India and Indonesia),* ***which would result in lower net emissions than using these energy sources.*** *Using gas instead of coal, for example, reduces emissions by around half when producing electricity and by around one-third when providing heat. UKEF concluded that LNG was fundamental to enabling the energy transition without massive disruption and whilst maintaining energy security (a view supported by the International Energy Agency, among others). …*

75.3. UKEF concluded that it was more likely than not that, over its operational life, 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.*** *…*

75.7. Judged in context, ***the Project would represent lower GHG emissions development than was the case with coal and oil and existing gas production.*** *…* **[CB/15/364-365]**

106.2. The Claimant points to the fact that the NDC says that "the implementation of any proposed reduction is conditional on the provision of financial, technological and capacity building from the international community" and contends that the only financial support that can be provided consistently with that statement is financial support for projects that reduce GHG emissions. That is wrong. The PA does not impose a ban on projects that result in GHG emissions. It does not impose a ban on providing financial support for such projects either. ***That is particularly so where, as here, such projects are judged to have an important role to play in the future reduction of GHG emissions.*** *…* **[CB/15/373]**

111. Secondly, the Claimant contends that the "rationale" set out in UKEF's climate change report "makes no sense". This is based on the same misunderstandings of both the way UKEF operates and the circumstances of Mozambique. As explained in the climate change report, there was nothing irrational about UKEF's conclusions on climate change and the PA. ***The IMF judged that the Project would help reduce GHG emissions ... US EXIM and AfDB judged that the Project would be likely to result in a net reduction of GHG emissions*** *…"* **[CB/15/375]**

6. The witness statement of Louis Taylor, Chief Executive of UKEF, stated:

> *90. In summary, the CCR judged that the Project was overall in alignment with the Paris Agreement. In particular:*
>
> > *A. the Project* ***would have a significant impact in climate change terms due to increased GHG emissions****, but also would contribute to the overall global energy mix for the transition to a low carbon future. …*
> >
> > *C. 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 reduction in GHG emissions.*** *…*
>
> *95. In terms of the emissions, the CCR conclusions included the following…*
>
> > *C. if gas from the Project was combusted instead of an equivalent amount of coal or oil, this* ***would not reduce the quantity of GHG emissions generated by the Project****,* ***but the net GHG emissions impact of combusting gas would be lower than that of combusting an equivalent amount of coal or oil.*** *…"* **[SB/60/477-478]**

7. The Defendants' skeleton argument for the hearing before the Divisional Court stated:

> *"4.4. The Project would have a significant impact in climate change terms due to* ***increased GHG emissions but would contribute to the overall global energy mix for the transition to a low carbon future*** *…*
>
> *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*** *…* **[CB/12/215-216]**
>
> *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."*
>
> *42.1****. The CCR considered whether the Project was likely to lead to a net reduction <u>or increase</u> 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 <u>net reduction</u> in future GHG emissions when compared with fossil fuel alternatives"*** *…*
>
> *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" … 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)."* **[CB/12/226-227]**

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. … **[CB/12/229]**

*59. 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**" …"* **[CB/12/232]**

8. At the hearing before the Divisional Court, Leading Counsel for the Defendants stated:

Stuart Smith LJ: Sir James, I wonder if I could just raise something with you which I do not necessarily want an answer to now…. In the defendant's detailed grounds, CB/184, para.75.3, which I am sure you will know by heart, after 75.1 which is the reference to "UKEF overall conclusion", you see in 75.1 "Concluded, in essence, that the project would have a significant impact" but go on about, two lines down,

"There was scope for the project to replace or displace more polluting hydrocarbons … which would result in lower net emissions than using other energy sources".

And at 75.3 you say,

"UKEF concluded that it was more likely than not that, over its operational life, 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."

That has an air of clarity and certainty about it and, at least on one reading, which is why I am raising it, it appears to be suggesting that the view was taken that the effect, certainly in relation to scope 3 emissions, was that the project scope 3 emissions **would lead to an overall global reduction in emissions**. But we then look at your skeleton, in para.4.2 or 4.3 to 4.5, where you add absolutely what seems to us to be critical words at the end of 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.!

SIR JAMES EADIE: Yes, I think you get the same point in about 22(4) and (5) of the skeleton as well.

LORD JUSTICE STUART-SMITH: Yes. And we understand the case - or I understand the case - I think we understand the case - that your skeleton is running to be that, to the extent that the project LNG caused replacement or displacement, that would effect a net -- to that extent would effect a net production.

SIR JAMES EADIE: That is exactly the case we are running.

LORD JUSTICE STUART-SMITH: That is the case you are running.

SIR JAMES EADIE: It is. And apologies if the detailed grounds were in truncated form and gave that impression, but you will have seen I am going to outline----

LORD JUSTICE STUART-SMITH: Do not worry how we got there, but you will understand why----

SIR JAMES EADIE: I understand entirely.

LORD JUSTICE STUART-SMITH: -- we feel the need to have absolute clarity.

SIR JAMES EADIE: That is the case we are running.

LORD JUSTICE STUART-SMITH: That is the case.

SIR JAMES EADIE: And it is based on, as you will appreciate, the climate change report on which I am going to make submissions----

…

LORD JUSTICE STUART-SMITH: Thank you very much. So, if the detailed grounds appear to be saying something absolutist, <u>that is no longer the case</u>.

SIR JAMES EADIE: <u>That is no longer the case</u>.

SIR JAMES EADIE: Exactly so." (Day 2 page 3(A) **[SB2/46-48]**)

9. Later:

SIR JAMES EADIE: … *UKEF did face up to the fact that this project would or would be likely to increase GHG emissions*, but, for all of the reasons I have gone through, they considered that the degree to which the project was consistent or that the other factors that I have mentioned rendered this project consistent with the high-level aims or the broad aims set out in the Paris Agreement. So they weigh the fact of the emissions increase, which was *obvious and inevitable and very high* in relation to scope 3…(Day 2 p. 96 **[SB2/51]**)

…..

MRS JUSTICE THORNTON: Did you say earlier that the confusion in the project was that it would be likely to increase greenhouse gas emissions? I noted you as saying that.

SIR JAMES EADIE: I do not want to give the wrong answer to that question. It is the point that has been repeatedly put to me. (Day 2 p. 98 **[SB2/53]**)

10. The Respondents' skeleton argument for the hearing before the **Court of Appeal** states:

> "*1. … In brief summary, UKEF concluded that, whilst the Project will have a significant climate change impact by increasing global GHG emissions, LNG can act as a 'transition fuel' by displacing the use of more polluting fuels such as coal and oil and the Project will have transformational economic benefits for the Mozambican economy and has the "potential to lift millions of Mozambicans out of poverty". …* **[CB/8/66]**
>
> *Footnote 6: The Appellant construed this statement to mean the Project would reduce aggregate global GHG emissions.* ***As the Respondents clarified below, that is not what UKEF meant by these statements. It meant that the LNG produced by the Project might lead to a net reduction in GHG emissions if and insofar as it displaced more polluting fossil fuels.*** *Stuart-Smith LJ rejected any suggestion that the decision-makers might have proceeded on the basis of the Appellant's own apparent misunderstanding. His detailed analysis at J/177-205 is adopted and endorsed. He considered the meaning of these statements to be incontrovertible and clear.* **[CB/8/69]**
>
> *37.* ***UKEF decided that providing export support in relation to the Project would be compatible with the UK's international law obligations under the PA, notwithstanding the fact that it would lead to an overall increase in GHG emissions.*** *That conclusion was correct, and certainly tenable. …* **[CB/8/77]**
>
> *53. ASkel/36 says that the Respondents needed to quantify the Project's estimated Scope 3 emissions "in order to determine their impact on the attainment of the [Paris] temperature goals". On the Appellant's case, a quantified figure would not be necessary for assessing compatibility.* ***The Appellant's case at ASkel/38 is that support in relation to this Project is inconsistent with Article 2(1)(c) by definition because it will lead to a net increase in GHG emissions (at least in the short-term, putting to one side the point about it acting as a catalyst for moving towards renewables later).*** *If that is right, the Respondents would not need to obtain a numerical estimate of how large those emissions would be. On the Respondents' case, the assessment of consistency with the aims (not obligations) set out in the PA was never going to be determined by the magnitude of the Scope 3 emissions because the assessment was far more multi-faceted."* **[CB/8/83]**