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

CO/3206/2020

Royal Courts of Justice

Tuesday, 7 December 2021

Before:

THE RIGHT HONOURABLE LORD JUSTICE STUART-SMITH
THE HONOURABLE MRS JUSTICE THORNTON DBE

B E T W E E N

THE QUEEN
on the application of
FRIENDS OF THE EARTH LIMITED

Claimant

- and -

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

First Defendant

- and -

CHANCELLOR OF THE EXCHEQUER

Second Defendant

- and -

TOTAL E & P MOZAMBIQUE AREA 1 LIMITADA

Interested party 1

- and -

MOZ LNGI FINANCING COMPANY LIMITED

Interested Party 2

PROCEEDINGS
(Hybrid hearing via CVP)

A P P E A R A N C E S

MISS J. SIMOR QC, MISS K. COOK and MISS A. DAVIES (instructed by Leigh Day) appeared on behalf of the Claimant.

SIR JAMES EADIE QC, MR R. HONEY QC, MISS H. HIGGINS and MR C. FEGAN (instructed by the Government Legal Department) appeared on behalf of the Defendants.

MR A. HEPPINSTALL QC and MISS F. FOSTER (instructed by Latham & Watkins LLP) appeared on behalf of the Interested Parties.

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SUBMISSIONS

Miss SIMOR

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(10.34 a.m.)

A USHER: This hearing is being conducted both in court and remotely in light of the COVID-19 pandemic and is being recorded by Her Majesty's Courts and Tribunals Service. These are legal proceedings and provisions of s.9 of the Contempt of Court Act apply. You must not make any recording of any part of this hearing; to do so would be a contempt of court.

B This hearing is being conducted in court and over Cloud Video Platform, but that does not change the serious nature or the importance of the hearing.

C The Queen on the application of Friends of the Earth Limited v Secretary of State for International Trade and President of the Board of Trade before the Right Honourable Lord Justice Stuart-Smith and the Honourable Mrs Justice Thornton DBE on Tuesday, 7 December 2021, 10.30.

D LORD JUSTICE STUART-SMITH: Thank you very much. I think that concludes the formalities. Yes?

E MISS SIMOR: My Lord, my Lady, I appear with Kate Cook and Anita Davies for the claimant, instructed by Rowan Smith of Leigh Day. Sir James Eadie QC, Richard Honey QC, Hollie Higgins and Conor Fegan appear for the defendants, instructed by the Government Legal Department. Adam Heppinstall QC with Freya Foster appear for the interested parties, instructed by Latham & Watkins.

F LORD JUSTICE STUART-SMITH: Yes. Well, I am sure I know you will not, but I will undoubtedly get names wrong during the course of this hearing, so can I do a blanket prophylactic in advance apology for when I do.

F MISS SIMOR: One of my junior counsel, Anita Davies, is very pregnant, so I would just like to say she may leave the court as suited, if that is all right with your Lordship.

LORD JUSTICE STUART-SMITH: Absolutely fine.

MISS SIMOR: Just to give you some explanation.

G LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: Now, you should have before you two core bundles, two supplementary bundles and five authorities bundles.

LORD JUSTICE STUART-SMITH: Yes.

H MISS SIMOR: I am going to approach my submissions in the following way.

LORD JUSTICE STUART-SMITH: Well, hang on. I have got a-- yes, speaking entirely for myself, the supplementary bundle I have only got electronically.

A MISS SIMOR: Ah.

LORD JUSTICE STUART-SMITH: Which is not-- I am not fussed about, but----

MISS SIMOR: Okay. Well, we will get-- if you would like, we will get you a hard copy.

LORD JUSTICE STUART-SMITH: I hope that would be okay.

B MISS SIMOR: Okay. I am going to approach my submissions in the following way. First, I am going to take you to the relevant statutory power and policy documents relevant to the decisions; secondly, I am going to take you to the relevant decisions and the key documents on which they were based, namely, the Climate Change Report and its underlying Wood Mackenzie analysis and in so doing I will show you the uncontested fact that in reaching the decision the defendants proceeded on the basis that the project was compatible with the UK's C obligations under the Paris Agreement; thirdly, I am going to give you some background to the Paris Agreement, specifically, what it requires and, fourthly, I will turn to our legal submissions as to why the decision was unlawful and I am going to deal first in that regard D with the decision-making process, so 1(b).

But I want to start with giving you a short top overview of the decision-making process. Now, in our submission, what appears to have happened here is that the UKEF did two things E early on in the project which created an imperative to agree funding. First, as a board member of the African Development Bank ("AFDB"), it persuaded and voted for the AFT to grant funding to this project. You will find in a submission to the Secretary of State (that I will take you to) that it said to the Secretary of State for the Board of Trade if funding were to be refused the AFDB could query the decision, given that Her Majesty's Government, via F DFID, argued in favour of their own support for the project as a member of the AFDB Board. It also noted that some may also question the consistency of the UK not supporting this project, yet the UK being an off-taker marker for the gas that project produces. So, those are two quotes that you will see.

G Secondly, early on, in around 2018, UK involvement and potential contracts for UK companies started to be discussed. During 2019, UK's Investment Committee gave the go ahead for UKEF to lend the project and the negotiations developed. Some contracts were H plainly entered into before the financing was agreed, although we have not seen their terms. But you will see the contracts at core bundle 2, p.327 and I will take you to that. It appears

from several documents that there was concern that saying no to the financing could lead to legal proceedings being brought against UKEF subsequently.

A There was nonetheless considerable disquiet in Government about the project. The Secretary of State for BEIS, the Secretary of State for the Foreign Commonwealth Office and the Secretary of State for DFID, at that time separate, all opposed the funding of the project and those letters have been disclosed.

B

C The Secretary of State for Trade made clear in March 2020 that she was to make all decisions on lending to hydrocarbon projects and therefore that she had specifically to give the Chief Executive delegated power to agree the financing before he could do so. I will give you the reference for that; it is core bundle 2, p.323, para.8. So, Louis Taylor's (the Chief Executive) final exercise of his delegated power on 30 June was dependent on the Secretary of State's prior agreement, which took place on 10 June.

D It was only very late in the day that consideration was given by UKEF to climate change impacts of the project. Indeed, in the defendants' skeleton it said that the so-called qualitative analysis of emissions impact was not carried out until early May, after Ben Caldecott, who is from EGAC - I will show you all of this - criticised the lack of analysis in the CCR. You will find that in para.64 of the defendants' skeleton. Maxwell Griffin, a witness for the defendants, states in his statement that the reason the CCR was done was because the Wood Mackenzie report was not considered adequate. You will find that at core bundle 1 at p.211, para.44. It was completed speedily for the end of May due to the deadlines of documentation signing.

E

F By that time, it is clear that those in UKEF and in the High Commission in Mozambique all felt that not agreeing to the loan would be embarrassing for the United Kingdom, given its role in the African Development Bank and the potential for legal action. I give you one reference for that; core bundle 2, p.294, para.5.

G

H The Climate Change Report was not based on any specialist expertise and in that regard it is notable that we have no expert from UKEF, rather, it relied heavily on a short presentation type report that Total had asked the lender's market advisor, Wood Mackenzie, to provide. That report, we say, is categorically not a report to assess climate impacts. It was a

presentation worked up to enable the lenders to go to their boards and explain how higher emission fuels could be displaced by liquid natural gas so leading to global emission reductions. This is clear from the scope of works that was very belatedly disclosed pursuant to our Part 18 requests. We have set that out in our skeleton at para.93 to 95. But, again, I am going to take you to it.

LORD JUSTICE STUART-SMITH: Just give me that again.

MISS SIMOR: I will take you to all of that.

LORD JUSTICE STUART-SMITH: Could you----

MISS SIMOR: Yes. The reference is claimant's skeleton, para.93 to 95.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: You will see-- I will give you the reference to the Part 18; it is supplementary bundle p.1588. That disclosure also revealed extremely significant internal criticisms of the adequacy of the Climate Change Report. Indeed, its failure to consider or estimate the quantity of emissions that would be caused by the use of the gas was set to fundamentally undermine its credibility, and that is set out in the claimant's skeleton, para.73, and the document is at core bundle 2, p.315.

Those criticisms were not acted on, not because, as is said in the detailed grounds and also in the CCR, it was not possible to do further due diligence but rather due to the lack of time before the signing. Now, those criticisms were, in large part, identical to ground 1(b) of our claim.

Despite the real expertise of those who criticised the approach that had been taken, UKEF did not seek the necessary expertise to deal with the vital emissions and errors in the CCR. Nor, indeed, were they even recognised in the CCR or anywhere else. Rather, the CCR was provided to the decision-maker as a credible assessment of climate impacts when it was plainly nothing of the sort. Crucially, without foundation, it concluded:

1. that the project was likely to likely to lead to a net reduction in global emissions and, thus, was in alignment with the low emissions pathway (core bundle 2, p.253, claimant's skeleton, 36(b)(iii));

2. that it was compliant with the UK Paris Agreement obligations globally and its obligations to assist Mozambique to meet its NDC (claimant's skeleton 36(a), 36(c) and the documents at core bundle 2, p.256).

I am going to go to all these documents.

In the detailed grounds of----

LORD JUSTICE STUART-SMITH: Can I just raise one thing now while it is on my mind, so it stops bugging me? At some stage, you will explain - for my benefit, if nobody else's - how the Doctrine of Foreign Sovereign State applies here. Because if we are not to decide that Mozambique's decision to carry out the project was in breach of anything, if we are not to decide that, it seems to me we need to tread a very careful path if we are then to say that a decision to fund which does not make the difference between the project happening and the project not happening is irrational, unlawful, whatever.

MISS SIMOR: Well, I can very quickly answer that because we actually say that the whole act of state argument, which has only up at the skeleton stage, I should add, is a complete red herring. Our position is that what we are looking at in this court is whether the defendants properly assessed whether the United Kingdom was right to conclude that providing this financing would assist Mozambique to meet its NDC and/or commence its NDC over the next 5, 10, 15 years.

LORD JUSTICE STUART-SMITH: Whether UKEF was right to conclude that financing the project as suggested assisted----

MISS SIMOR: Would assist because-- I will show you the Paris Agreement. The obligation on the United Kingdom and, indeed, they accept this, because this is in the CCR, is to assist developing countries, not just to meet their current NDC, but to augment their NDCs into the future, because there is a ratchet effect whereby NDCs obviously need to increase.

The other point we make is that the NDC itself, Mozambique's NDC itself, which I will take you to, is conditional on receiving finance and technology for renewables. So there is no question in the context of an NDC saying, "Well, we will only be able to do this actually if the developed world gives us the money to do it and the technological support to do it." So, there is no question of Mozambique breaching its NDC in such circumstances, because the NDC is conditional. But the question for this court is whether the defendants were right that this would assist Mozambique. That is the substantive question, the procedural question, it is

whether they ask themselves the right question in order to reach a rational conclusion on that issue.

A So, those are the two conclusions that I was just saying what was actually concluded, that the project would lead to a net reduction and therefore was in alignment with the low emissions pathway and, secondly, that it would assist Mozambique to achieve its NDC and presumably augment it as well. Those are the conclusions on which the decision was based. In the
B detailed grounds of defence, the defendants say at para.111 that the IMF also judged that the project would help reduce GHG emissions. But US Exim and the African Development Bank judged that the project would be likely to reduce in net emissions.

C Now, those conventions are not borne out by the underlying evidence and documents that have been disclosed that showed that no such finding was made by US Exim or by the AFDB. But it was nonetheless on that basis that the decisions to grant the funding were made. Both the first and second defendants, as well as the prior decisions of the ERiCC
D Committee relied on those conclusions as the basis for the (inaudible) that UK taxpayers investing in this project.

E Now, I am going to hand you up a very detailed chronology and the reason I am going to give you this is because it was prepared by my team and I found it incredibly useful when I did my oral submissions in navigating the documents. So it is literally a way for your Lordships to find the right document in the right place. (handed)

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: I just hope it will be helpful to you----

F LORD JUSTICE STUART-SMITH: Yes. So, not in any sense an agreed document, but an aide to your submissions?

MISS SIMOR: Yes. Very useful. It has got all the references so you can----

LORD JUSTICE STUART-SMITH: Thank you.

G MISS SIMOR: If you are looking for things it is very easy to find them, because it is obviously quite a document-heavy case.

H Now, I am going to turn, then, to the first section of my submissions, the powers themselves. If we go first to the statutory power with which we are concerned here, that is at authority bundle 1, tab 14. If we start with section 1, you will see the power.

A

“The Secretary of State may make arrangements under this section which the Secretary of State considers are conducive to supporting or developing, whether directly or indirectly, supplies or potential supplies by a presence carrying on a business in the United Kingdom of goods and services or intangible assets to persons carrying on a business outside the UK.”

So, basically to assist with exports. Then (2):

B

“The Secretary of State may make arrangements under this section for the purpose of rendering economic assistance to countries outside the United Kingdom.”

C

So it can be done in a quasi-aid way as well. Then you will see in subsection 1(4) that this can be in any form, including guarantees, insurance, grants or loans. Then if you turn the page you see that the Secretary of State has power in section 4 to do it on whatever basis she chooses. At 4(2) there is, nonetheless, a requirement of the consent of the Chancellor or the Treasury.

D

Then the following page, 13:

E

“(1) All the functions of the Secretary of State under Part I of this Act, except the power to make orders under section 5 or 6 of this Act, shall be exercised and performed through the Export Credits Guarantee Department, which shall continue to be a Department of the Secretary of State.

(2) There shall continue to be an Export Guarantees Advisory Council.”

F

I will be taking you to the comments of Ben Caldecott, who is on that Council.

G

“(3) The function of the Council shall be to give advice to the Secretary of State, at his request, in respect of any matter relating to the exercise of his functions...”

What you will also see stated by the witnesses for the defendants is that that committee has no role in decision-making, it is entirely advisory. Thus, I will show its advice was not taken on board.

H

The first point to make is that the defendants reached the decision on the basis that the project and its financing were compatible with the UK’s obligations under the Paris Agreement. We

do not need to and do not have to show that the defendants were in any way obliged to proceed on that basis. Our point is that they did proceed on that basis. For that reason, if they made a mistake in that respect, then the decision is vitiated by an error of law or fact; in effect, a standard misdirection as to the law.

A

LORD JUSTICE STUART-SMITH: And it is no part of the Secretary of State's case that the decision would have been the same in any event?

MISS SIMOR: No, it is not. We specifically asked that question because there was a bit of uncertainty in the submissions, put it that way, and we have asked that question and it has not been responded to in a clear way.

B

LORD JUSTICE STUART-SMITH: Well, can I have a clear response now, please?

SIR JAMES EADIE: We have not advanced that case under s.31.

C

LORD JUSTICE STUART-SMITH: And it is no part of the case. Thank you.

MISS SIMOR: The second point to make is that it was, in fact, the United Kingdom Government's position that it intended to comply with its international obligations under the Paris Agreement and UKEF's position that it complied with international standards of review and assessment and only granted financing if satisfied that the standards were met. These included but were not confined to the UK's obligations under the Paris Agreement.

D

Now, I say that simply as a fact. As I say, it is not essential or even necessary for the purposes of our case. But, obviously----

E

MRS JUSTICE THORNTON: (inaudible) do you say it is not necessary?

MISS SIMOR: Because all that matters, for the purposes of your determination, is the fact that the decision-makers concluded X and Y under the Paris Agreement. So for your purposes, the question is could they rationally do so and was it right.

F

LORD JUSTICE STUART-SMITH: Forgive me for being so slow. Your case is whether or not they were required to they treated compliance with the Paris Agreement as a consideration that was relevant to their decision. They formed the view that it was compliant. That view, you say, was wrong and therefore there is an error in the assessment of a material consideration.

G

MISS SIMOR: Precisely. We say not----

LORD JUSTICE STUART-SMITH: Even if they could have left the Paris Agreement----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- quite unmentioned and even if, which is not their case, the decision would have been the same anyway.

H

MISS SIMOR: And we say, in relation to the second point that I was making, that in fact their policy was to comply but----

A LORD JUSTICE STUART-SMITH: But it was not a policy breach of which automatically gives rise to an illegality or finding of illegality?

B MISS SIMOR: It is not our case and it would have been perfectly possible, in my understanding of public law, for the defendants to decide to disapply their policy or not to approach it in that way. So had they said, “Well, look, we are not satisfied on the Paris Agreement. That is what we have decided. We are not satisfied it is compatible. We are going to go ahead nonetheless.” It would have been much more difficult to argue illegality in relation to that because under public law it is perfectly permissible if there is a reasonable basis for the defendants to decide not to apply that policy.

C So we are concerned entirely with what they did and whether they reached a-- the two elements are not just whether they were right or wrong, that is one element, but whether they rationally reached their conclusion. Ground 1(b), as I will show you, establishes, in our submission, that they did not rationally reach a conclusion that this was Paris Agreement compliant.

D So, I am going to start by taking you to the policy because I think, in my submission, it is relevant for you to know about it, because it may be something that influenced, in a sense, how they approached their decision-making.

E Now, if we go to the UKEF policy, we have set these out-- the policy out in 17 to 28 of our grounds. You do not need to go to that. It is at core bundle 1, p.10 to 12. I am just going to take you to a few points.

F First of all, the UKEF Policy on Environmental, Social and Human Rights due diligence and monitoring, and you can find that in core bundle 2, p.5-- must be-- p.32 to 33, tab 5.

G So, if we start on p.33, you will see “Policy” in the middle of the page and then the second bullet:

H “we will comply with all international agreements which apply to the operations of ECAs. These agreements include the OECD Council Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (OECD

Common Approaches), which informs the way in which member ECAs should address ESHR due diligence for projects and existing operations they are asked to support and ESHR monitoring after support has been agreed.”

A

Then after the bullets:

“The OECD Common Approaches applies to all types of officially supported export credits involving exports of capital goods and/or services...”

B

Then the next bullet down:

“In line with the OECD Common Approaches and Equator Principles, we:

C

identify ESHR risks and carry out due diligence to be satisfied that projects should comply with applicable local and relevant international laws, and align with international ESHR standards before support is provided;

D

and monitor ESHR performance of projects to be satisfied they are being constructed and operated in compliance with applicable local and international laws, and align with international environmental and social standards after support has been provided.”

Then just after, “Pre-issue”, 4.1:

E

“We determine whether applications for support fall within the scope of the OECD Common Approaches...”

Then if you could turn to the next page. After the bullets in the second paragraph down, starting with “Where a review...”

F

“Where a review of the ESHR risks and impacts of a project or existing operation show it does not, or is unlikely to align with the international standards, notwithstanding our efforts and advice an application for support would normally be refused, in accordance with the OECD Common Approaches and the Equator Principles.”

G

Then if we go to the Common Approaches, you will find them in the first authorities bundle, tab 8. You will note on the first page at 219 the date of the document, it is June 2012. Then if we go to p.220 and we look at the recitals to the Common Approaches. Fifth recital down:

H

“**NOTING** that, since the adoption of the 2007 Revised Council Recommendation, there have been significant developments in the field of environmental and social sustainability;”

A

Then four further down:

“**RECOGNISING** the responsibility of Adherents to implement the commitments undertaken by the Parties to the United Nations Framework Convention on Climate Change;”

B

Now, that is the umbrella framework under which the Paris Agreement is adopted.

Then further, fourth down:

C

“**RECOGNISING** the responsibility of Adherents to consider the positive and negative environmental and social impacts of projects, in particular in sensitive sectors or located in or near sensitive areas, and the environmental and social risks associated with existing operations, in their decisions to offer official support for export credits;”

D

And then to the next page at A:

“**RECOMMENDS** that Adherents, before taking decisions on officially supported export credits, apply the following common approaches for addressing environmental and social issues relating to exports of capital goods and/or services and the locations to which these are destined.”

E

Then if we turn to p.222 we see the definition of “projects” in the first bullet there and then if we go down to 2, to “Scope”:

F

“This Recommendation applies to all types of officially supported export credits¹ for exports of capital goods and/or services, except exports of military equipment or agricultural commodities...”

And then “Objectives”:

G

“The objectives of this Recommendation are to:

- i) Promote coherence between Adherents’ policies regarding officially supported export credits, their international environmental, climate change, social and human rights policies, and their commitments under relevant international agreements and conventions, thereby contributing towards sustainable development.”

H

Then if we go to 225 at the bottom at para.18:

A

“For a Category A project [this is a Category A project], Adherents should require an ESIA [Environment Social Impact Assessment] to be undertaken; the applicant is responsible for providing the resulting ESIA report, together with other studies, reports or action plans covering the relevant aspects of the project. An ESIA report and any supporting documents should address the issues set out in the international standards applied to the project in accordance with paragraphs 21-26 of this Recommendation: in this context, Annex II contains information on the typical items to be included in an ESIA report [which I am going to take you to]. An ESIA should not be carried out and reviewed by the same party.”

B

I should just say that a Category A project is defined in Annex I, which you find at p.232, which includes this project, fossil fuel project.

C

LORD JUSTICE STUART-SMITH: Because of the potential for adverse difference(?).

MISS SIMOR: Exactly. So that is at Annex I, para.18, p.232.

D

If we now go to Annex II, which is at p.234, you will find the requirements of the ESIA:

E

“An Environmental and Social Impact Assessment (ESIA) report focuses on the significant issues of a project. The report’s scope and level of detail should be commensurate with the project’s potential impacts and risks, and should address the issues set out in the international standards applied to the project in accordance with paragraphs 21-26 of this Recommendation. The ESIA report typically includes the following items (not necessarily in the order shown)...

F

2. Policy, legal, and administrative framework: discusses the policy, legal, and administrative framework within which the Assessment is carried out, including host country regulations, including obligations implementing relevant international social and environmental treaties, agreements, and conventions, the international standards applied to the project, as well as any additional priorities and objectives for social or environmental performance...”

And then 5:

G

“Environmental and Social impacts: predicts and assesses the project’s likely positive and negative impacts, in quantitative terms to the extent possible. Identifies mitigation measures and any residual negative impacts that cannot be mitigated. Explores opportunities for enhancement. Identifies and estimates the extent and quality of available data, key data gaps, and uncertainties associated with predictions, and specifies topics that do not require further attention. Evaluates impacts

H

and risks from associated facilities and other third party activities.
Examines global, transboundary, and cumulative impacts as appropriate.”

A And then the appendices expected to the report, tables presenting the relevant data referred to or summarised in the text.

B Then this accords, my Lord, my Lady, with why the Government statements regarding finance and climate change relevant to both defendants and I will take you to just a few examples. First of all, the Clean Growth Strategy, which you can find in the supplementary authorities bundle at tab14-- no, tab 1. It is at p.14.

LORD JUSTICE STUART-SMITH: Supplementary authorities bundle, tab 1?

MISS SIMOR: Tab 1, p.14.

C LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: “The UK remains strongly committed to the Paris Agreement whatever the----

LORD JUSTICE STUART-SMITH: Wait a minute. Where are you?

MISS SIMOR: The bottom of the first column on the left.

D LORD JUSTICE STUART-SMITH: Right. I am looking at the supplementary authorities bundle.

MISS SIMOR: Yes. In fact, I am not sure that----

LORD JUSTICE STUART-SMITH: Tab 1, which is the Clean Growth Strategy.

MISS SIMOR: Yes. It is at the bottom at p.14.

E “The UK remains strongly committed to the Paris Agreement and whatever the form of our future partnership with the EU we will satisfy our international obligations under the Agreement.”

F LORD JUSTICE STUART-SMITH: So what is the date of this?

MISS SIMOR: This is 2017. It was when Theresa May was still Prime Minister, so I believe it is 2017. Yes? Yes. Then we go to the Green Finance Strategy, which you could find, I hope, in tab 4. This is July 2019. Go to p.68

G LORD JUSTICE STUART-SMITH: Can I just see? So these are both Government documents two years apart, they are both industrial strategy documents, as appears from the front of them?

MISS SIMOR: Yes. This was specifically-- the Green Finance Strategy was actually a document aimed at private finance, essentially.

H LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: But it makes statements about public finance.

LORD JUSTICE STUART-SMITH: Thank you.

A

MISS SIMOR: It was a strategy to align private finance with the low emissions pathway.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: At p.68 you will see what I want to rely on.

B

“The transition to a green financial system means fundamental changes to the way decisions are made across the economy. To achieve the goals of the Paris Agreement and our wider environmental ambitions, all finance will need to incorporate the financial risks and opportunities presented by climate change and other environmental challenges.

C

There is increasing international recognition of the need to integrate climate and environmental factors into mainstream financial decision-making.”

LORD JUSTICE STUART-SMITH: Forgive me. I am very slow on these sort of things. What is the relevance of this? Just how does this fit into the argument?

D

MISS SIMOR: So, none of this is necessary, so perhaps I should have skipped it. It is all, we say, in a sense background relevant because we say it probably affected how UKEF approached this decision in the sense that instead of facing what we say is the reality, which is this was not a Paris Agreement compliant decision.

E

LORD JUSTICE STUART-SMITH: Is this in support of a general proposition that as a general statement there has been a move towards a greater appreciation of the need to take climate change issues and green issues into account, including specifically the Paris Agreement? I am sorry I am not----

MISS SIMOR: Well, in a sense it is.

F

LORD JUSTICE STUART-SMITH: For my benefit, although I am sure not for my Lady’s, if you could - I think you did - flag up that which is absolutely necessary which is, as it were, background.

G

MISS SIMOR: Well, in a sense this is important because, as you will see when I take you through the decision, the Treasury had to agree to this and, as it happened, the Prime Minister also. Did not need to agree in law, but his consent was sought. Therefore, the consent was sought. Therefore, the general Government position, which was that the UK intended to comply with the Paris Agreement, was relevant, I would submit, in relation to how UKEF was approaching its decision-making process, in the sense that it possibly - and this is me surmising from what I have understood from the documents - it was possibly inconceivable that UKEF could go to the Chancellor and the Prime Minister and say that, “We intend to

H

breach the Paris Agreement by granting this funding.” Therefore, its decision-making was approached with this in the background.

A We have to remember, I suppose, that originally COP 26 was going to be in October 2020 and then, as it happened, because of the pandemic, it ended up being November this year. But at the time of the decision-making in March through to May, it was still planned to be that year.

B LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Thirdly, I wanted to take you to UKEF’s current-- sorry, I am just-- actually, I want to go a little bit more. I just want to flag up a few more things in that document. We are in tab 4.

C LORD JUSTICE STUART-SMITH: We were at p.68.

D MISS SIMOR: Yes. I have picked up the wrong one. It is this one. Thank you. So, if we go-- we were at p.68. If we go to just 69 and perhaps-- I am very aware of how much we have to get through, perhaps for the time the court could just mark it up. At the bottom right hand corner, starting with “Building on the UK’s international experience,” you will see what the-- including the Bank of England’s involvement, the Central Bank, we will also use our influence to strive towards the greening of the global financial system. This will include playing an active role in founding coalition of Finance Ministers for Climate Action; co-leading alongside Egypt; partnering with the private sector to drive the phase-out of coal; exploring initiatives to accelerate the alignment of financial flows to the Paris Agreement - that is the fourth red bullet there - aligning the UK’s ODA assistance with the Paris Agreement. Then next page, middle of the left column:

E “And while the focus of this Green Finance Strategy is on private financial flows, we recognise that the financial risks and opportunities of climate change are relevant for the public sector as well as industry. That is why:

F The Government will consider the financial risk exposure relating to climate change and the low carbon transition as part of the 2020 Managing Fiscal Risks report...”

G That would have been the Chancellor. Then:

H “CDC and UK Export Finance will make climate-related financial disclosures in their accounts in line with the TCFD recommendations as soon as practicable, following the close of the 2020/21 financial year.”

If we then go to p.75 you will see “Why finance is part of the solution”.

A

“Limiting global warming to 1.5°C may still be feasible. In the next decade urgent, ambitious and concerted action is required across all countries and sectors globally to deliver emissions... The IPCC estimate that for a 1.5°C trajectory [that is the emissions path] annual average investments in low-carbon energy technologies and energy efficiency need to be upscaled by roughly a factor of six by 2050 compared to 2015, overtaking investment in fossil fuels globally by around 2025.”

B

That is in four years’ time.

C

“Recognising this need for urgent and coordinated action, 195 countries signed the Paris Climate Accord in 2015 which commits signatories to keeping a global temperature rise this century to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C. Signatories of the Paris Agreement also committed to making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”

D

Then in the next column, starting with “In recognition”:

“In recognition of the vital role of the financial sector in delivering global and domestic climate and environmental objectives, green finance is at the heart of the UK’s Clean Growth Strategy, 25 Year Environment Plan and Industrial Strategy and supports the UK’s economic policy for strong, sustainable and balanced growth.

E

Through the publication of our Green Finance Strategy we are clear in our ambition to align private sector financial flows with clean, resilient and environmentally sustainable growth and strengthen the competitiveness of the UK financial services sector.”

F

Then if we go to 88 to 89 we see “Driving the greening of the global financial system” and then “Establishing the G20 Green Finance Study, the first bullet. And second bullet:

“HM Treasury recently became a founding member of the Coalition of Finance Ministers for Climate Action and endorsed the Helsinki principles...”

G

Third bullet:

“The Governor of the Bank of England chaired the Financial Stability Board...”

H

And then:

“UK financial services expertise has contributed to the EU Sustainable Finance Action plan.”

A

Then starting one further paragraph down:

“At the same time, we recognise further urgent action is required to meet the challenge set in the 2015 Paris Agreement to align financial flows with low carbon and resilient growth.

B

The Government commits to using the UK’s global influence to promote the greening of the financial system internationally. This includes playing an active role in the Coalition of Finance Ministers for Climate Action; leading on the adaptation and resilience strand at the United Nations (UN) Climate Action Summit; and exploring initiatives to accelerate alignment of finance ahead of COP26 in 2020.

C

To drive the greening of the global financial system, the Government will:

Champion the resilience agenda;

D

- Drive action through international collaboration;
- Partner with the private sector;
- Explore initiatives to accelerate alignment to the Paris Agreement;

E

- and Align the UK’s Official Development Assistance (ODA) spending with the Paris Agreement.”

Then if we just go to 92, you see “Exploring initiatives to accelerate alignment to the Paris Agreement” and then if we read from the second title. Perhaps you can mark up all that. But

F

then just come to the second title, “Aligning the UK’s ODA with the Paris Agreement”:

“As the Government explores initiatives to align global financial flows, we will be taking action to ensure UK Government leads by example through aligning the UK’s Official Development Assistance spending with the Paris Agreement, strengthening the existing provisions in the UK Government’s guidance on considering climate and environmental factors.

G

In practical terms this will include:

- Using an appropriate carbon price in relevant bilateral programme appraisal...”

H

You will see that that will be relevant.

A

- “Ensuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans;

B

- Implementing a proportionate approach to climate risk assurance;

C

- and Ensuring that relevant programmes do not undermine the ambition in countries’ Nationally Determined Contributions (NDC) and adaptation plans.”

You will see that the first and fourth bullets are the conclusions that the defendants reached in relation to the financing.

D

“We will consider how to demonstrate that on aggregate, our ODA is delivering climate benefits and supporting implementation of the Paris Agreement. We anticipate this including identifying opportunities to work with countries to enhance and embed clean growth and climate resilience, incorporating what is included in NDCs and adaptation plans into their growth plans, to help meet the long-term goals of the Paris Agreement. We will encourage similar actions in relevant multilateral institutions and programmes, where appropriate.

E

Our actions to align the UK’s ODA with the Paris Agreement also demonstrate the Government’s commitment to leading by example by integrating climate and environmental factors into financial decision making in the public sector, as we discuss further below.”

F

I will not take you to any more of that. My Lord, in relation to that, it will be said, “Well, this was not development finance.” But our submission on that is simply that it is pretty pointless aligning one bit of your finance with the Paris Agreement but not another. But in any event, the defendants say that this finance was aligned with the Paris Agreement and that accords with a sensible approach, which is that you do not use one bit of finance to totally undermine the efforts of another bit of finance. Of course, you will also recall that the power itself allows finance to be given for assistance and development as well by UKEF.

H

A So, I am going to take you to make that good to UKEF's current strategy and UKEF's current strategy continues. Of course, we are starting from a point where UKEF purports to comply, in any event, but now its current strategy we can find in tab 12 of the supplemental authorities bundle.

LORD JUSTICE STUART-SMITH: Is this September 2021?

MISS SIMOR: Yes, that is right.

LORD JUSTICE STUART-SMITH: Thank you.

B MISS SIMOR: So this is post-decision. Actually, I will just take you to one little bit of it. We will return to it. It is policy prior to this decision and as a basis for this decision was aligned with Paris. This is its current policy and its current policy is the same. It continues to intend to align with Paris and we find at 225 in the third line:

C "Making financial flows consistent with a net zero and resilient economy----

LORD JUSTICE STUART-SMITH: Hold on.

MISS SIMOR: Sorry. Sorry. Two two five, tab 12.

D LORD JUSTICE STUART-SMITH: "The time to act is now"?

MISS SIMOR: "Context" I have got.

LORD JUSTICE STUART-SMITH: Yes. "Context" and the "The time to act is now"?

MISS SIMOR: Yes. Then the third column:

E "Making financial flows consistent with a net zero and resilient economy is a crucial goal of the 2015 Paris Agreement. It will require a transformation of the financial system. Businesses are essential in boosting innovation and transitioning away from high carbon sectors to clean growth alternatives, providing adaptation and resilience solutions, as well as in understanding their own climate-related risks and impacts."

F Then "UKEF's role":

G "As an export credit agency, we are in a unique position to support both domestic and international climate aims; our support realises economic opportunities for the UK and can facilitate our international partners in their transitions to lower carbon economies. Our Climate Change Strategy outlines how we will make our support to UK exporters and suppliers consistent with this commitment."

I am going to just come back to it later. But you will perhaps recall in the skeleton that in December, so some five months after the decision, the Prime Minister announced that there would be no further funding by the United Kingdom for fossil fuel projects and in March---

A LORD JUSTICE STUART-SMITH: The thing about the African Development Convention---

B MISS SIMOR: That is right. That is right. Now, one point I forgot to mention when I took you to the Green Finance Strategy was that the Secretary of State for Foreign Affairs specifically was against this project and the Secretary of State for DFID because they could not see how the United Kingdom could seek to persuade countries to align their finance in this way if the United Kingdom went ahead funding this project. That was prior to COP.

C So, turning, then, to the relevant decisions, the second issue of my submissions, and we are going to start with a prior approval by UKEF's Senior Credit Committee of 30 April 2020 and you can find that in the second core bundle at-- it may be p.124, tab 13, I hope. Yes.

D So, this is a decision of the Committee giving prior approval. You will see from para.1 permission to proceed was given in February '19. So at that point, negotiations on contracts evidently started. An update on 12 September:

“The project team are now seeking commitment approval from ERiCC.”

E And then para.3:

“The planning of this meeting is driven by the need to get ministerial approvals following ERiCC approval and the project timeline. ERiCC note the remaining steps prior to signing the document by the Sponsor's deadline (end May 2020).

F HMT consent, due to size, novel elements, first use of FXP externalisation policy, contentious nature of support for hydrocarbons with potentially repercussive results if support is not provided and that OECD Sustainable Lending Principles apply.”

G So that is my point about there was obviously repercussions if it was not provided.

“DIT Secretary of State approval, following indication (12 March 2020) that SOS would to take decisions on any proposed UKEF financing of hydro-carbon project.”

H So, the Secretary of State had said that she had taken to herself the power to take those decisions.

“UKEF underwriting and UKEF clearance documents.”

A Then para.5:

B “In addition to UKEF the lender group comprises Atradius, Nexi, ECIC, JBIC, SACE, ERIC, US Exim, Thai Exim, African Development Bank (AfDB) and various commercial lenders. The lead sponsor is Total SA which acquired its share in Area 1 from Occidental Petroleum in September 2019. UKEF had initially provided an expression of interest to the Project in 2014 but had subsequently been invited to join the lender group in late 2018. The Project had taken Final Investment Decision in June 2019 and work was well advanced.”

C Now, I should ask you to correct para.5 of the interested party’s skeleton, where they say that funding was being given by the World Bank and the IMF. That is incorrect.

Then para.6----

D LORD JUSTICE STUART-SMITH: Sorry. What is incorrect?

MISS SIMOR: It is incorrect in the interested parties’ skeleton-- you will see the funders there---

-

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- at para.5.

LORD JUSTICE STUART-SMITH: Yes.

E MISS SIMOR: At para.5 of their skeleton they say the IMF and the World Bank were providing financing and they were not-- and they are not.

Then at para.6:

F “The view of the project team was that the Project will be transformative to the economy of Mozambique – it is estimated that by 2035 its GDP will be \$82bn with this project, \$54bn without...”

And that----

G LORD JUSTICE STUART-SMITH: I am terribly sorry. It is my fault. I missed your-- which paragraph are you on?

MISS SIMOR: I am sorry, I am at para.6.

LORD JUSTICE STUART-SMITH: Six?

H MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Thank you.

A MISS SIMOR: So, on my maths, the first line means that the project is worth \$28 billion to the GDP and, again, in para.8 of the interested parties' skeleton it says the project is worth 67 billion GDP.

B Now, there are many, many figures in these documents and my junior has very, very helpfully put them all into a table which, if it will help you, I will give you. It helped me. Because clearly one cannot actually ascertain what the actual figures are. But certainly you cannot take 67 billion from para.8 of the IP's skeleton, because that is not even what the Credit Committee were being told.

C The World Bank has provided an exemption from its non-concession borrowing policy for the project in August 2019. This is because Mozambique was not allowed to borrow because of its debt state, so the World Bank gave it a waiver in relation to that and that is the extent of the involvement of the World Bank.

D In response to a request from UKEF the Secretary of State for DFID had written to the Chancellor in 2020 to indicate that in DFID's view the project met the sustainable lending principles and you will see-- I will show you that letter. That is a letter where she says:

E "It meets the sustainable lending principles, that is all I am really allowed to say, but for the record I do not agree with this funding."

And then 9:

F "UKEF's Environmental, Social & Human Rights (ESHR) due diligence on the Project was explained. A category A notice was published in August 2019 following a site visit in July 2019. The final draft ESHR Report has been prepared and seen by UKEF's Accounting Officer. [That is Mr Taylor] The final document would be circulated to ERiCC members. In addition to its usual ESHR procedure UKEF will consider climate change impacts as part of its decision on the Project. UKEF's E&S team has drafted a Climate Change Assessment (CCA) for the Project as part of ESHR due diligence and this had been provided to ERiCC members."

G

So, obviously, these are minutes that have been provided to them.

H "The CCA considers the note on climate change considerations provided by the lenders' legal advisers, Wood Mackenzie's report... and insight

from AfDB and US Exim on their approach to climate change issues. The final CCA would be circulated to ERiCC members. Miana Capuano provided some further explanation of the CCA and she took questions from ERiCC attendees.

A

10. Mozambique is very vulnerable to climate change, due to its geographical location, long shoreline and extensive lowlands. It has limited capacity to deal with climate change impacts due to its development status (i.e. it has limited financial and technological resources). The project will have a significant impact on Mozambique's greenhouse gas emissions, with its Scope 1 and Scope 2 emissions expected to account for 10% of the country's total emissions.

B

11. There are no estimations of Scope 3 emissions from the project however, these are expected to be significantly higher than its Scope 1 and 2 emissions. Quantification of Scope 3 emissions requires details on where the Project's gas volumes will be used, when it will be used, how it will be combusted and for what purpose (including with what technology and the efficiency of that technology), and in what volumes. Detailed information on all these aspects is not available. The sales purchase agreements signed thus far show that the LNG will go to a multitude of countries, but most is directed at the Asian market, where several governments are undertaking active decarbonisation efforts. There is scope therefore for the project LNG to reduce reliance on coal and oil in these markets, which could help their transition to a lower carbon economy."

C

D

But the crucial part is the first section, because at this stage, at least, and indeed it is what we saw in the original grounds, it was believed that you could not estimate the quantity of Scope 3 emissions because you did not know how they would be burned or when they would be used or the technology and efficiency of that technology.

E

Now, that is, you will see-- that is actually wrong because, of course, it does not matter how efficient a combustion engine is, the amount of carbon is ultimately the same. It is just that you might get more energy out of it. So it is perfectly possible to take a fuel and work out how much carbon is in it in order to determine how much greenhouse gas will be produced from it.

F

Then if we go to 15 to 16, the "Lenders' Market Consultant", that is Wood Mackenzie, because Wood Mackenzie is not the climate consultant, Wood Mackenzie is the market consultant:

G

"Lenders' Market Consultant considers the current low oil price a short-term condition and have provided a long-term base case of \$65/barrel..."

H

Then if we go to 16, the bottom of 16, starting-- I think it is the last sentence:

A

“The lenders’ market consultant [Wood Mackenzie] also points out that LNG is expected to play a vital role in the energy transition towards a world of net zero carbon emission and remain a crucial part in the long-term energy mix. LNG demand increased by circa 13% last year, and this is the sixth consecutive year of growth; investments like this project will be needed to satisfy it.”

B

So what the market consultant is saying is that there is a lot of demand for gas out there and it is just growing.

C

Then we ask for explanations of the redactions. We got an explanation of 19 as commercial sensitivity. I could not find an explanation of 18.

Then 22:

D

“After an extensive discussion, which was the third such formal discussion around this transaction, ERiCC unanimously agreed to the \$1.15bn transaction. The Chair noted that despite this being a complex, single asset greenfield project in a highly challenging country, rated CCC+, and significant price risk, this is nonetheless...

E

c) We are satisfied that the project meets the externalisation criteria, we have received DIFD approval [that is in relation to the Sustainable Lending Policy] and we have reviewed ESG and Climate Change factors extensively.”

We then go the final decision of ERiCC, which is on 29 May on the next page, and if you could start at 3.

F

“3. In accordance with the minutes of 13 April, the final Environmental, Social and Human Rights Report and the final Climate Change Report (BG explained that name had changed from Climate Change Assessment) as part of ERiCC’s agreement on the Mozambique LNG project...

G

4. BG sought ERiCC’s final approval for these reports, alongside all other project information...

H

5. BG stated that the climate change analysis identified that although the project would contribute to greenhouse gas emissions, both in Mozambique (Scope 1 and 2 emissions) and at the point of end use of the LNG (Scope 3 emissions), provided that LNG from the project is used to replace and/or displace the use of more polluting fossil fuels the net

effect may be a decrease in future greenhouse gas emissions, given the recognised role gas is expected to play as a transition fuel. This project is expected to align with international standards.”

A Then we are told that 7 is legal advice privilege. If we go to 10 and 11 the redactions are also legal advice privilege.

LORD JUSTICE STUART-SMITH: Who or what is L&C?

MISS SIMOR: Is which?

B LORD JUSTICE STUART-SMITH: Beginning of para.7; who or what is L&C?

MISS SIMOR: Maybe it is a person.

SIR JAMES EADIE: Legal and compliance.

MISS SIMOR: Legal and----

C SIR JAMES EADIE: Legal and compliance.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Yes. Seven, 10 and 11 are all legal advice privilege redactions. At 10:

D “RAD asked whether UKEF is consistent with the wider UK Government policy on climate change.”

We do not get the answer to that, although we would expect the answer to say, “Yes, it is,” because that is what the climate change report says.

E “11. ERiCC asked whether it is possible to add an additional reference to the UK’s Paris Agreement commitments on p.11 of this report. L&C lead ERiCC through a discussion...”

Then para.13:

F “ERiCC stated that based on previous detailed presentations and discussions on project structure, credit metrics... and today’s comprehensive discussions on the ESG and Climate Change Factors this deal is now formally approved.”

G Then following that, UKEF sent the relevant submissions to the Secretary of State, who had required she approve any decision on hydrocarbons, you saw that, on 12 March. It was sent to both the Secretary of State for Trade and to the Chancellor of the Exchequer because of the need for the Treasury’s consent. You find that in Mr Taylor’s statement, which is CB1 (we do not need to go to it) tab 7, p.180, para.39. We find the submissions that were put to both
H the Chancellor and the Secretary of State in core bundle 2, tab 17, p.145.

SIR JAMES EADIE: My Lord, it is tab 15 of the Essential Reading List, if you are on that.

LORD JUSTICE STUART-SMITH: Thank you.

A

MISS SIMOR: Oh, sorry. Have I got the wrong tab number?

LORD JUSTICE STUART-SMITH: No, no.

SIR JAMES EADIE: No, right tab number.

LORD JUSTICE STUART-SMITH: It is just----

MISS SIMOR: It is the other bundle. Yes, I know.

B

LORD JUSTICE STUART-SMITH(?): I sent a message out. But do not worry if you----

MISS SIMOR: I am afraid I did not have time to change my references.

LORD JUSTICE STUART-SMITH: I am quite sure you had other things on your mind.

MISS SIMOR: Thank you.

C

So, if we go to-- if we could just read from 1 to 5:

D

“As you are aware, UK Export Finance (UKEF) has been considering financing support for approximately US\$1bn of UK contracts containing up to US\$730m of UK content for the Mozambique Area 1 Liquefied Natural Gas (LNG) project (‘the Project’). The transaction was considered and approved by UKEF’s senior credit committee on 29 May.”

That is what I just showed you.

E

“Following the conclusion of UKEF’s internal approval process, and subject to HM Treasury consent, I recommend the use of my delegated authority to underwrite this transaction, allowing UKEF to support this facility.”

F

So, Mr Taylor is seeking delegated authority in order to enter this transaction.

“In March 2020 you indicated to UKEF that you will take a final view on future fossil fuel-related transactions before I use my delegated authority. This transaction, about which you have previously been made aware, is now at that stage.

G

Before you take a final view, and given you have already received views from the Secretary of State for DFID and Minister Stuart, it is open to you to receive views from other ministerial colleagues, including the Foreign Secretary...”

H

The Foreign Secretary's view, in fact, for your note, was given on 5 June. It is at core bundle 2, tab 23, p.292, and that is the letter where he says the UK cannot do this at the same time as trying to persuade other nations not to do it.

A

“The Secretaries of State for Business and Scotland...”

Again, that view which was subsequent was against and that is at core bundle 2, tab 26, p.297.

B

“...No.10...”

I will show you No.10's conditional agreement or agreement.

C

“... and the National Security Adviser...”

We have not seen anything from the National Security Adviser.

D

“... all of whom may have an interest in this transaction. Given that HM Treasury is considering whether to grant HMT Consent to UKEF support, you may also wish to include the Chancellor in this process. If you would like to consult your colleagues, UKEF can support that process and provide a draft note under your guidance.

E

If your decision is to support the transaction, UKEF would expect to enter into the transaction by mid-June (having completed its usual process and transactional steps).”

So there is some urgency, this is 1 June. And then 6:

F

“Should you be minded against support for this transaction, you will need to set out your reasons, and I would advise that these are specific to meet a level that is legally defensible, and further that we have a chance to discuss these together.”

That is the point I was making about the concern that if they refused this funding there could be litigation.

G

Then if we go to 8, “Timing - Urgent”:

H

“UKEF will need to indicate whether it can enter into the transaction by no later than 12 June. To avoid long term delay to the Project, which would hurt the economic recovery of Mozambique (see later), signing needs to take place no later than w/c 15 June.”

If we then go to 14----

A LORD JUSTICE STUART-SMITH: In the light of the other information, some of which we have read in advance and some of which you have shown us, delay would be because one of the consequences of approval or not would be contracting-- finalising contractual documentation with contractors and so on, which would take time, although the project was already well-advanced. Is that----

B MISS SIMOR: We do not know that. We do not know what 8 means because, apart from anything else, we are told that-- I suppose-- we are told that irrespective of the position, this project will go ahead. So this money will be found from somewhere. We do not know why, at para.8, it is said that it will cause----

C LORD JUSTICE STUART-SMITH: It is probably not critical(?).

MISS SIMOR: Nor do we know the contractual position for why there was concern in para.6 that if the project was not financed----

D LORD JUSTICE STUART-SMITH: Well, I think we do, do we not? I mean, whether it is right or wrong, they have gone sufficiently far down the road of commitment and there is evidence of some contractual obligations having been entered into which would have to be unwound. Those two factors alone are sufficient to give rise to a concern.

E MISS SIMOR: What there is in this table my junior made is also very helpful. Throughout the documents there are different figures as to how many contracts, how much value already exists for the UK irrespective of this loan and how much additional this loan might lead to.

F LORD JUSTICE STUART-SMITH: Yes. But I do not have my fingers on the reference, but there is, at least somewhere in the limited papers that I have read, the suggestion that there would be contractual commitments which had been entered into which would either have to be or would be unwound. If I am wrong about that, I will be told, but anyway----

G MISS SIMOR: I have not specifically seen that, but it may be that I misunderstood something. That was what I had understood by implication, but not explicitly.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Fourteen.

H “For completeness, and to evidence the rigour with which UKEF has considered the transaction, UKEF’s Business Group and Risk Group Committee papers are appended to this Submission (Annexes A and B), alongside the Environmental, Social and Human Rights (ESHR) and Climate Change Reports (Annexes C and D). I do not believe you need to read all of these, but given concerns raised by colleagues [that is

presumably Secretaries of State for DFID and the Foreign Office] you may wish to pay particular attention to the Climate Change Report.”

A So that was obviously a crucial decision, crucial element of the Secretary of State’s ultimate decision to agree to give Mr Taylor delegated power to enter into this agreement.

B Then 16 to 17. Ah, in fact, my Lord, I have got a note here on my document which says: “Note DIT document at SB2, p.1069. “Multi-billion UK exports have already been secured.”” That was April 24, 2020. So that may be the document that my Lord was thinking of.

LORD JUSTICE STUART-SMITH: Possibly. No admissions.

MISS SIMOR: Paragraph 16:

C “The UK businesses behind these contracts are located across the UK, including many in Scotland, most notably Aberdeen, and in northern England. Over 2,000 jobs...”

D Well, we will give you the table. That is contradicted by various other places.

“... including those already secured, could be supported directly through UKEF’s participation.”

E I suppose, benefit of the doubt, it does say “could”.

F “These include 600 at McDermott and 800 at William Hare in Bury and Scarborough. Many UK SME’s will additionally benefit from the major contracts, through multi-level smaller contract awards across the UK supply chain.

G 17. Prior to UKEF’s participation there was approximately US\$160m of UK content in the transaction and this has now increased to US\$360m [so that is prior to agreement] with an additional US\$370m of UK content in further contracts to be awarded. These are expected to be firmed up in the weeks following UKEF confirming its participation in the Project.”

H So that is what I mean by implicit rather than explicit, because I could not take from that that the contracts were conditional on financing.

Then para.23:

A “Mozambique is a country progressively emerging from debt distress. UKEF support is therefore subject to DFID’s confirmation that the Project meets the OECD Sustainable Lending Principles, which include a consideration of the economic and social development benefits of the Project. DFID provided this confirmation in a letter from their current SoS to the Chancellor in April 2020, which also raised concerns related to climate change impacts.”

Then 24:

B “Climate change has been part of UKEF’s extensive due diligence process. A Climate Change Report is attached at Annex D, and the subject is also discussed further in this Submission.

C 25. The Africa Development Bank will provide a US\$400m loan participation in the Project, following a positive decision by its Board in November 2019. HMG is represented on AfDB’s Board and DFID’s former SoS approved a UK position in favour of AfDB support...”

So the UK had voted for support by the African Development Bank.

D Then if we quickly go, that is probably a helpful moment just to go to the Secretary of State’s letter. It is p.62. We are going to come back to this document. It is on p.62 in the same bundle.

LORD JUSTICE STUART-SMITH: CB2, 62?

E MISS SIMOR: Yes. Just a few pages back, 60 pages back.

F “As you are aware, HM Treasury requires my Department’s advice on whether the Department for International Development (DFID) officials assess that proposed UKEF transactions in Low Income Countries meet the Organisation for Economic Cooperation and Development (OECD) Sustainable Lending Principles.”

That is para.1. We jump to para.3. So, 2 is yes, they do. Three:

G “Notwithstanding DFID officials’ assessment, I have strong reservations about the project’s climate impact. In the light of UK’s very high domestic ambitions around achieving net-zero, I believe it would be more sustainable to fund other energy projects with UK companies to help UK industry to extend its capability and volume in renewable energies.

H We have an opportunity to strengthen UK business investment to assist countries in meeting the challenges of moving out of hydrocarbons through investments in alternative energy sources.

A

I acknowledge that environmental risks and impacts of UKEF projects are assessed by UKEF itself and fall outside the narrow scope of advice that my Department is asked to provide to you. However, I feel it is right for HM Treasury to consider carefully whether to support the development of such a large gas field at this time, considering the UK's commitment to promoting non-fossil fuels and reducing carbon emissions globally.

B

I am copying this letter to the First Secretary of State and Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for International Trade; Secretary of State for Business, Energy and Industrial Strategy; and the Chief Secretary to the Treasury."

So that is 1 April. I told you the Foreign Secretary also did not agree on 5 June.

C

If we then go back to p.148 and read para.29:

D

"As well as being an extremely poor country, Mozambique currently has an extremist Islamic insurgency towards the north of the country, amongst some of the least populated areas and far from the capital, Maputo, in the far South. Whilst the recent elections in Mozambique passed peacefully, the Government is struggling to contain the insurgency given the size of the country and its economic position. However, as the economy of Mozambique improves, and development takes place, the attractiveness of such insurgencies to the local population should diminish. Additionally, the Project sponsor has committed to try to procure food from this insurgency region to provide an alternative to farmers who might otherwise be forced to take up with these groups."

E

Then para.30:

F

"Clearly the Project funds can also be used by the government of Mozambique for other developmental priorities, including developing the nation's renewable energy potential and asset out in its energy planning policy commitments."

G

I will take you to it later, but in the response to the Part 18, I believe, the defendants accepted that they have no policy document, no plans in relation to the use of this funding. So usually you would have an explanation as to how these funds would be used to develop renewables, but there is no such plan.

H

If we then go to 36----

LORD JUSTICE STUART-SMITH: What difference does that make?

MISS SIMOR: In terms of one's assessment as to the reasonable----

LORD JUSTICE STUART-SMITH: Sorry?

MISS SIMOR: The assessment as to the reasonableness of granting this funding in order to assist Mozambique to move towards net zero. So if you---

LORD JUSTICE STUART-SMITH: I do not quite understand. Just showing how little I understand, I thought there was a consistent thread, both from the Government documents and also from other documents, that one of the reasons why Mozambique likes this project is that it will give it access to funds which it would not otherwise have that would enable it to create an infrastructure and have funds which go to improving its debt distress position. I must say when I read when para.30 in advance of today, on p.CB2/149, I thought that was likely to be uncontentious, but---

MISS SIMOR: What there is not-- so there is the vague belief/view that it could be used for renewables or transitioning to renewables. What there is not is a plan to use funding to do X, Y, Z. So it is not-- for example, there is not a plan to say we are going to somehow convert a gas-powered electricity grid into a renewable grid. First we are going to build gas-powered electricity grid and then in five years' time we are going to use the funding to transfer that into a solar or hydro-powered grid, which obviously those kind of things require serious planning, including financial planning.

LORD JUSTICE STUART-SMITH: Okay. There is not a plan, I understand that, setting out precisely how they are going to choose this. But just for my assistance, is para.30 contentious?

MISS SIMOR: Oh, no, it is not contentious that the Mozambique Government can use it. It is not contentious that the Mozambique Government can use the money absolutely as it likes, obviously. What there is not is any actual developed or commitment or undertaking or explanation as to how these funds would be used. I will find you the reference. So what we do not have is, "Yes, we fund this," and Mozambique, through its plan, is going to put X per cent into doing-- into renewables. There is no link, if you like, in the plan. So, Mozambique can do exactly what it likes with the money and that is actually our point, really.

Then if we go to - where did I get to? Thirty-six? We do not need to read 33. So, 36.

"UKEF has reviewed the Project with regard to the potential environmental, social and human rights ('ESHR') risks and impacts in accordance with the international agreements which apply to the operations of ECAs and the requirements of the Equator Principles, which UKEF has adopted..."

Then at 37:

A

“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. This document is attached at Annex D and I recommend that you review it in full. This Report was considered as part of UKEF’s Enterprise Risk and Credit Committee (ERiCC) assessment of the Project, and I have also taken account of its findings in coming to my decision that I am prepared to underwrite the Project (refer to the section on My Decision to Support at para 56 below). I am not aware that DFID has undertaken its own climate change assessment of the Project.”

B

If we then go to 38 and 39. So, at 38:

C

“As of today, UKEF is on cover to support projects in the fossil fuel sector, with the exception of new support to thermal coal projects where government policy on this, as set by the Prime Minister at the African investment Summit in January this year, needs to be taken into account. I am aware that policy development work is taking place across Whitehall in respect of the Government’s future policy on trade and energy, to which UKEF is contributing. That work is ongoing, with the evidence base being gathered, including a consideration of how this area of policy might interact with other government priorities, including the levelling up agenda, increasing support for SMEs, strengthening the Union and promoting clean growth capabilities within the supply chain. The expectation is that initial policy options will be put to Ministers over the summer to inform further refinement of that policy ahead of a rescheduled COP26.”

D

E

That policy became the No Fossil Fuels Policy which was announced in December, five months after this decision was taken.

F

“39. While I would not wish to pre-empt the outcome of that policy work, analysis to date recognises the role of different fossil fuels in the transition to a low carbon future, and indeed gas has a significant role to play as a ‘transition’ fuel. Future modelling of energy needs and demand, as described above by the IEA, suggests that demand for gas will increase in the period through to 2040 in all scenarios. From a UK perspective, gas currently represents c.40% of the UK’s energy mix and is currently expected to continue to feature at least into the 2030s, as the use of coal and solid fuel reduces and the use of renewables and nuclear increases.

G

H

40. The Project will also contribute to global energy security, exporting gas to global markets, including the UK. Centrica, amongst others, have signed long term off-take agreements for the purchase of gas from the Project from the start-up of production until the early 2040s, meaning some of this gas will be used in the UK.”

A Now, I should make the point here that there is a distinction between liquid natural gas and pipeline gas, because liquid natural gas your Lord and your Lady will know is a gas that is compressed and then when it is decompressed it becomes gas again and so it involves a higher use of energy because there is both the compression, the decompression and the transport by tanker, which is not the case, for example, in natural gas directly through pipelines, so its emissions are much higher.

B To the extent that UK pipeline gas - I believe this is uncontentious between the parties - was replaced by liquid natural gas, that would lead to an increase in UK emissions. Equally, to the extent----

C MR JUSTICE LINDEN: Attributable to the need to compress?

MISS SIMOR: Yes, and the transport, because it comes in tankers from Africa, so it is a higher emitting fuel than natural pipeline gas.

D It would also, of course, increase UK emissions insofar as it displaced the development of renewables or nuclear.

LORD JUSTICE STUART-SMITH: Am I right in thinking that one of the diagrams in the Wood Mackenzie Report which indicates usage makes that point for you?

E MISS SIMOR: Yes. I will show you the percentages, the SPAs, the supply purchase agreements; they show what percentages come into-- not necessarily come into, but on the face of it looks like it is coming to Europe and it is around 22 per cent of fuel.

LORD JUSTICE STUART-SMITH: Okay. I will take your word for it, but I am not sure I spotted that yet.

F MISS SIMOR: I will show you that. Of course, there is an argument, which is no doubt the argument that is made by Wood Mackenzie, that the SPA's themselves, although it might say Europe, Japan, India, China, it is possible that they would nonetheless end up on a global market, so you cannot necessarily ascertain from the advance purchase agreements, which I believe cover about 89 per cent of the capacity, actually determine where the gas is finally used. Then----

G LORD JUSTICE STUART-SMITH: I think that comes into the category of "interesting but not critical", does it not?

MISS SIMOR: It will be relevant to the extent that the assumption that is made here is that it all goes to China, in a sort of vague way, “It will be used in China.” We do not actually know because there is no quantification.

A

LORD JUSTICE STUART-SMITH: Chinese use is a benchmark?

MISS SIMOR: Well, exactly. It is used at “if it goes to China----

LORD JUSTICE STUART-SMITH: “If it goes to China, this is what it looks like.”

MISS SIMOR: Yes. Then if we go, where am I, 47.

B

“The Export-Import Bank of the United States (EXIM) which has committed up to US\$5bn released the following statement on 14 May, “EXIM’s financing for the Mozambique LNG project continues to strongly support President Trump’s Prosper Africa Initiative to unlock opportunities for U.S. businesses in Africa. The amendment approved today expands the scope of U.S. involvement in the project to support even more American jobs—16,700 U.S. jobs—across additional states. As was previously underscored, private financing was not available for this project given its size, complexity, and risk—necessitating support from EXIM. We were told that China and Russia were slated to finance this deal before our EXIM board quorum was restored by the U.S. Senate one year ago. This is a great example of how a revitalized EXIM, thanks to President Trump’s leadership and bipartisan support from Congress, can help ensure the use of ‘Made in the U.S.A.’ products and services, without ceding ground to countries like China and Russia.””

C

D

So, of course, we cannot look at EXIM in terms of the Paris Agreement because by that time the USA was not a party.

E

Then 50:

“A decision to support the Project will, though, attract significant attention and scrutiny from the NGO community and adverse comment from sections of the media.”

F

We are told that the redaction is legal privilege there.

“I believe the fact that UKEF has undertaken a substantive consideration of climate change matters alongside its ESHR due diligence of the Project, and that these have been considered in coming to a decision to support the project.”

G

Again, legal privilege.

H

A LORD JUSTICE STUART-SMITH: Perhaps you complete the sentence “makes this decision more defensible” or words to that effect. It is meaningless if you just stop at the word “project”.

MISS SIMOR: Fifty-two:

B “If it became clear that UKEF was unable to support at this late stage for reasons not associated with the credit risk of the Project [i.e., I suppose, climate change], there would be damage to UKEF’s reputation in international export financing circles stemming from a loss of trust in its ability to execute transactions.”

Then 54, again, the redaction is legal privilege:

C “There would be a further resonating impact to HMG support more broadly to the fossil fuels sector as a decision not to support would in essence be setting government policy in relation to its support to this sector.”

D So there is a belief that if they say no that will, in a sense, pre-empt the current consideration as to what policy to adopt, which we know became No Fossil Fuels.

UNKNOWN SPEAKER: (inaudible)

LORD JUSTICE STUART-SMITH: Well, I am not sure who that is. We are grateful for your submissions. But I think if you mute whatever you are doing that would be very popular.

MISS SIMOR:

E “From a government policy consistency perspective, such a decision would impact government support to the hydrocarbons sector both internationally and in the UK. Therefore, a decision on such grounds can only be made by ministers and not civil servants.”

F That all seems to be about the fact that policy is currently being discussed. If we agree it now, that will become policy, and that will have bad impacts for the UK support in hydrocarbon sector which ultimately it turned out it decided not to do anyway.

LORD JUSTICE STUART-SMITH: Well, no, all it is really saying is it inadvertently will create new policies.

G MISS SIMOR: Yes. Exactly. Then 55:

H “Although the NGOs would likely see the decision not to support the Project as a step in the right direction, this may, as we saw following the announcement on support for thermal coal, encourage further campaigning against UKEF and wider HMG support for other

strategically important, but also ‘controversial’ areas or sectors, such as civil aerospace and defence.”

A So, it might lead to more campaigns.

“In reaching my decision that I recommend the use of my delegated authority to underwrite this transaction...”

Then we go to d:

B “d. the environmental and social risks of the project, the due diligence that has been undertaken and the management processes that have been put in place;

C e. 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 and beyond the lifetime of the potential UKEF supported facility;

D f. government policy in the round relating to support for overseas upstream oil and gas projects;”

Then if we now to the annexes to these submissions.

LORD JUSTICE STUART-SMITH: Just as a matter of interests, where, in the list of key considerations, do we deduce or see a conclusion that it is in accordance with Paris?

MISS SIMOR: In the CCR.

E LORD JUSTICE STUART-SMITH: In what?

MISS SIMOR: In the Climate Change Report.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Which I think I have just shown you two paragraphs----

F LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- where she has shown she must pay special attention to that.

LORD JUSTICE STUART-SMITH: So, not in this document expressly, but by virtue of its reliance on the Climate Change Report?

MISS SIMOR: Exactly, yes.

G LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And, indeed, the detailed grounds of defence make it clear that those were the conclusions on which the decision was based. Then if we go just to p.156, we see-- so these are the four annexes to the submissions to the Chancellor and the Secretary of State for

H Trade. We have been given H to J. So we have not been given G, Environment----

LORD JUSTICE STUART-SMITH: Sorry, you are on CB2/156?

MISS SIMOR: Yes. You will see----

A

LORD JUSTICE STUART-SMITH: This is not a document that I have looked at, so----

MISS SIMOR: This is not an important document, it just tells you what is in this first annex, Annex A.

LORD JUSTICE STUART-SMITH: Yes.

B

MISS SIMOR: What we have been provided with is H, I and J, not the stuff above. So we have not been given G, for example, and we have not been given the legal analysis at F either.

If I go, then, to 162, you can read perhaps these key documents if you have time at some point, but if you go to 162, just at 104:

C

“104. Cabo Delgado Province is not a cyclone prone area. Prior to 2019, only one cyclone struck the Mozambican coastline north of Pemba in the past 50 years. It made landfall near Mocimboa da Praia in 1959. The main cyclone season in the South-West Indian Ocean is between November and April.

D

Cabo Delgado was impacted by two cyclones during 2019. Historically, this is a rare event but may be indicative of changing global weather patterns.

E

107. On a related topic, heavy rains in December did wash out some bridges in Cabo Delgado. Total assisted the contractor in the mitigation of this impact. Our understanding is that the Mozambique army is building replacement bridges and heavy items are being transported by barge as an alternative.”

F

Now, the reality which is actually set out also in Mozambique’s NBC and its other documents, some of which you do not have, but if I can take you to the supplementary bundle of authorities at tab 20, the reality, 2019, if we go to p.365 of that document you will see:

G

“Mozambique, Zimbabwe and the Bahamas were the most affected countries in 2019 followed by Japan, Malawi and the Islamic Republic of Afghanistan.”

H

Then we see the table with the most affected countries in terms of climate. We have Mozambique at number 1. We have 700 fatalities and we have a GDP loss of 12.16 per cent and then if you start the text:

A “In March 2019, the intense tropical Cyclone Idai [which is in that document we just looked at] hit Mozambique (1), Zimbabwe (2) and Malawi (5), causing catastrophic damage and a humanitarian crisis in all three countries. Quickly becoming the deadliest and costliest tropical cyclone in the South-West Indian Ocean, Idai was labelled as “one of the worst weather-related catastrophes in the history of Africa” by United Nations Secretary-General António Guterres. The torrential rains and destructive winds with top speeds of 195 kilometres per hour¹⁷ caused flash floods and landslides, which caused economic losses amounting to US\$ 2.2 billion. Overall, the cyclone affected three million people and caused over 1 000 fatalities.”

B I take you to that because Mozambique is not only one of the poorest countries in the world, it is also one of the countries most affected by climate change and most vulnerable to worsening climate change in the future.

C So if we can go back to-- we were at p.162, if we can go from para.115 onwards. So, 114 perhaps you can mark. It is about the World Bank position, World Bank revising its position in terms of debt status because, of course, it was in debt distress.

D “115. In addition to the usual ESHR due diligence which UKEF is required to carry out a supplementary Assessment has been prepared, providing broader considerations of climate change risks associated with the Project. This document remains under development but ERiCC is asked to consider the current UKEF Climate Change Assessment...”

E So they are given a draft and this draft, I understand, is 30 April. Then if we go-- the rest of that is redacted.

F If we then go to the next report, the next report, which is Annex B of the submissions, starts on p.165. This is the RAD Risk Analysis Report. I only have a few comments to make in relation to this. If we just go to p.180. Well, perhaps I should just quickly point you to 170 and just explain to you the position in terms of debt because----

LORD JUSTICE STUART-SMITH: Page?

G MISS SIMOR: Page 170. I do not want you to read it, I just want to explain to you the debt position, as I understand it. Each participant in this project underwrote the risk of the project not taking place. Besides the costs of that, they would have to step in to deal with-- if one fell out, another would have to step in. A percentage was owned by Mozambique undertaking and that debt it could not afford and therefore that potential risk to it of a debt service undertaking of US 2.57 billion was underwritten by the Mozambique Government,

but the Mozambique Government could not have met that debt and for that reason, in para.61, it was determined that it was very likely that the project would take place. That is my understanding.

So if you look at para.61:

“However, in a worst case enforcement scenario, RAD considers it in reality questionable whether the Government of Mozambique would be able to support its US\$2.25 guarantee obligation. The IMF reported that Mozambique’s net international reserves were estimated at US\$2.7bn as of end 2019. While Mozambique’s reserves are broadly the same as the size of the obligation, the country would not be able to use all of it to support the obligation, as it would cause a liquidity crisis. Therefore RAD considers the low likelihood of such an event as a very important credit matter and mitigant (see next section).”

So it is unlikely the project would not take place because a consequence would be significant bankruptcy/insolvency of the country.

Now, if we then go to p.180, I am taking you to this because you may recall from the grounds or skeleton that one of our arguments is that this project was to be eight to ten trains, certainly not two trains, that is production facilities, and you will see that in assessing the credit risk in relation to the project or financial risks the reserve risk was assessed by reference to eight trains. Rather, it was considered that the reserve risk was okay because there was enough for eight trains.

“RAD considers the reserve risk as acceptable given: (i) the extensive gas findings in the discovery area are expected to be sufficient to cover up to another 8+ LNG trains and (ii) project specific reserve certification requirement including a 20% buffer at completion.”

So, it could cover up to ten trains. Then you will see in para.122 those quantities.

LORD JUSTICE STUART-SMITH: Do you accept the points that is made against you, which is that what UKEF was proposing to fund was a two-train project?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Full stop?

MISS SIMOR: We accept that that is what they were proposing.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: But in terms----

LORD JUSTICE STUART-SMITH: And if someone was proposing, then, to increase it to six, eight, ten, there would need to be further borrowing, further funding, further submissions and a different decision.

A

MISS SIMOR: Well, in terms of the United Kingdom, yes. In terms of the rest, we have to accept what we are told. So we are told that, so that is the position. For your purposes, the position is that there would need to be another licence, because that is the evidence.

LORD JUSTICE STUART-SMITH: Thank you.

B

MISS SIMOR: That, however, does not impact---- Put it this way; a rather different question needs to be asked in terms of what UKEF had to assess in terms of the reasonable prospects of what the project really was and its client impacts and I will take you to the relevant provisions in relation to that.

C

LORD JUSTICE STUART-SMITH: I may need some help on that.

MISS SIMOR: Yes. So, it needs to consider how reasonable---- (After a pause) The standard requires it to consider the reasonably defined project. I will take you to that. It is IFC PS1. It is a standard.

D

LORD JUSTICE STUART-SMITH: Take us to it in your own time.

MISS SIMOR: Yes. The reason I take you to this is because we say that this, with all the other pieces that I will take you to, shows that it was reasonably defined that it would extend beyond two to six, eight, ten, fourteen.

E

Then if we go p.180. If we now go to para.139:

“According to the Lenders Market Advisor (‘LMA’) ‘Wood MacKenzie (WM)’...”

And this is important. Wood Mackenzie is the Lenders Market Advisor.

F

“... the global demand for energy cannot be met without oil & gas. In particular gas and LNG are fundamental to enabling the energy transition without massive disruption and providing energy security.³⁷ Although overall gas demand remains relatively flat to 2040, LNG’s share of demand will increase significantly. Additional investments in LNG beyond Mozambique will be required to meet demand.”

G

So it is looking at everything from a demand perspective.

H

“140. Global demand for LNG is expected to double from 313 million tons per year (mtpy) in 2018 to 631mtpy by 2035 (continuous growth of 4% CAGR) with Asia Pacific being the largest market and driver of future growth accounting for 62% of this demand. Key markets will be

China, India etc. whose energy systems still heavily rely on coal and clean air policies mandating coal-to-gas switching.”

A LORD JUSTICE STUART-SMITH: And those two graphs come from the Wood Mackenzie Report, do they not?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Where they are slightly----

B MISS SIMOR: Whether they come from the IEA, they may come from the IEA originally.

“... with Asia Pacific being the largest market and driver of future growth...”

C So, what Wood Mackenzie is looking at here is the global growth in gas use, in gas demand, and future growth accounting for around 62 per cent of this demands.

“Key markets will be China, India etc. whose energy systems still heavily rely on coal and clean air policies mandating coal-to-gas switching.

D 141. Growing demand, expiring existing contracts and decline in output from producing fields are widening the uncontracted demand gap...”

E And I emphasise that because this is a market analyst looking at the whole thing from the perspective of the market.

“... requiring a significant portion of new supply. Therefore, WM concludes that there is sufficient gap in the market to absorb MZLNG output.

F 142. The current largest buyers are Japan and South Korea. Japan’s demand is expected to decrease [this is the global demand, this is not of the contract] over the coming years³⁸ and South Korea’s demand to stabilize, although both will remain large established buyers of LNG. The LNG demand of China and India will grow significantly requiring new sources of LNG supply. Other emerging markets with significant growth expectations include Pakistan, Bangladesh, Indonesia and Taiwan.

G 143. WM confirmed that each of the respective key markets under the SPAs show sufficient uncontracted volume gap to absorb the designated MZLNG volumes.

H

Conclusion: RAD considers volume demand risk acceptable.”

But will there be enough demand in the market?

A

Then if we turn to 147 on the next page----

SIR JAMES EADIE: I am sorry, just before my learned friend goes there can I just invite you to note the title of the section she has just read, which is on the previous page at 181/7.5.1.

B

MISS SIMOR: Yes. This Annex B is a document concerned with the financial risk of the project. We are not in the climate change aspect of the project at all at the moment. This is the bit that we will look at things like stranded asset risk, market risk, et cetera.

C

Then 147:

“However, in the LMA’s [Wood Mackenzie] view additional investment beyond MzLNG are required to meet future demand.

D

149. According to the LMA, MZLNG is well positioned to compete in this market against projects in East Africa, Australia and US. MzLNG is positioned in the top quartile in terms of cost competitiveness.”

Sorry, that is para.149, 147 and 149.

E

LORD JUSTICE STUART-SMITH: Thank you. Can I just ask you a very general question, again, because it is bugging me. Mr Muttitt does not accept that gas can be a transition bridge; do you accept that others disagree with him?

MISS SIMOR: Well, others plainly do.

F

LORD JUSTICE STUART-SMITH: Do you accept that it is a rational point that people can-- or view that people can reasonably form? For example, look at Mozambique’s position, where on one view of the materials we have from Mozambique, Mozambique sees this project as providing, if I can put it this way, cover for its development of infrastructure and then moving to renewable fuels, which at the moment are not on the table. Is that a view which can reasonably be taken by Mozambique or do you not want to go there?

G

MISS SIMOR: Well, we do not actually know the position in relation to their view on this, Mozambique’s view. They have-- various documents are set out, but we do not actually have a view specifically on that analysed. It is true that in one of the reports there is a reference to development of gas. We accept that people hold the view that gas can be a transition.

H

Specifically in relation to this project, what is extremely important is the IPCC 1.5 special report and the UNEP Production Gap Report. Because the UNEP Production Gap Report

A shows the excess of supply over the available budget of carbon that can be used to stay within 1.5 degrees. So, while it may be correct to say that there is this ever-increasing demand, the UNEP Production Gap Report makes clear that if you used all the fossil fuels that are already online being produced, that would exceed the available carbon budget, which ultimately determines the temperature increase. So the answer in that respect is that this fossil fuel essentially has to remain in the ground and what Paris requires is that the finance, whether it be 20 billion or 30 billion or whatever, be given to Mozambique to develop renewables for its own use.

B
C Because there is, obviously, an injustice, and that is what the UNFCCC and Paris are intended to deal with. There is a gross injustice in the fact that the developed world has caused the problem, but the developing world is the world that is going to suffer most from it. Of course, Mozambique has this vast resource now. So, to say, “Well, you cannot get rich and you are also going to suffer from climate change,” that is an injustice that is redressed by the agreement, which is to ensure that the financing goes to Mozambique to enable the development of renewables and to compensate for its inability-- the fact that these resources can no longer be developed within the 1.5 degree temperature----

D
E LORD JUSTICE STUART-SMITH: That is a very interesting response, for which thank you. I will try and remember it and cogitate on it. But does it not raise a very big question, which may be you do address and I have simply missed it. When we are talking about compliance and powers, should we be looking at it from a UK perspective or from a Mozambique perspective or from a global perspective?

MISS SIMOR: We are looking at it in relation to this decision entirely from a UK perspective.

LORD JUSTICE STUART-SMITH: Why?

F
MISS SIMOR: Because we are not concerned with Paris in the abstract, we are concerned with this specific executive decision.

G
LORD JUSTICE STUART-SMITH: Correct. So what we are concerned with, surely, is whether-- leave aside for a moment the distinction between the project and the financing of the project, what we are concerned with, if this is an issue at all, should be whether Mozambique’s project is consistent with the Paris Agreement. Because if it is, why should that not be funded?

H
MISS SIMOR: No, because we are concerned with two legal questions in terms of Paris; one is the United Kingdom’s obligation to make finance flows consistent with the Paris Agreement.

LORD JUSTICE STUART-SMITH: Fine. So if they are financing a compliant project, what is wrong with that?

A MISS SIMOR: Well, we say it is not a compliant project.

LORD JUSTICE STUART-SMITH: I know there is a disagreement, but I am just trying to get the structure clear in my head and, forgive me, others may have it much more clearly than I do. If, just for the sake of argument, this project for Mozambique is consistent with the Paris Agreement, allowing for the fact that less developed countries, because of the injustice that you have spoken about a moment ago, on one view, possibly, possibly, I express no view on it at the moment, on one view Paris has different implications for different countries.

B MISS SIMOR: It does.

LORD JUSTICE STUART-SMITH: And what is troubling me at the moment, and I do not necessarily ask for a definitive answer now, but I certainly need to understand people's position by the end, and I hope my Lady thinks this is not a completely irrelevant question, if it were to be the case that this project is Paris compliant for Mozambique, where do we go then?

C MISS SIMOR: So, I hope I can help you in this way. The obligation under 21(c) of Paris is to make - and I am going to come to it after dealing----

D LORD JUSTICE STUART-SMITH: Sure.

MISS SIMOR: -- is to make finance flows consistent with the low emissions pathway. The low emissions pathway is the pathway to net zero as set out in IPCC 1.5. Bear with me, I----

E LORD JUSTICE STUART-SMITH: I am holding on.

MISS SIMOR: Now, that obligation applies to those who are finance flows, so states who are sending money somewhere. It is essentially an obligation on states. It also potentially entails an obligation on states to require private financiers also to make their finance flows, which is why you have the Green Finance Strategy. So, we are concerned, essentially, that first question, are these finance flows consistent with the low emissions pathway. Now, we say no, because two reasons. First of all, this amount of fossil fuels does not meet the low emissions pathway. Well, essentially, that is the reason.

F LORD JUSTICE STUART-SMITH: So that is your submission, that it is not acceptable to invest in any development of energy(?)?

G MISS SIMOR: In this project it is not consistent with that pathway.

LORD JUSTICE STUART-SMITH: But the consequence of what you have just said, I think, would be that it would be unacceptable ever to invest in an LNG project.

H MISS SIMOR: It is effectively the policy of UKEF now and the widening----

LORD JUSTICE STUART-SMITH: Now?

MISS SIMOR: Yes.

A

LORD JUSTICE STUART-SMITH: But it was not at the time.

MISS SIMOR: Yes, that is our submission in light of the UNEP Production Gap Report.

LORD JUSTICE STUART-SMITH: Okay. I am sorry.

B

MISS SIMOR: Sorry. So, for developed countries. Now, Mozambique is not-- Mozambique is in a different position. Mozambique is bound by its NDC commitment. Its NDC commitment is to reduce emissions by 76.5 million tons of carbon from 2020 to 2030, as I understand, that is what is written. But that commitment is conditional on it being provided with finance by countries like the United Kingdom.

C

So, it is in a totally different position because as the defendants make very clear, the Paris Agreement does not oblige any state to commit any specific amount of contribution to greenhouse gas reduction. So, Paris allows states to decide how much they are going to commit to reducing global emissions. That is a matter before the state. Of course, once they have committed to do that, that is a legally binding commitment. But here we have a commitment that is a conditional commitment, so obviously it is conditional. So that is a very different analysis from the perspective of Mozambique.

D

E

The other obligation on the United Kingdom under 45, 91 and 21(c) and 3 of Paris is to assist developing countries, not just to meet their NDC but also to augment and improve and increase their NDC. So, again, the commitments are very, very different and therefore from the perspective of Mozambique this project could be within its NDC, but it could nevertheless be a breach of the Paris Agreement and we say is contrary to the Paris Agreement for the UK to finance it.

F

G

LORD JUSTICE STUART-SMITH: So, if that were a generally accepted proposition, you would, in fact, perpetuate injustice about which you have spoken by another route, because you would prevent any developed country from supporting Mozambique in their transitional efforts. I am putting it in an extremely tendentious way, but I think it is where this submission leads.

H

MISS SIMOR: Well, of course, there is an injustice. It is intended to be addressed through climate finance, through the separate, you know, giving of finance. Whether it will be is another matter. It is the problem with the fact that there are too much fossil fuels under the ground, if you bring them up climate-- and Mozambique suffers the cyclones and disasters

A and that is why Article 2 of Paris is very clear that development goes hand in hand with
dealing with climate change, because Mozambique will suffer hugely from the climate
change that its potential wealth could create. It should be pointed out that we are not talking
about enabling Mozambique to develop energy sources for its own use because 95 per cent of
this LNG is for the global market. So we are talking about revenue and revenue can be
provided to Mozambique. You will see that the UKEF policy in relation to fossil fuels now
is that if the energy-- the fossil fuels to be developed are for the global market, it is an
B absolute ban.

LORD JUSTICE STUART-SMITH: It is a what?

C MISS SIMOR: Absolute ban. They will not finance that. I will take you to that document. It
makes sense because it is one thing to say, "Well, you have got this energy, you should be
able to use it to develop your own energy source." It is another to say, "You should be able
to sell it," because it is easy to provide----

D LORD JUSTICE STUART-SMITH: But that is completely unreal because Mozambique's
economy at the moment, as I understand it, would simply not justify the sort of investment
we are talking about and certainly if you limited it to domestic consumption you do away
with the prospect of improving its debt distress by the obtaining of foreign (inaudible).

MISS SIMOR: That is right. That is why there is the finance mechanism.

LORD JUSTICE STUART-SMITH: Okay.

E MISS SIMOR: It is a fundamental problem. If we could bring up all those fossil fuels and sell
them and then----

LORD JUSTICE STUART-SMITH: Or would it not be nice if this particular project had been
for renewable energy? But it was not.

F MISS SIMOR: Yes. And actually the renewable energy capacity, as recognised in the CCR, of
Mozambique is vast. It has vast potential----

LORD JUSTICE STUART-SMITH: Yes, but it is not on the table at the moment.

MISS SIMOR: The reason it is not funded, and you see that in the NDC, the reason it is not
developed is because it has not got finance and that is what developed countries are supposed
to be providing.

G LORD JUSTICE STUART-SMITH: Yes. But the starting point for that has to be a proposal
from Mozambique, does it not, of which there is none at present?

H MISS SIMOR: Well, not necessarily. The original reason by UKEF for not funding renewables
is because they said no UK companies had come to them with proposals for renewable

projects in Mozambique and therefore that is why they were not funding renewables. We will find you the reference to that.

A In fact, they have now got a policy that goes to UK companies and industries to encourage them to go out into the world and develop renewable projects, which they will assist with funding. Indeed, you saw that from the Secretary of State for DFID. She said, "Let us go and encourage our British companies and let them go to Mozambique and say, "Well, why do we not have a hydropower project here or a solar project here or a wind project?""

B LORD JUSTICE STUART-SMITH: Okay. Could you just-- that is very helpful, thank you very much, but could you just give me a second?

C (After a pause) Thank you.

MISS SIMOR: I had got to, I think----

LORD JUSTICE STUART-SMITH: You were on p.185, I think.

MISS SIMOR: If we go now to para.165, we see what I just mentioned at the top of 187:

D "95% of the produced LNG will be sold to export markets via ten well diversified offtakers with a weighted average IG rating of BBB+, while 5% will be sold domestically..."

Then the top of 165:

E "The project has executed eight Offtake Contracts/SPAs with ten LNG buyers."

F Then you will see where they are from. Then if we turn over we see the table I mentioned, my Lord, earlier. We will see that these are the offtake SPAs, the advanced contracts. We see Centrica, which is the UK mentioned purchaser, UK/Northern Europe, up to 11.7 per cent. Then if you go down you see Europe, EDF, 10.8 per cent. And Global, Shell, Global, is the third row down, 18 per cent.

G If we then look for China we find China is 13 per cent. That is CNOOC. It is sixth row down. You will see that underneath you have that you have Indonesia 9 per cent and on the next page India 9 per cent. So, essentially, ignoring the global, we have around 22 per cent for Europe, 13 per cent for China and 9 per cent for India.

H LORD JUSTICE STUART-SMITH: That is treating all of Shell's as Europe?

MISS SIMOR: No, ignoring Shell. I took Centrica----

LORD JUSTICE STUART-SMITH: You said 22 per cent?

MISS SIMOR: Yes. I ignored Shell's. Then para.274 to 278. Oh, now I have I have the CAGR.

A So this is basically the assessment of stranded assets. My Lord, my Lady, you may know stranded assets, what that essentially means. Yes. So, at the bottom of 274 you will see Global long-term LNG demand is predicted to double until 2035, 4 per cent, and that is compound annual growth rate.

B Then at 276:

“RAD considers the asset to become stranded as ‘low’ given the following:”

C Then if we jump to (vi):

D “The project has access to a 30-year concession for Area 1 with gas reserves of up to 150TCF [so that is the expanded site] sufficient to develop up to 8 further trains and a total estimated economic value of US\$150bn. This has the potential to propel Mozambique to one of the top five global LNG suppliers with significant revenues for the GoM and the country. This project alone will provide the GoM with estimated net total revenues of US\$13bn between 2019-2049.”

E So, the US-- Mozambique would get US\$13 billion over that 30-year period. That, my Lord, puts it into perspective in terms of what the developed world potentially ought to pay Mozambique to keep the fuels in the ground.

F “RAD considers there to be insufficient evidence to show a high likelihood that either the sponsors and the GoM will allow the asset to become stranded or adversely intervene (i.e. low likelihood of expropriation).”

F So this is the stranded asset assessment.

If we now go to Annex C. It starts at p.211. This ESHR only considers two trains.

G LORD JUSTICE STUART-SMITH: So, this is in our essential reading?

G MISS SIMOR: Yes, this is the-- I do not-- perhaps you will not mind if I just take you to the key paragraphs for my purposes.

H So it is para.1:

A

“...carries out an environmental and social screening and review of potential transactions falling within the scope of the OECD common approaches and the equator principles. UKEF is considering provision of support for the development of the offshore facilities for gas receiving and natural gas liquefaction of 12.88 MTPA [that is the two trains] and related infrastructure in Afungi Peninsula.”

Then if we go to para.9, the last three lines on p.212:

B

“Both Area 1 and Area 4 projects will separately construct and operate their own respect offshore and onshore facilities (each based initially [I emphasise] on two trains) comprising about 12 MTPA capacity per project [so 24 in total, only 12 of which is being funded by the UK]. In parallel, they will jointly design, construct and use certain onshore facilities.”

C

Then if we go to p.214, para.14, starting on the second line:

D

“...Two LNG trains (5.99 MTPA capacity each) will be constructed initially to treat and convert natural gas to liquid. Space for up to 10 trains has been allocated for both Area 1 and 4 to include the potential for future growth (in line with the Government’s LNG park aspirations)...”

Then 227 we get the climate change and greenhouse gases at the bottom of the page:

E

“The Project EIA takes account of potential physical impacts to the Project from climate change (e.g. warmer temperatures, increased rainfall, sea level rise and extreme weather events)...”

So these are all things that Mozambique is suffering already but going to suffer more as a result of climate change.

F

“... predicted over the 30 years lifespan of the Project. Mozambique’s low-lying coastline makes it particularly vulnerable to such effects. These conclude that the predicted impacts on the Project are manageable...”

So, the project, despite these cyclones, the project can survive.

G

“... and adequately built-in to the design, construction and operations planning (e.g. The Project is being built on high ground onshore designed to sustain heavy rainfall and high winds, MOF/jetty designs account for increased sea-levels and wave heights, and offshore facilities designed to withstand high winds and sea-states associated with intense tropical cyclones).”

H

LORD JUSTICE STUART-SMITH: I think you can take it that the essential reading documents, unless we indicate to the contrary, we have read.

A MISS SIMOR: Okay. I can just skip----

LORD JUSTICE STUART-SMITH: So you can point and highlight rather than necessarily reading the whole thing out.

MISS SIMOR: If I can then just highlight the last line of 83, that it will account for 5 to 10 per cent, we have covered that already, additional. Then 85 is simple:

B
C
“As energy is to be generated on site (Scope 1), the Anadarko Specialist GHG Study assumes there are no Scope 2 emissions from purchased electricity. There are currently no estimates of Scope 3 emissions from the Project due to considerable uncertainty in the measurement and reporting of these data. For gas production and LNG projects it is anticipated that Scope 3 emissions would be significantly higher than Scope 1 and 2.”

Now, that is something that the Secretary of State will have read. She is told that there are no estimations of Scope 3 because you basically cannot estimate them.

D LORD JUSTICE STUART-SMITH: But the working assumption is that Scope 3 would be significantly higher----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- than Scopes 1 and 2?

E MISS SIMOR: Yes. Then we now go to the Climate Change Report at 246. Actually, before I do that I want to take you to the guidance that was adopted following criticism, I believe, by Ben Caldecott and EGAC. There was some guidance about the Climate Change Report that was disclosed to us. We find that back at p.132.

LORD JUSTICE STUART-SMITH: One three two?

F MISS SIMOR: One three two.

LORD JUSTICE STUART-SMITH: Yes.

G MISS SIMOR: I just want to take you to this first couple of pages, 132 to 133. I do not need you to read it, but I just want the first title you will see included as a guidance note and a reminder of certain agreements, guidelines and documents that may be available to review the Climate Change Report and there they set out bits of the UNFCCC and then on the following page Articles 2 and 4 of the Paris Agreement. Then on p.134, the IPCC Report. So these are all relevant to climate change assessment.

LORD JUSTICE STUART-SMITH: Well, having giving you that helpful indication about three minutes ago, this is a document that I have not read, so if you want me to read anything in particular would you just identify it?

A
MISS SIMOR: No. What I just want to identify to you is that there was background guidance that was adopted very late, it is beginning of May.

MRS JUSTICE THORNTON: Where did this come from? Is it internal?

MISS SIMOR: It is internal. It came out in the disclosure.

B
MRS JUSTICE THORNTON: And what is said about it in-- is there a date or----

MISS SIMOR: It is probably in that wonderful chronology somewhere. We will find you the date.

MRS JUSTICE THORNTON: Yes, you can----

C
MISS SIMOR: I believe what happened, I am going to go through it and we will probably find it, I believe what happened is the initial climate change report was showed to Ben Caldecott from EGAC. He then said, "Well, where is your framework? You need some kind of framework." This was then produced and then a subsequent Climate Change Report. So I believe it is the beginning of May.

D
MRS JUSTICE THORNTON: But we do not see the precursor to the Climate Change Report, then, (inaudible)?

MISS SIMOR: We do have two. I think there is one missing.

LORD JUSTICE STUART-SMITH: So, back to the Climate Change Report?

E
MISS SIMOR: Yes. I was really hoping I was going to finish this before lunch, I may not be able to. Let us go back to p.250, that is where I am going to start. Okay, so I have already made the point it says at the beginning of p.250, that 95 per cent of this product was for the global market.

F
Then if we go to p.252, we see-- sorry, 252.

LORD JUSTICE STUART-SMITH: If it is of any relevance to you I have highlighted the paragraph in the middle saying "Energy consumption estimates" and the last paragraph.

MISS SIMOR: Yes. The last paragraph was what I was going to take you to, that:

G
"Some of the gas from the Project will be used as energy source in Mozambique. Investment in renewable energy would offer a more environmentally sustainable pathway for Mozambique's domestic energy needs and to meet the aims of the Paris Agreement..."

H

And the point that there would not be such financial incentives to but it should be recognised that the same financial incentives to attract investment and that it is unlikely Mozambique could get such financial investment.

“As per Mozambique’s own NDC, UKEF considers that the financial outputs of this Project will act as catalyst to enabling the country’s climate change plans to be fulfilled, offering an energy bridge as the nation moves from traditional biomass to renewable energy sources.”

The NDC does not actually say that, but that is the assumption that is made because the NDC in the list of documents includes the Natural Gas Masterplan.

LORD JUSTICE STUART-SMITH: Would that be a perfect moment for you to stop?

MISS SIMOR: It would be.

LORD JUSTICE STUART-SMITH: Are you content to start again at two o’clock?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: How are you getting on? I know I, in particular, have been interrupting you rather a lot.

MISS SIMOR: Well, I am not getting on desperately way, to be honest. I was concerned that this case was-- well, it may be that if tomorrow morning we could start early and I will try and see what I can cut from my submissions, but I will need to cut some because my submissions are pretty forensic, they continue in a rather forensic way which requires me to take you to the documents and that does take a lot of time.

LORD JUSTICE STUART-SMITH: Well, we will try to start on the dot of two and certainly go to 4.30 p.m., and then I will speak to my Lady about what time we will start tomorrow.

MISS SIMOR: Thank you.

LORD JUSTICE STUART-SMITH: Thank you very much.

(1.02 p.m.)

(Adjourned for a short time)

(2.01 p.m.)

LORD JUSTICE STUART-SMITH: Well, you got an extra minute.

MISS SIMOR: My Lady, you asked about the guidance document. We do not know the date of it. It says May on it. We do not know when it was produced but in supplementary bundle

p.1592, para.50, you get the answer to the Part 18 response explaining that it was part of the process.

A

MRS JUSTICE THORNTON: Can you give me that page reference again, please?

MISS SIMOR: Page 1592, supplementary bundle, para.50. So I was in the climate change report but I am going to deal first with the Mozambique NDC and their assessment as to whether UKEF would be assisting Mozambique in meeting its NDC and increasing ambitions so I am going to actually start with the Mozambique NDC because of the issues raised by my Lord.

B

That is at CB2, p.13----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- and you will see in box----

LORD JUSTICE STUART-SMITH: Hold on. Hold on. I have (inaudible). Yes.

C

MISS SIMOR: So perhaps actually look-- if you could just look-- you will probably look at this yourselves at some point but on p.2/11 you will see gaps and barriers to achieving. That is box 5 and the key thing is finance, technology and knowledge and that goes on onto the next page, so those are gaps and barriers in achieving-- in being able to achieve the NDC, and if we go to box 10 on p.13----

D

LORD JUSTICE STUART-SMITH: Yes?

MISS SIMOR: -- you will see the proposed NDC which is the reduction of emissions by the amount stated there, 76.5 megatonnes, million tonnes, of CO2 in that decade and then the last line of that box:

E

“The implementation of any proposed reduction is conditional on the provision of financial, technological and capacity building from the international community.”

F

Then in 11:

“The implementation of the actions referred will limit the GHG emissions by sources and the removals by sinks at the same time as they contribute to the increase of the well being of the Mozambicans through the increase of the access to renewable energy sources and to basic sanitation services...”

G

And then 16:

H

“Considering Mozambique’s historical GHG emissions, which are insignificant in the global total, the effort that the country is willing to make to create adaptative capacity and face the national challenges of reducing poverty, including those of the most vulnerable... is fair and adequate...”

So that 67.5 million tonnes.

A

“It is recognized that achieving a resilient and low carbon development can be a catalyser to reduce poverty...”

B

So creating a low carbon economy goes hand in hand with reducing poverty and diminishing inequalities towards the most vulnerable. “Therefore, the implementation,” at that time it was INDC but it became the NDC with Paris coming into force.

C

“...will include the most vulnerable communities, promoting an inclusive climate proofed development, with a higher degree of access to efficient technologies and cleaner energy sources, promoting environmental integrity and the creation of green jobs.”

D

Okay. Now, if we can go back to the CCR and I am going to look at the bits of it that deal with Mozambique’s NDC, if we start at p.258 and I am going to move quite quickly-- I know you have read this. At the bottom of 258 you will see that there are no offsetting plans. Last sentence of the penultimate paragraph:

E

“Whilst a number of offsetting projects exist in Mozambique, these are have not yet produced results which could compensate for the GHG emissions created by LNG investments.

F

After reasonable inquiry and having checked with DFID’s Mozambique representatives and local legal counsel in Mozambique, UKEF is not aware of any further recent relevant climate plans, strategies or legislation in Mozambique in addition to those considered above.”

G

Then if we go to 264 we get the actual emissions in box 5 that are predicted for Mozambique. Now, these are the emissions that will come from the product producing the gas, so they are not from any use of gas. They do not concern the 5 percent of LNG that is to be used in Mozambique. They concern only the infrastructure and the production of the liquid natural gas itself. That is scope 1 and 2. Then if we go-- you will see it is 6 million tonnes of CO2 reaching 150 million tonnes over the project lifetime.

H

LORD JUSTICE STUART-SMITH: Where are you?

MISS SIMOR: Box 5.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And then if we go to 268 to 269----

MRS JUSTICE THORNTON: Sorry, where is the reference to 6 million tonnes (inaudible)?

A MISS SIMOR: 6 million tonnes is-- it should be there. It is the second paragraph. It is predicted to be 6 million tonnes per year. "The Project's EIA noted the permanence of the impact," because it remains for 100 to 500 years.

MRS JUSTICE THORNTON: Yes.

B MISS SIMOR: And then-- so, obviously, over the thirty years. That would be 56. No, 180. 150. Then if we go to 268, if you could side line the points about lock-in, which is the middle paragraph of para.268. UKEF determined that they could not work out the cumulative carbon emissions and they refer to Oxford University calculations, specialist consultants. In fact, we will show you that one of those consultants was their very own Ben Caldecott, which has actually produced a methodology. But, quite apart from that, cumulative carbon emissions are not as complicated as-- not complicated. That is shown in our witness statement from Mr Anderson and Mr Muttitt because, essentially, they are just all the scope 1 and 2 emissions added up together, so to get a rough estimate, you would multiply 6 by 30. But it is slightly-- it is slightly more complicated because of disputes as to exactly what is going up but, certainly, it is not something that is difficult to calculate.

C
D
E Then-- so 268 to 269, that is all lock-in but I also want to draw your attention on 269 to the point I made earlier in the morning. The last sentence on the first paragraph of 269, "No further information is available." Okay. So-- no. I need to start at "During":

F "During AfDB's due diligence, the Government of Mozambique indicated that proceeds from the Project will improve their overall resilience and ability to respond and adapt to a changing climate... No further information is available from the government of Mozambique related to this, nor is there further information as to whether the government has a plan in place as to how Project funds will be utilised."

G So we do not know whether they will be utilised for renewables, these funds that-- the 13 billion that I showed you that will be the revenue to the Mozambique government over the 30-year period. So then just the summary, my Lord and my Lady, if you could read the last summary on p.269. So we have the last bit of the paragraph. Mozambique needs financial resources. We know that from its NDC, "Including renewable sources and its limited electricity distribution network." It, "Considers that the financial outputs of this Project will act as catalyst to enabling the country's climate change plans to be fulfilled, offering an energy

H

bridge as the nation moves from traditional biomass,” but there is no plan that they have seen. The African Development Bank asked Mozambique for that. Then 270, bottom of 270:

A

“Whilst as a fossil fuel, the production of LNG does not directly align with the Strategy for New and Renewable Energy Development...”

That is one of the plans that is listed there in the NDC, the gas master plan being another. I think there are ten or so. So while it does not directly align with the Strategy for New and Renewable Energy:

B

“... the Project is intended, and likely to help reduce the country’s reliance on oil and biomass, a stated aim of this strategy.”

C

Then in the middle, a bit down:

D

“Whilst this will not be used immediately, as the Government of Mozambique needs to put infrastructure in place, it has identified various projects which could use this gas. The Government has indicated it is most likely to proceed first with a gas fired power project using this gas, which would displace power from other more carbon intensive forms of power generation and, where this results in excess power being generated export power...”

E

So it may not actually even use the entire 5 percent. It might sell the power itself to South Africa through existing interconnectors, displacing coal fired power.

F

“Summary: The Project has a significant impact on the country’s emissions but is still considered in alignment to Mozambique’s stated climate policies and by extension with their Paris Agreement commitments.”

Then we go to the conclusion back at 253.

LORD JUSTICE STUART-SMITH: 253?

MISS SIMOR: 25----

G

LORD JUSTICE STUART-SMITH: 253?

MISS SIMOR: 253, and that is basically the same conclusion in the last paragraph of 252 but the actual first line of 253 you have the conclusion: it will have a significant impact but it is still in alignment and, by extension, with Paris. Then 256 but then-- so it is considered by Mozambique to be in line with its NDC and its Paris commitments:

H

“This aligns with the UK Government’s commitment to support developing countries to respond to the challenges and opportunities of climate change as part of its own Paris Agreement obligations.”

A

So that is what we rely on in terms of the agreement.

“The Paris Agreement also recognises that the global peaking of greenhouse gases will take longer for developing countries such as Mozambique (Article 4.1)...”

B

So there is a recognition that it will increase there.

“... and the Project sits within Mozambique’s longer-term climate change... to establish strong social and economic stability.”

C

Then I want to go to the global impact, so if we flip back to 252, we get the heading, “International climate change impact,” so the majority of the gas will go to international emissions and then starting from, “A high-level qualitative assessment,” and we rely on that, so just under the title on p.253-- sorry, I am confusing you. 253, there is the title. We rely on:

D

“A high-level qualitative assessment indicates that the potential Scope 3 emissions... will be very high and will significantly exceed Scope 1 and Scope 2...”

E

And then:

“However, whether the Project leads to a net reduction or increase in global GHG emissions, is dependent upon whether the gas replaces and/or displaces more polluting hydrocarbon sources or not. Best, worst and mid case scenarios were considered and from the information available to UKEF, whilst it cannot be stated with certainty exactly where or how the gas will be utilised, it is likely to result in an outcome somewhere between the two (i.e. the mid-case scenario).”

F

LORD JUSTICE STUART-SMITH: I am sorry. I got distracted. You are now at-- just about an inch down on 253.

G

MISS SIMOR: I am in the first paragraph. I was reading the last line of the first paragraph under the title. Just under the title, the first paragraph, on p.253.

LORD JUSTICE STUART-SMITH: Yes, thank you.

H

MISS SIMOR: And then:

“It cannot be stated with certainty whether or not the Project will contribute to fossil fuel transition...”

A

So they cannot--

“...due to the flexibility of the SPAs and not knowing with any confidence how and where the Project’s LNG volumes will be used. This uncertainty is [unavoidable]...”

B

Because of the offtaking arrangements. It could not be resolved with further analysis or due diligence. In fact, we see that that is not the view of the ETAG expert.

C

“For this Project, the end-uses are highly likely to be in multiple countries, so the impact of the Scope 3 emissions will contribute to the GHG emissions (and possibly the NDCs) of a range of countries and be spread across them. Where the Project replaces and/or displaces coal or oil, the Project can be viewed as a transition fuel as it provides lower carbon energy. Where the Project displaces lower carbon fuels or potential use of renewable energy however, it cannot.”

D

And then we rely on this:

“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.”

E

So their conclusion is that there will be-- this project will result in a net reduction in global emissions of CO2 equivalent.

F

LORD JUSTICE STUART-SMITH: The last words of that sentence are clearly attached to what has gone before.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: So it is saying that, in slight paraphrase, if and to the extent that there is some displacement of more polluting fuels, that will lead to a net reduction from the level of emissions that otherwise have pertained.

G

MISS SIMOR: Yes, but what it does, and I will take you to the scenarios, is if you go from “On balance,” it says, “On balance, taking the three posited scenarios”----

H

LORD JUSTICE STUART-SMITH: Yes.

A MISS SIMOR: -- we conclude that it will lead to a net reduction, presumably on the balance of probabilities. Then-- so we say that there was a high qualitative assessment, no quantification. There was uncertainty which could not be resolved without further due diligence or analysis, although that is questionable. On balance, they decide that the consequence will be a net global reduction in emissions so they determine that without determining the overall global emissions. They did not go further and consider by reference, for example, to the most likely locational use. As I have said, for example, 20 percent was Europe, where the prediction is that that would result in an increase, and 13 and 19 was China. Rather, they put a finger in the air and decided that, on balance, it would result in a net reduction in emissions.

B LORD JUSTICE STUART-SMITH: Well, I know that is what you say in your notes now but, surely, taken, and maybe I am just missing the point-- they accept that putting-- bringing this project on stream will overall lead to an increase in emissions.

C MISS SIMOR: Only in Mozambique. In scope 1 and 2 they accept that it will lead to an increase in emissions and they say that that is okay.

D LORD JUSTICE STUART-SMITH: Okay. I will look at that again. But whether they are limiting their observations to Mozambique alone or elsewhere as well, and I would have thought it was more relevant to elsewhere, they are saying that if and to the extent that it displaces fossil fuel, the increase will not be as great as it would otherwise be.

MISS SIMOR: No, my Lord, and, actually, their detailed grounds----

LORD JUSTICE STUART-SMITH: You do not think that is right.

E MISS SIMOR: -- does not say that. Their conclusion on which the finance was based was that this project would result in a net global reduction in emissions and they did that on the basis of their three scenarios. That is one place it says it but I have got-- I just took you where? To 25-- I think it might be at 256 as well. There is another-- there are two places where it is said. 252, 253. Let us go to 272. It may be there. We find a scenario-- 272, so if we go to the top of 272----

F LORD JUSTICE STUART-SMITH: 272?

MISS SIMOR: Yes.

G “There are currently no estimates of Scope 3 emissions from the Project due to difficulty (across all sectors) in accurately measuring and reporting of the data. Scope 3 emissions are all indirect emissions (not included in scope 2)...”

H So scope 1 and 2 emissions are the emissions that come from the project in Mozambique. Scope 3 emissions are from the use of the LNG. But, as I understand it, the 5 percent use in

Mozambique is assessed nowhere. The 95 percent of the LNG that is produced globally is assessed here by reference to three scenarios and this is what we are talking about here. The international impact is only scope 3.

“To calculate the Project’s Scope 3 emissions, details on where the Project’s gas volumes will be used, when it will be used, how it will be combusted (including with what technology and the efficiency of that technology), and in what volumes, is required.”

Now, that is exactly the same paragraph that you saw in para.85 of the ESHR which said, “We cannot quantify how much emissions the LNG will produce.”

“UKEF (together with the ECA lender... and AfDB asked that the project principal sponsor - Total, commission an assessment of the emissions impact (including the Scope 3 emissions impact) of the Project for the benefit of the lender group. This was undertaken by Wood Mackenzie, a global energy consultancy.”

In fact, also their market advisor, the lenders’ market advisor who has been advising on demand, and you saw that in the round:

“Wood Mackenzie concluded that it is impossible, due to the nature of the sales purchase agreements for the LNG, to state with any certainty what the Scope 3 emissions would be as it is not known where the Project’s gas volumes will be used, how and for what purpose and when. Wood Mackenzie’s professional view is that any Scope 3 calculations would be inaccurate, and therefore likely to be misleading.”

Now, that was understood by UKEF as meaning that you cannot actually do the calculation.

LORD JUSTICE STUART-SMITH: Yes. We may be----

MISS SIMOR: Then----

LORD JUSTICE STUART-SMITH: -- at slightly cross purposes. I think you are responding to a suggestion I made that there was an acceptance that bringing this project on stream would globally lead to an increase in emissions even if that increase might be less than would otherwise be the case if it acted as a transition-- if it acted in place of-- was used in place of more polluting fuels and I thought you were disagreeing with that.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: But the next paragraph on 272 surely makes plain that because they are looking at where the gas goes, all over the world.

MISS SIMOR: Exactly. So----

LORD JUSTICE STUART-SMITH: What am I missing?

A
MISS SIMOR: No, no. You are not missing anything. First, they say we cannot quantify exactly and then they say we also-- separate exercise: we also cannot work out whether-- first, we cannot work out how much there is that will be released. Secondly, we cannot work out whether that amount that is released would displace higher emitting fuels and therefore reduce emissions, so those are two separate exercises. So what they do then is they set out scenarios and they set those scenarios out in p.273 and they set out the case scenario where it will not
B displace, where it will displace and they take the mid case scenario. So you see scenarios 1, 2 and 3 on p.273.

C
LORD JUSTICE STUART-SMITH: And these are worldwide scenarios. They are not limited to use in Mozambique?

MISS SIMOR: This is just scenarios that they have come up with----

LORD JUSTICE STUART-SMITH: Yes, but they are not limiting----

MISS SIMOR: It has got nothing-- yes.

D
LORD JUSTICE STUART-SMITH: They are not limiting them to----

MISS SIMOR: It has got nothing to do with Mozambique.

LORD JUSTICE STUART-SMITH: -- emissions in Mozambique?

E
MISS SIMOR: It has got nothing to do with Mozambique. This is all international emissions, so these are global emissions. So if they had done it with-- if they had done it with data, rather than qualitative analysis, they would have taken 95 percent of the LNG and multiplied it by a factor to get CO2 equivalent emissions. So we get those scenarios and then on p.274 we get a statement about what US EXIM did and I am going to actually take you to the underlying documents. So this you will see in a later witness statement they say helped them and then they get to the conclusion so they then-- in the middle of 275 you get the same as the thing I
F already showed you. Four lines up, it is likely that the result of the outcome will be somewhere between the two, fourth line from the bottom of the second-- first box, and then you get the conclusion-- well, let us actually look at 276 first. So you get:

G
“The extent to which gas from the Project may displace renewable energy globally cannot be known for certain due to end-use optionality under the Project sales agreements, as well as some of the gas being sold at spot and the complex uses of the LNG by each potential end user country.”

H
That is-- that perhaps slightly needs to be explained because mostly when LNG is used as fuel it obviously produces exactly the same carbon amount irrespective of the efficiency of the

energy producer but if the LNG is used for a product that actually captures the carbon, then, obviously, there could be some difference but that is accepted to be minimal. It will generally be used as a fuel. Middle:

A

“However, the mid-case Scope 3 scenario considered above would see gas replace or displace current coal and oil dependencies.”

B

So they choose the mid case scenario.

“It is, though, recognised that investment in renewable energy offers by far a more environmentally sustainable pathway for global community in meeting the requirements of... Paris...”

C

Then they say in the next paragraph:

“This uncertainty is an unavoidable consequence of the Project’s offtaking arrangements and could not be resolved with further analysis or due diligence.”

D

Which, actually, is not correct because, certainly, you can work out the quantity and there is also modelling and they were told that there was modelling that they could use to actually crunch the numbers. Then if you look at the last line on p.277:

E

“On balance, taking the three posited scenarios, it appears more likely than not [balance of probabilities] 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.”

F

So I just want to make a couple of tiny more points on this. Page 267 you will see that it is stated that there is no mitigation technology in relation to the project. That is box 9, first line.

LORD JUSTICE STUART-SMITH: Hold on. Hold on.

MISS SIMOR: Page----

LORD JUSTICE STUART-SMITH: Hold on. Hold on. Thank you. Where are you?

G

MISS SIMOR: And then----

LORD JUSTICE STUART-SMITH: Where are you?

MISS SIMOR: That was 267, middle box, box 9, first line.

LORD JUSTICE STUART-SMITH: Middle box, box 9, yes.

H

A MISS SIMOR: Yes. Just first line, no-- it has not used any new sustainability, climate mitigation or adaptation technology/processes/practices. It is using up-to-date industry technology but not any new sustainability etc. Then p.287, just to note that Sweden, box 23, first line, the Swedish Export Credit Agency, equivalent of UKEF, but-- decided not to support it and you will see in the middle of that line:

B “EKN stated that they had no information that indicated that the Project LNG will be used for an energy transition from coal to gas among the end users.”

And then it says:

C “It is important to note that Wood Mackenzie studies suggest the Project volumes may facilitate the displacement of coal to gas in certain markets. This information has since been relayed to EKN.”

D So they did not know it at the time. Well, my Lord and my Lady, you will be unsurprised to know that they are still not funding this project. Then if we jump to the conclusion at 277-- perhaps we already went to that. Yes, we did go to that. That is the----

LORD JUSTICE STUART-SMITH: 277?

E MISS SIMOR: Yes. That is the conclusion I just read to you about global emissions, the net-- net reduction and, my Lord, unless I have misunderstood my-- the defendants’ case, the defendants’ case is not that this project will lead to an increase in global emissions. They are-- they are not arguing that global emissions will be increased by this project. They are arguing that it will result in a net reduction, as is necessary for them to argue because, otherwise, it could not be consistent with the low emissions pathway mandated by Article 2 of the Paris Agreement.

F I am now going to go to the Wood Mackenzie report which was relied on in this report we have just seen and also at paras.53 and 56 of the defendants’ skeleton. It must be the claimant’s skeleton. So I just want to make a few remarks. First of all, as you saw from the RAD report and as stated, indeed, by the interested parties in their grounds, Wood Mackenzie was the lenders’ market advisor. Its role was to advise the lenders on the commercial viability of the project, essentially to advise them on market demand. Crucially, Wood Mackenzie is not and does not profess to be a climate change advisor. Nor was it appointed by the lenders to carry out a climate impact assessment as the defendants and interested parties have claimed.

We only discovered this when we sought further disclosure from the defendants and were provided with the scope of works. We have set this out in paras.92 to 97 of our skeleton. Wood Mackenzie was asked to assess the potential reduction in CO2 emissions associated with the use of LNG and that is at 93 of our skeleton and I am going to take you to the emails if we can go to p.95 of the second core bundle.

LORD JUSTICE STUART-SMITH: Did you say CB----

MISS SIMOR: 95. CB2----

LORD JUSTICE STUART-SMITH: CB2, p.95.

MISS SIMOR: -- 95, and we start with the mail of 12 February 2020. It is at the bottom of p.95 and this is a mail from White and Case who were Total's-- who are Total's lawyers. I am told by my learned friend next to me that they are the lenders' lawyers but they are also Total's lawyers in-- at least according to White and Case.

LORD JUSTICE STUART-SMITH: The bottom email on p.95----

MISS SIMOR: Perhaps-- can I-- I am told that I am wrong on that so I take it from the other side that I am wrong. White and Case were apparently the lenders' lawyers and not Total's lawyers and perhaps I misunderstood something on their website.

LORD JUSTICE STUART-SMITH: Well, if that is material, someone will explain it to me later but on p.CB2/95----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- you were asking us to look at the bottom email----

MISS SIMOR: Yes, please.

LORD JUSTICE STUART-SMITH: -- which does not set out a scope of work.

MISS SIMOR: Not yet, no.

LORD JUSTICE STUART-SMITH: What?

MISS SIMOR: Not yet.

LORD JUSTICE STUART-SMITH: Not yet. I thought I had read it all.

MISS SIMOR: No. So what has happened-- I need to take you to this because of various things that are said on the other side but:

“We understand that WoodMac and Total have been in discussions for a number of weeks agreeing WoodMac's terms of reference... .”

So they are being discussed by Total and WoodMac.

“... (this work was outside of the WoodMac terms of reference under their engagement letter).”

A Presumably, they were advised therefore as market advisor to do the RAD report that you saw.

“The good news is that WoodMac were given the greenlight on Friday...”

And the date of this is February 2020.

B

“... to undertake their analysis.”

So in February-- 10-- 12 February 2020 or 10 February 2020-- no, sorry, Friday is 7 February 2020-- they were told they could go ahead and do this analysis.

C

“We do [not] understand however, that Total have requested that once WoodMac...”

“We do understand however, that Total have requested that once WoodMac circulates it's (sic) report, that there is...”

D

One meeting with all the ECA/AfDB to discuss that analysis rather than multiple one-to-one calls.

E

“Hopefully this process works for you. In terms of planning, WoodMac are looking to circulate their analysis to the ECAs... very early March...”

So mid-February they start doing this analysis following discussions with Total as to what it is to involve and then (b) we see that the AfDB is getting a bit fed up. That is at the top of that

F

page:

“Thanks for the update on the current status. It is appreciated. Will we (lenders) be receiving the... Scope of Work for review/inputs to ensure that the output of the analysis is aligned with their expectations? It would be important.

G

Total's proposed approach in clearing the report (all parties call) is noted and would be expedient but let me reconfirm...”

Okay, and then we go to (c) which is in the bottom of the following page:

H

“Our understanding is that WoodMac developed the scope of work following previous input (received at the end of last year) from your team and the ECAs. This scope was then approved by Total.

A

We will contact WoodMac for the agreed scope of work and circulate to you.”

And then (d):

B

“For the avoidance of doubt...”

This is from the-- it is from AfDB with all of the ECAs copied in or at least UKEF.

C

“... AfDB requested (and has been expecting)...”

So still not seen the draft scope of works.

D

... from [WoodMac] since Nov 2019. This was further restated in Tokyo in January, which is why I’m surprised by your earlier message. You may wish to discuss with UKEF and JBIC, which both seemed to have the same expectation when we discussed in January. The intention is not to delay the process but, rather, to ensure that this exercise is helpful to all parties - also, [x] and I had discussed the preparation by WM of a CO2 emissions model that would then be updated on a yearly basis by the project. We currently have no way of knowing whether this is part of the ongoing work by [WoodMac] because we have not had a chance to review the [Scope of Works].”

E

So lenders have not even seen it now in mid-February. The next day on 13 February 2020 White and Case shares the scope of works and that is on the previous page, 92 to 93, and you will see that the scope of works does not request WoodMac to carry out an emission impact report and this is wholly unsurprising because WoodMac would not be qualified to do such a report. It was asked rather to quantify the emissions reduction that could be associated with the project and it is totally-- so let us see the scope of works:

F

G

“Apologies if any misunderstanding - our understanding was [it] had been agreed... I am copying Frank----

LORD JUSTICE STUART-SMITH: Where are you reading----

MISS SIMOR: Sorry, 92. Bottom of 92.

H

LORD JUSTICE STUART-SMITH: 92. I am looking at a White and Case----

MISS SIMOR: Yes, 13 February, 11.31.

LORD JUSTICE STUART-SMITH: Yes, and I have got a bit in blue and then, “Analysis of possible CO2”----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- which I think is the start of the scope of work.

MISS SIMOR: Yes. So the scope of works is entitled, “Analysis of Possible CO2,” and I emphasise the word “Reductions Associated with,” Mozambique Liquid Natural Gas. So that is the objective. No, the objective then is important:

“The ECAs are trying to inform their Boards and stakeholders as to the potential reduction in CO2 emissions associated with the use of [liquid natural gas] from [Mozambique].

Caveat: We have explained to the ECAs that it is impossible to accurately quantify the impact for many reasons, but particularly given that...”

And then we have flexibility etc so we cannot quantify the potential global reduction because we do not know exactly where it is going to be used or how it is going to be used etc and then:

“Suggested Approach:

Therefore, what we have suggested to the ECAs is that we could calculate by how much CO2 emissions would be reduced if you assume that 1 mtpa of LNG from MZLNG was used to generate electricity in a power plant in an Asian country instead of using the amount of coal and oil required to generate an equivalent amount of electricity. For coal we could consider an existing older and less efficient plant and a newer state of the art one. We would also take into account the emissions associated with producing and delivering [liquid natural gas] volumes and the emissions associated with producing and delivering the coal and oil as the alternative fuels.

The ECAs could then use this in their Board/stakeholder discussions/approval requests to give an indication of possible carbon emission reductions, for example: ‘If we assume that... that 1 mtpa of LNG... is used to power a new-build... in Asia rather than building a new 1 GW coalfired [power] plant the level of increased emissions would be less [than x]... To be clear though, we cannot provide a definitive answer as to what the impact of MZLNG production would be, for the reasons noted...

Deliverable:

We would prepare a handful of slides...”

And, my Lord and Lady, that is all we get, a handful of slides.

“Summarise the objectives with caveats as noted above

A · State our methodology and, assumptions on power plant location, size, efficiencies... etc...”

And compare that with delivering coal and oil.

B “Detail the changes in emissions that occur where LNG is used to replace coal and oil in an existing plant, versus being used instead of coal in a new-build plant.”

C That is the scope of works. Now in parentheses I have already noted that they did, in fact, have some idea where the LNG was headed so that even on their own, what they have been asked to do is fairly questionable. But three points arise from this. First, the statements in the CCR and the submissions to ministers that Wood Mackenzie was unable to quantify scope 3 emissions was wrong. It could have quantified the emissions but that was not what it was asked to do. It was asked to carry out a different exercise. It was asked to work out the extent to which it might be said----

D

E LORD JUSTICE STUART-SMITH: Is it really? I mean the premise of the scope of work which you have just read us at the bottom of p.92 is, “We have explained to the ECAs that it is impossible to accurately quantify the impact for many reasons, but particularly given that...” so why is it misleading or wrong? I know Mr Muttitt thinks it is wrong as a matter of fact but why is it wrong to pass that on to the minister as saying it is not possible to calculate?

F MISS SIMOR: Well, two things are said. You will see in the ESHR and in the paragraph in the CCR that was copied across to the ESHR what is said is that Wood Mackenzie could not quantify the scope 3 emissions and, as I explained, that is a simple mathematical formula and, in fact, was done in 24 hours----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- (inaudible).

LORD JUSTICE STUART-SMITH: But that is not the point you are making at the moment.

G MISS SIMOR: No. The separate point is quantifying what impact it would have. Now, Wood Mackenzie was never asked to quantify the absolute emissions so it is wrong to say to a minister, “We do not know the scope 3 emissions,” because it is easy to know what they are. We know them through a mathematical calculation. The LNG has a certain carbon content. If it is burned, irrespective of the efficiency levels of the power plant, that carbon enters the atmosphere. So it is easy to know the absolute. What is difficult to know is the relative and

H

they are different things and they are different things because the first question is what is the absolute. One needs to know for the purposes of looking at carbon budgets and cumulative emissions what are-- what are-- what is the absolute.

A

My second point is that even if you approach it in their way, you cannot determine-- I am going to go into this in my submissions but you cannot determine the potential reduction without starting with a quantity. So you have got-- this is just common sense. You do not need an expert to say this. In order to know whether x million tonnes of carbon dioxide will be displaced, you have got to know first how many you have got and you have got to know how many are used and you have got to at least vaguely address your mind - we say you have to do much more and we say this method is not appropriate anyway - but even if you do use this method, you cannot do it without any numbers. It is just a nonsense.

B

C

So the first-- so-- so, at the very least, there was a misunderstanding and I do believe it was a misunderstanding by those internally in UKEF. They did not understand that Wood Mackenzie had been asked to look at potential reductions. It had never been asked to quantify the emissions in the first place so in telling the ministers that you could not quantify them, that was actually just wrong.

D

The third point is that the defendants now appear to have recognised their error and one can see this in the amendment to para.52-- from para.52 of the summary grounds of defence which is at SB6.

E

MRS JUSTICE THORNTON: Is that the online bundle or the----

MISS SIMOR: It is the supplementary bundle.

LORD JUSTICE STUART-SMITH: Supplementary authorities bundle?

F

MISS SIMOR: No, it is not authorities. It is a supplementary substantive bundle.

MRS JUSTICE THORNTON: This is the one that is on-- we have only got online. Is that right?

MISS SIMOR: I believe that may be the----

MRS JUSTICE THORNTON: (inaudible)?

G

MISS SIMOR: No, I think it is-- we have got the core bundle and then there is-- there are two supplementary bundles which you should have.

LORD JUSTICE STUART-SMITH: Yes. I have got a supplementary bundle called "SB".

MRS JUSTICE THORNTON: Online?

H

LORD JUSTICE STUART-SMITH: Online.

MRS JUSTICE THORNTON: Yes. We do not have hard copies but it is fine. We have got-- it is tab 6, is it not, the summary grounds of resistance?

A MISS SIMOR: Yes.

MRS JUSTICE THORNTON: Is that it?

MISS SIMOR: Yes. Yes, that is right and I have now lost my place.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: So if we go to para.52 of that, which is at p.54, you see that-- sorry.

B MRS JUSTICE THORNTON: Can you just wait while we----

MISS SIMOR: Yes, sorry.

LORD JUSTICE STUART-SMITH: I am looking at a page which starts with the word "Emissions," surprisingly enough.

C MISS SIMOR: That is right, and it is para.52.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And if you read the first sentence you will see:

D "For the reasons given in the climate change report, it was on any view rational to consider Scope 3 emissions in qualitative terms and not to attempt a quantification of them."

So we did not-- it was reasonable not to actually work out what they were going to be.

E "UKEF considered that the unavoidable uncertainty arising from the Project's off-taking arrangements meant that it was impossible to state with any certainty what the Scope 3 emissions would be."

So how much would they actually be irrespective of whether they displaced anything else?

F And that was the same as in the ESHR and that sentence I showed you in the CCR. The detailed grounds of defence realised that that was a misunderstanding and we now have para.87 of the detailed grounds of defence which is at p.87, apparently. Yes, p.87 of the core bundle and this is a copy/paste of the paragraph.

LORD JUSTICE STUART-SMITH: And your page number is?

G MISS SIMOR: Page 87.

LORD JUSTICE STUART-SMITH: Thank you so much. This room-- two things: (1) my hearing is not brilliant; and (2) this room is horrible for hearing things so I am having a bit of trouble listening.

MISS SIMOR: Well, I am sorry because I always think that I shout so I have been trying to keep my voice down.

A

LORD JUSTICE STUART-SMITH: Do not let me dissuade you from shouting.

MISS SIMOR: So it is paragraph----

LORD JUSTICE STUART-SMITH: Do not shout at my Lady but you have absolute permission to shout at me.

B

MISS SIMOR: Paragraph 87 then and you will see this is literally a copy/paste of the para.54 of the summary grounds save for the words that have been inserted after “certainty” in the fourth line, “What the impact would be.” They now say not that Wood Mackenzie could not quantify scope 3----

LORD JUSTICE STUART-SMITH: I must have misheard you.

C

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Could you just give me the reference again?

MISS SIMOR: So it is p.1/87 of core bundle 1----

LORD JUSTICE STUART-SMITH: Thank you.

D

MISS SIMOR: -- para.87----

LORD JUSTICE STUART-SMITH: Thank you very much.

MISS SIMOR: -- fourth line down, the words “what the impact of” have been added. So if you strike those words through, you get the summary grounds. So the defendants now say not that Wood Mackenzie could not quantify scope 3 emissions, which was what was said in the CCR and the ESHR, but rather it could not assess the impact of those emissions and these are two crucially different exercises as is explained by Greg Muttitt who is highly critical, I should add, of the avoided emissions approach generally, and his criticisms of such an approach are at paras.16 to 22 and 49 of his statement which is at core bundle 1, p.302.

F

So I am going to turn now to the decisions. I am going to really try and speed up. There is the decision of the Secretary of State for Trade. That is referred to-- it is actually in the detailed grounds of defence because we have never actually been given the decision itself so you find that at 23.4 of the detailed grounds of defence which just says the date:

G

“On 1 June 2020, UKEF informed the Secretary of State... On 10 June 2020, the Secretary of State confirmed that she was happy to approve... supporting the Project...”

H

A We have not actually been given a copy of the decision itself but it was apparently in an email from the Principal Private Secretary to the Secretary of State. That is why it is referred to, which is at core bundle 1, tab 7, para.40. We then have the decision of the Chancellor of The Exchequer. That is at 23.5 of the detailed grounds of defence which is open and we know he received the submission that I took you to and those four annexes that we have been through. They were sent under a letter at core bundle 2, p.289. Consent was sought on 4 June and granted on 10 June. Sorry, I just want to check something. Yes. So it is at core bundle 2, if you could turn up core bundle 2, p.289.

B LORD JUSTICE STUART-SMITH: 209?

MISS SIMOR: 289.

LORD JUSTICE STUART-SMITH: 298, thank you.

C MISS SIMOR: And then if we just go to para.8, this is a submission to the Chancellor from inside the Treasury but he had also Mr Taylor's submission with the four annexes. Paragraph 8, there is work in government to review the policy and then the last line:

D "A decision not to offer support for this project could pre-emptively change the Government's policy without consideration of the wider impacts..."

The point I took you to earlier, and then 10:

E "As the project will proceed with or without UK involvement, a decision not to offer support would have no impact on global emissions."

And then para.13, last line of the first opening paragraph:

F "Therefore, the relevant considerations to take into account are:

a. UKEF has reviewed the project with regard to the potential environmental, social and human rights risks and impacts in accordance with the relevant international agreements and recent UK case law. UKEF's report on climate change risks concludes that, with the actions proposed by UKEF and other lenders, the project meets the relevant international standards."

G And then the decision of the Prime Minister which is at-- well, if we go-- that is referred to in detailed grounds of defence 23.6, so that is just the next one. Then we have the formal submission to the Prime Minister at p.294 and if we read 5 and 6:

“There are material legal risks to a decision either way, with likelihood of action greater if support is given, but defensibility also greater if support is given.”

A So it will be easier to defend against Friends of the Earth than it will against an I-do-not-know-who and then 6:

B “UKEF’s Accounting Officer recommended support based on the required legal and policy factors including UKEF’s statutory purpose and climate change.”

And then 13:

C “There are obvious climate change-related concerns about the Project, both environmental and reputational. A number of NGOs are vocal in their opposition to any... (and UKEF) support for the oil and gas sector, and some are tracking this project specifically. Last year, the Environmental Audit Select Committee recommended the cessation of UKEF support to the sector from 2021, a recommendation the government rejected.”

D And then 15. So 14 and 15 are projects that are in the pipeline, current projects, and then-- so there is 14, 15 and 16 about pipeline projects and then 17:

E “From an environmental perspective, while gas is a fossil fuel, it is generally recognised as a transition fuel that is likely to displace higher polluting fossil fuels like coal and oil and result in a net decrease in emissions in those nations where that is the case, the UK being an example.”

F I suppose what that is talking about is the fact that when we did have a very fast fall in emissions in the beginning of the Climate Change Act period that was largely because we were displacing coal and not using that any more than oil.

G “UKEF is satisfied that the Project’s direct emissions will be lower than those of similar projects due to the most modern technology being used... However, it is not possible to assess accurately the much larger indirect emissions, since the final use of the gas cannot be known – multiple geographies, and for multiple purposes including power, domestic use and chemical production.”

H Chemical production is the example I gave you of LNG being used but actually incorporating the carbon.

“UKEF has produced a specific climate change report, considering support of the Project in the context of the UK’s (and Mozambique’s) Paris Agreement commitments. UKEF’s Accounting Officer has considered its findings in coming to his recommendation to support...”

A

And then:

“The reputational risk of supporting the Project in the run-up to COP26 has caused the Foreign Secretary, BEIS SoS and DFID SoS to recommend against support. While they are aware UKEF’s recommendation is based in part on its Climate Change Report, they have not seen that report, and nor are we aware that BEIS, DFID or FCO have completed their own. The COP26 Secretariat is similarly against support for the Project.”

B

Then, 21, material commercial risks and then if we go to second supplementary bundle, 1047.
LORD JUSTICE STUART-SMITH: Supplementary bundle, 147?

C

MISS SIMOR: 1047. It is-- perhaps it is just a single file for you. Supplementary bundle, 1047.

LORD JUSTICE STUART-SMITH: I am looking at a page which starts with para.27.

MISS SIMOR: No. It starts with “OFFICIAL - SENSITIVE”. I possibly needed to take you to something else.

D

LORD JUSTICE STUART-SMITH: Okay. I am now looking at “OFFICIAL - SENSITIVE”.
Thanks.

MISS SIMOR: Yes. I possibly needed to take you to something else before. This is the document that my Lord might have been talking about because my note says that this document shows that an undertaking had already been given to Total and contractors following consent. That was following consent to the Secretary of State so for some reason I have not marked it up. Paragraph 2:

E

“Subsequent to the Ministerial decisions, UKEF confidentially...”

So we had the ministerial decisions of 10 June:

“...indicated to the Project sponsors

Financial advisors and legal advisors, and to certain participating Export Credit Agencies, that it had received its final Ministerial approvals, and that only the internal procedural formalities of underwriting/clearance of documents remain. The Government of Mozambique is also aware of this.”

G

H

A And then 3, its communications with Total. In a sense, none of this is very significant
because, legally, although the Prime Minister's consent was sought, it was not actually
necessary. Mr Taylor was then as a result of these agreements by the Secretary of State able to
exercise his delegated power to agree the financing on 30 June and you find that agreement at
p.303 of the second core bundle. That is the final decision, if you like, and that decision, as it
happens, was taken one hour and six minutes, if you look at the email below it, after Mr Taylor
was actually given a quantification of scope 3 emissions. That quantification had been carried
B out in around 24 hours by BEIS in conjunction with UKEF because the Prime Minister wanted
to know how much it would cost for the UK to pay for CCS to cover the percentage of the
scope 3 emissions or emissions, maybe it was scope 1 and 2 emissions if it was CCS, in
relation to the project but, as Mr Taylor makes clear in his statement, his agreement preceded
C that and was not conditional on that and then we get at 321 the underwriting minute sent to Mr
Taylor. So that is 321 and I think we need to look at it. You get at p.326 the contracts to be
supported and then at 337, para.67, a reference again to UKEF having looked at the climate
change impacts and all the decision-makers having looked at that climate change report and
then 68, the point about there being no estimate of scope 3 emissions due to the difficulties in
D accurately measuring and reporting the data because it is still believed that somehow it is
difficult to do that, and then in 69 we see the rough calculations which were done overnight
and you will see from the emails in a slight state of trepidation in relation to that because the
people carrying them out were effectively Googling, "How do you work out how much a
E kilogram of LNG-- how much CO2 equivalent that creates?" and they did some calculations so
they are a bit nervous of their expertise to do it but then at 69 you get their estimates.

F So I am going to go now to the Paris Agreement and I hope that that quick survey will help me
move a little bit faster in my legal submissions. It is a very fact specific case so I think it is
important we have been through all that. Now, my Lord and my Lady, we have set out in our
skeleton some of the relevant provisions and background at paras.18 to 28. I am going to start
with the umbrella treaty, the UNFCCC, and that is a 1992 treaty and you can find it in
G authorities bundle 1, tab 2 and if we start with the recitals, first of all, recital 2:

H "Concerned that human activities have been substantially increasing the
atmospheric concentrations of greenhouse gases, that these increases enhance
the natural greenhouse effect and that this will result on average in an
additional warming of the Earth's surface and atmosphere and may adversely
affect natural ecosystems and humankind..."

And one forgets, in a sense, that it is so long ago that this was all known about. I in fact studied geography between 1986 and 1989 and was learning about it in 1986, so by 1992 climate change was well established and the world came together to make this treaty.

A LORD JUSTICE STUART-SMITH: Let us give ourselves thirty seconds of irrelevance. You may well have been and I never studied geography and certainly not as recently as that but the general acceptance of climate change to which you have just referred was longer in coming, was not? So among people who you would describe as right-thinking it was accepted and it is the premise on which this treaty is founded.

B MISS SIMOR: Yes. It was----

LORD JUSTICE STUART-SMITH: But the argument, the noise, has gone on for a long time.

C MISS SIMOR: Yes. It was well accepted by the eighties in the scientific community. I mean what I studied would now be environmental science, effectively, and by the mid-eighties it was well established in the scientific community as to what would happen. I do not want to-- we will find the established date but it is seventies or eighties.

LORD JUSTICE STUART-SMITH: Do not worry. I think it was a thirty-second diversion which (inaudible).

D MISS SIMOR: Well, the fact that by 1992 this treaty----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- came together in a sense indicates how well established it was even right back then and then if we-- so if we go to recital 15:

E

“Conscious of the valuable analytical work being conducted by many States on climate change and of the important contributions of the World Meteorological Organization, the United Nations Environment Programme and other organs, organizations and bodies of the United Nations system, as well as other international and intergovernmental bodies, to the exchange of results of scientific research and the coordination of research...”

F

G Because this is, in a sense-- it is not an exceptional treaty because there are other treaties that have the same-- Montreal Treaty and other-- have scientific bases for them but scientific progress and science is at the heart of the treaty and, in that sense, the treaty and the obligations in the treaty develop with the science because, obviously, all of the science is predictive and, as one moves forward, the predictions change with more evidence as to what has happened. And then 16:

H “Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are

based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas...”

A That was essentially my point, that these treaties are grounded in continual re-evaluation as to what they demand, and then if we go to Article 2, we see the objective:

B “The ultimate objective of this Convention and any related legal instruments [which includes the Paris Agreement] that the Conference of the Parties [that is what we hear of as COP] may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner...”

C And the budget is essentially cumulative, so for each tonne of carbon that goes up, there is a corresponding temperature increase and that is now scientifically established. And if we then go to Article 3:

D “In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided... by the following...”

E And if my Lord and my Lady could just read para.3, I will get my voice back a little bit. Just to underline in 3(3), “Lack of full scientific certainty should not be used as a reason for postponing such measures,” I should say that we are now at a stage where there is scientific certainty. We are no longer in the precautionary principal stage.

F If we then go to Article 4(4) on p.15:

G “The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable [that is Mozambique] to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”

H And then (5):

“The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to

A

enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.”

And then (7):

B

“The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.”

C

So precisely what my Lord pointed out to me, that the whole-- the possibility of developing country parties actually implementing their commitments is dependent on the developing country parties doing something because we have to understand the priorities of developing country parties and then (8):

D

“In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:

E

(a) Small island countries;

(b) Countries with low-lying coastal areas [Mozambique];

F

(c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay;

(d) Countries with areas prone to natural disasters...”

G

These are all Mozambique. Drought, desertification etc, fragile ecosystems: Mozambique and then (h):

H

“Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels...”

A And then (9), again, Mozambique and the same, (10), Mozambique. So then if we go to Article 14, just to tell you that Article 7 establishes the Conference of Parties, which is the COP, and I should say if you look at 7(2) (a)-- sorry 7(2), the end of the line, 7(2):

“The Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”

B And I am going to show you the COP 21 decision by which the Paris Agreement was adopted in which it, the COP, commissioned IPCC report 1.5, the special report that lays down the low emission pathways. Then if we go to 14 we see the dispute resolution mechanism. We have---

C LORD JUSTICE STUART-SMITH: Between parties.

MISS SIMOR: Yes, between parties regarding implementation. 14(1):

D “In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means...”

But then:

E “When ratifying, accepting, approving or acceding to the Convention, or at any time... [they may recognise] as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation...”

F The submission to the ICJ and/or arbitration and, of course, that is the acceptance merely of a continuing, existing dispute resolution mechanism. Of course, one could-- equally, a party could accept to resolve a dispute separately through arbitration and I take you to that because-- well, I will just show you that in Paris. It said that there is no mechanism, that, actually, none of these provisions mean anything and no court could actually determine their meaning. That is wrong.

G Now if we go to the Paris Agreement, that is in the next tab. Again-- I did not say in Article 24-- it is just relevant for the purposes of treaties. Article 24 of UNFCCC says that you cannot have any reservations so the entirety of the treaty applies or you leave the treaty. Now, the Paris Agreement is at the third tab and the key point we have set out in our summary of facts and grounds from 53 to 57 and 17 to 28 of our skeleton. The UK signed the agreement on 22

A April 2016. It was then laid before Parliament in accordance with section 20 of the Constitutional Reform and Governance Act by way of a command paper. We have brought the command paper and we will hand it up to you. It is actually in our skeleton-- referred to in our skeleton. There was no dissent from Parliament. It was ratified on 18 November and came into force on 18 December 2016 and from that date the United Kingdom was bound in international law to comply with its provisions.

B It was initiated, the Paris Agreement, in COP 17 in 2011 in which the parties decided to develop another legal instrument with legal force and its aim was to raise the level of ambition and we can start with the recitals to the decision that adopted it which is at the front of the tab. If we start with recitals 5 and 6:

C “Recognizing that 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, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions;

D Also recognizing that deep reductions in global emissions will be required in order to achieve the ultimate objective of the Convention [that is the objective in Article 2 of the UNFCCC] and emphasizing the need for urgency in addressing climate change accounts...”

E If we then go to 10-- sorry, I have not-- they are not numbered. It is the next page, third one down:

F “Emphasizing with serious concern the urgent need to address the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2 °C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5...”

G That was because before Paris came into force in the preceding COP decisions, countries were asked to submit INDCs, which is why you get the title “INDC for Mozambique 1”, which indicated their intended nationally determined contribution and, by the time it came to adopting Paris, it was seen that those commitments came nowhere close to allowing the temperature goals to be met and that, unfortunately, remains the case today and you see that in the emissions gap report and the IPCC report. If we then go down four more:

“Emphasizing the enduring benefits of ambitious and early action, including major reductions in the cost of future mitigation and adaptation efforts...”

A And the point there is the longer you leave it, the harder it is and the more expensive it is, so the emphasis is on the need to move fast now. Next recital:

B “Acknowledging the need to promote universal access to sustainable energy in developing countries [renewable energy], in particular in Africa, through the enhanced deployment of renewable energy;

C Agreeing to uphold and promote regional and international cooperation in order to mobilize stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples...”

And then if we just go to clause 12 on the following pages we get the point I have just made:

D “Welcomes the intended nationally determined contributions that have been communicated by Parties in accordance with [the COP 19 decision.”

E And then para.22 on the following pages-- page converts those INDCs into NDCs under the Paris Agreement and then 21 is very important just above that. 21 is where the COP invites the IPCC to provide a special report in 2018 on the global impacts-- the impacts of global warming of 1.5 degrees above pre-industrial levels and related global greenhouse emission pathways. So the COP decision that adopted Paris also asked the IPCC to produce a report in 2018 that showed the related global greenhouse gas emission pathways and those are the pathways referred to in Article 2 of the Paris Agreement, so this is 2015 and in three years’ time there would be a report which exists and shows you the pathways and I will take you to that.

F

Then clause 53, Finance, on p.39:

G “Decides 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 both mitigation and adaptation to contribute to the achievement of the purpose of the Agreement as defined in Article 2...”

H

That is the temperature goal, the adaptation goal and the finance goal. Then if we go to 64 on the following page:

A

“Also decides that the Standing Committee on Finance [which is a committee under the UNFCCC] shall serve the Agreement [the Paris Agreement] in line with its functions and responsibilities established under the Conference of the Parties...”

B

That is as established in Article 7 of the UNFCCC.

Then we go to the Paris Agreement which is at p.52, so that was the decision that adopted the Paris Agreement, and then if we go to the actual Paris Agreement and read recitals starting at recital 4:

C

“Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge...”

D

So, again, science at the heart of the treaty.

“Also recognizing the specific needs and special circumstances of developing country Parties...”

E

Precisely what my Lord referred to.

“...especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention...”

F

And that is certainly Mozambique.

“Taking full account of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology...”

G

And then:

“Recognizing that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it...”

H

So, again, my Lord’s point.

A

“Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty...”

Again, my Lord’s point.

B

“Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change.

Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities

C

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate...”

That is the human rights provision and then if we go to Article 2(1) on the next page, this is the key three objectives of the treaty:

D

“This Agreement, in [and I emphasise the word] enhancing the implementation of the Convention [that is the UNFCCC] including its objective, aims to strengthen [emphasise that] the global response to the threat of climate change, in the context of sustainable development...”

E

So it is all part of the same thing. These are not either/ors.

“...and efforts to eradicate poverty, including by...”

F

And then we have at (a) the temperature goal which is the most well known goal of Paris but the enhancing and strengthening comes essentially with (b) and (c) and (c) is the one that concerns this court:

G

“Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development.”

And that is the report that was sought from the IPCC to find the low-- pathway of low greenhouse gas emissions to achieve the temperature goal in (a). Then (2):

H

“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.”

A So, at its heart, it recognises the common but differentiated responsibilities and that actually is the history of the entire climate process but it is at the heart of this. Then Article 3:

B “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.”

C So you are to communicate your efforts to do the things that you are required to do within those Articles, 4, 7, 9, 10 11 and 13, in order to achieve the effective implementation of the Agreement for the purpose of achieving the objective in Article 2. So everything comes through 3 back to the objectives in 2.

D Then if we can go to 4(1)(3)-- 4(1):

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

Then----

F LORD JUSTICE STUART-SMITH: Is the reason why it is recognised that peaking will take longer for developing country parties that they do not have the resources to respond to current emission levels in the same way as developed countries have?

G MISS SIMOR: My understanding is we had-- we had the UNFCCC and then we had Kyoto. Kyoto involved commitments only by the developing-- developed countries who were listed in an annex, so the United Kingdom and other countries actually started doing things much earlier, so we already started reducing according to Kyoto and the developing world did not have to. I think it is a-- I believe and I will just check with my expert behind me but I believe it is a recognition of where the countries are technologically, so China, obviously, is in a very different position in terms of energy from the United Kingdom, energy level development. So

H

I am told that that is not spelled out anywhere but that I am basically right. That is the basic understanding.

A LORD JUSTICE STUART-SMITH: But every-- every country is going to be different, is it not? So China may be in one sense developed but it has enormous consumption of and enormous emissions. India is different again. Mozambique is different again because it is an extremely poor country which happens to have an asset which it wishes to develop, so how does that play out with the recognition that global peaking of greenhouse gas emissions will come later for---

B

MISS SIMOR: Well, it is not global peaking.

LORD JUSTICE STUART-SMITH: -- developing countries?

MISS SIMOR: I think that is the important----

C

LORD JUSTICE STUART-SMITH: Sorry. I should not have used the word----

MISS SIMOR: Well, it is----

LORD JUSTICE STUART-SMITH: Parties aim to reach global peaking of greenhouse emissions as soon as possible----

D

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- but the recognition is that that will take longer for developing countries.

MISS SIMOR: So that is, in a sense, not very sensible and helpful language because, obviously, a country does not determine global emissions but, yes, essentially, the word “global” is quite important because what it is not saying is that countries can-- so Mozambique may be able to peak later in terms of its own use but it is not a permission for developing countries to make revenue to cause global peaking.

E

LORD JUSTICE STUART-SMITH: Where do we find that?

MISS SIMOR: So it relates to----

F

LORD JUSTICE STUART-SMITH: Where do we find that?

MISS SIMOR: -- aims to reach-- so, “Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking,” now, that must be national peaking because it cannot in any sensible sense mean global peaking, so it-- because each nation is only responsible-- so under the Climate Act, under our NDC, although we might buy all our products from China, we are not held responsible for the emissions that are created in the production of those products and when we report our emissions, we do not say, “Well, we bought x number of cars from China and we need to count those emissions.” We do not count them. We only count the emissions that come from our land mass and we need to reduce those

H

emissions as swiftly as possible. Equally, China needs to reduce them as quickly as possible.

So that is not about allowing other countries to increase their emissions by selling product.

A

LORD JUSTICE STUART-SMITH: Why not?

MISS SIMOR: Well, my Lord, that is because you do not-- when you look at a country's-- when you look at whether an individual country's emissions----

B

LORD JUSTICE STUART-SMITH: You are submitting that it is permissible to adopt exactly the inequity that you were complaining about this morning or perhaps I was complaining about this morning. You are effectively saying no one shall assist a developing country to develop its assets. That seems to me to be quite a bold suggestion.

MISS SIMOR: We ask-- in relation to 2(1)(c) we are saying that finance (inaudible) must be in line with low emissions-- consistent with the lower greenhouse gas emissions.

C

LORD JUSTICE STUART-SMITH: But I think you are also saying that, properly understood, it means that the United Kingdom could not fund Mozambique's development of its LNG.

MISS SIMOR: We are saying that and that is the UK's policy now.

D

LORD JUSTICE STUART-SMITH: It may be-- it may be UK policy now not to do it but that is different. What we are concerned with, as I understand it, in these proceedings is that you seek to impose an obligation - I know you have got other arguments - upon the government not-- under 2(1)(c) not to fund Mozambique in its development of this project and are you simply not by a different route imposing precisely the injustice of which we spoke this morning, which is, "We have made full use of our fossil fuels but you may not"?

E

MISS SIMOR: Well, I did try to explain that this treaty attempts to deal with that inequity which derives from history.

LORD JUSTICE STUART-SMITH: How----

MISS SIMOR: It attempts to deal with it through----

F

LORD JUSTICE STUART-SMITH: In that case, I may still-- I may simply not have understood what you say.

G

MISS SIMOR: Well, it attempts to deal with it through finance flow. So there are two approaches to finance flows in the Paris Agreement. One is the 2(1)(c) overarching obligations, all finance flows, and I will take you to the finance committee that explains that. The other is, actually, specific climate finance, which is like development finance to assist in developing renewables and developing actually adaptation. There is also a damages provisions in relation to-- so there are provisions in this treaty to deal with the fact that Mozambique has suffered vast losses in GDP. You saw 12.6 percent loss in GDP as a result of that cyclone which has effectively been caused by the developed world because we are the

H

ones who put the carbon up there. So there is also a damages mechanism within this treaty whereby money should be going from the developed world to pay Mozambique for those damages. So there are mechanisms to deal with it but, as I said this morning, there is an inherent inequity in the whole problem of climate change and this is an attempt to sort it out. At its heart though, in order to deal with climate change, there is a limited remaining budget of carbon that can be put into the atmosphere if we are to reach 1.5 degrees and it is through these mechanisms that states have agreed to do that and there is an attempt to deal with that inequity, however imperfect. But it is a-- it is a problem. It is a big problem.

MRS JUSTICE THORNTON: Do we get the analysis you have just given us from reading the whole of the climate change treaty or is there another (inaudible) analysis (inaudible)?

MISS SIMOR: Yes, my Lady. If you read the UNFCCC plus the Paris Agreement you will see that it effectively works to seek to-- to the greatest extent possible, to remove this inequity but that is why you have these battles as we had in Glasgow a few weeks ago where India and China-- these are battles but the battles were resolved in this text and that is what this-- this court is concerned with.

LORD JUSTICE STUART-SMITH: But reading (inaudible) skeleton (inaudible) Vienna Convention----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- to interpret the provisions according to their natural and ordinary meaning, do you say that we get the analysis you have just given us from the natural and ordinary meaning of Article 2 read with the other provisions and the UNFCCC?

MISS SIMOR: Yes, my Lady, and Article 31 of the Vienna Convention says the natural meaning in light of the object and purpose, so it is a purposive interpretation and we say, and I hope I am going to have time to deal with this-- we say that the natural meaning is evident and it is supported by the object and purpose which you find through the provisions that I have been taking you to.

LORD JUSTICE STUART-SMITH: Can I just see how far this goes? I will-- I am sorry to slow you down----

MISS SIMOR: No, no. It is very important.

LORD JUSTICE STUART-SMITH: -- but this is important. Is it-- is it your submission that the impact of 2(1)(c) read in context is that it is at least a treaty obligation, never mind anything else - it is a treaty obligation - that the United Kingdom should not provide finance to any energy-- any energy project which is not carbon neutral or carbon clean? So, effectively, wind and-- wind, solar and nuclear?

A MISS SIMOR: No. It could-- unabated, so if there is no carbon capture and storage, which is why the Prime Minister, no doubt, said, "How much will it cost for us to provide carbon capture and storage?" because if it could produce-- if it was energy that could be produced and the carbon could be captured or there were some other mechanisms or you might, for example, I suppose, have an offsetting mechanism whereby you plant a million hectares of forest and that becomes a sink - carbon sink - so in that sense there is still potential and, indeed, even in the IEA net zero scenario which you have in your supplementary bundle and, in fact, the IPCC scenarios, all assume that there will still be some fossil fuels operating in 2050. We will not be-- as you say, we will be carbon neutral-- we should be carbon neutral by 2050.

B LORD JUSTICE STUART-SMITH: We should be?

C MISS SIMOR: No.

LORD JUSTICE STUART-SMITH: The United Kingdom?

MISS SIMOR: The world. The world should be carbon neutral.

LORD JUSTICE STUART-SMITH: Well, the United Kingdom has pledged to be carbon neutral by 2050. I am not sure the world has.

D MISS SIMOR: I believe it is-- it is the whole world that needs to be effectively carbon neutral but the-- we will-- that was our understanding. We will check that.

LORD JUSTICE STUART-SMITH: That is to achieve 1.5.

E MISS SIMOR: Yes, but that does not mean no fossil fuels. The net zero report for IEA which came out this year is actually a very frightening document but it does posit the continued use of fossil fuels and the IPCC also has many scenarios some of which assume that there will be vast carbon capture and storage so, effectively, we will continue to a large extent with fossil fuels but the technology will deal with it. Other people are more pessimistic about the technology and many argue that on the basis of precautionary principle you cannot plan on the basis of carbon capture and storage, that that is an incorrect way. But, in any event, there is no sort of final number as to how much-- there are predictions. Everything is about prediction. But in terms of actually supporting more fossil fuels, what is fundamental to that is the UNEP production gap report because that shows that there is already far too much fossil fuel online, in train, to meet the temperature goal, so there is already-- in projects that are underway, there is already a massive overproduction of what can be used.

H The other point which when I get to the grounds, the key thing is that you have actually got to do an analysis to work out whether you are on the low emissions pathway, so this is apparently something like I think our witness says 7.5 coalmines or something equivalent, but you have

got to do a quantitative analysis. That is the process. But I also just quickly will take you to-- well, I am going to come to it but maybe I should just quickly take you to it now, to our skeleton at para.26.

A

LORD JUSTICE STUART-SMITH: 76?

MISS SIMOR: 26.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Page 9. I showed you the bit of the Paris Agreement that made the standing committee serve the Paris Agreement-- the standing committee on finance to serve the Paris Agreement. Perhaps I have not taken you to that yet but I will and you will see para.49 of the biannual assessment of the standing committee on finance:

B

C

“Climate finance continues to account for just a small proportion of overall finance flows...”

That is-- as I said to you, there are two kinds of finance. One is specific climate finance, so you might have heard of the 100 billion that was pledged and has never actually been produced.

D

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

E

F

So we got to-- where did we get to?

LORD JUSTICE STUART-SMITH: Article 2.

MISS SIMOR: We got to 4-- we are in Article 2 still. Looking at Article 3-- 4(1), we were discussing 4(1). I will have a further look to see whether I can find any more information in relation to my understanding of 4(1), my Lord.

G

H

4(3) and 4(4), these are what is referred to as the ratchet effect. That is effectively that NDCs must ramp up, so your aim must be to reduce more and more and more and that is relevant to the United Kingdom’s obligation which is to assist developing countries not just with their

predicted current NDC but with their obligation to ratchet up and increase that ambition because, ultimately, all countries need to be carbon zero.

A Then if we go to 4(19), that is just the obligation on parties to formulate their plans and it refers to common but differentiated responsibilities and the UK sends biannual reports to the UN telling the UN what it has done to assist other countries to reduce their emissions and it quantifies that effect and I put that report in the supplementary authorities bundle. So the
B common but differentiated responsibilities, developed countries have a responsibility as set out in this treaty to help developing countries and they communicate that assistance, what they have done and how much it is actually worth in terms of data, to the UN.

C Then the parts of crucial-- Article 9 that are crucial are set out in para.25 of the skeleton and I will not go through them. They again refer to the obligation to assist, including in finance, and then if I can just take you to Article 24, that is the provision that applies the dispute resolution mechanism to the Paris Agreement, so the ICJ or arbitration can between states interpret the obligations and terms of this treaty.

D Now I just want to show you where the IPCC report is so you know. It is in the next tab, I hope. This is the IPCC report that was adopted pursuant to CP21, the COP decision that adopted Paris, and you will see the first line on p.67:

E “This Report responds to the invitation for IPCC ‘... to provide a Special Report in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways’ ...”

F So that is the quote I took you to in the COP decision at the front of tab 3. Then the next page you see the UNEP production gap report.

LORD JUSTICE STUART-SMITH: Hold on. Which page of the document are you?

MISS SIMOR: So it is just the top of p.67, the first line of the introduction.

LORD JUSTICE STUART-SMITH: Thank you.

G MISS SIMOR: Then the next tab you have the production gap report and if you go to p.174 of the bundle, you will see a bold title at the top left and the UNEP report in the first paragraph-- the bottom of the first paragraph, it draws on what would be consistent with 1.5 and 2 degree pathways based on scenarios-- sorry, this is p.174 of the bundle.

H

LORD JUSTICE STUART-SMITH: My p.174 is the last page of the document. Have you got a paragraph number?

A

MISS SIMOR: No. It is-- have you got-- is it tab 5 you are in?

LORD JUSTICE STUART-SMITH: No.

MISS SIMOR: No. You should-- at the bottom right there should be a "174".

LORD JUSTICE STUART-SMITH: Yes, I am with you.

B

MISS SIMOR: Right. So in the far left-hand corner you will see that this-- this is the UNEP production gap report and this report, it says it would--

“... and what would be consistent with 1.5°C and 2°C pathways, based on scenarios from the recent... (IPCC) Special Report on Global Warming...”

C

So what the UNEP did was it took the scenarios that were considered feasible by IPCC so it-- IPCC looked at 84 scenarios and this report looks at 12, taking only the scenarios that the IPCC had considered were feasible and rejecting those, for example, that were entirely dependent on CCS or other carbon capture technology.

D

Right. Now I am going to turn to my grounds.

LORD JUSTICE STUART-SMITH: Okay. Can I-- I do not want you to deal with this now. I do not want to slow you down. But going back to Article 3, these questions: is pathway defined; secondly, low greenhouse gas emissions for whom - global/UK/Mozambique, see Article 2.2; and I would just like possibly on a piece of paper or by email a list of the references where you say that I can find the answers to that but that can wait. I do not ask you to do it now.

E

MISS SIMOR: Okay. I will answer the first one quickly though.

F

LORD JUSTICE STUART-SMITH: No, do not.

MISS SIMOR: Do not? Okay, I will not. Right. So, turning to the grounds----

LORD JUSTICE STUART-SMITH: Yes.

G

MISS SIMOR: -- there are two independent grounds to our challenge as you have seen and I am going to start with the second one, ground 1(b), because fundamental errors of assessment in-- are relevant to the question of whether ground (a) applies. If the defendants fundamentally erred in their assessment, then they could not reach the conclusion that they did as to Paris alignment. Now, we say all the evidence actually points to non-alignment but, certainly, there was no basis for reaching the conclusions that they did.

H

A Ground 1(b), this is a challenge to the way that the decision-makers went about assessing, first, the climate change impacts of the project, whether or not by reference to the Paris Agreement, so it is a rationality challenge even irrespective of the Paris Agreement, and, secondly, more generally, the question of whether to grant finance having regard to both climate change impacts and the risk of stranded assets. Our submission, which I will make good by reference to the facts, is that the defendants reached conclusions without any rational basis at all. Not only did they leave vital factors out of account, they ignored crucial factors that undermined their own conclusions and they reached conclusions without any evidential basis. We say the decision-making in this case is a paradigm example of arbitrariness. Worse, what appears to have happened here is that conclusions were reached to enable the finance to be granted when those conclusions were unsupported by evidence and that, we say, is irrational decision-making writ large.

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C
D
E Now, there is no dispute as to the relevant legal principles. They can be found in the *Plantagenet* case at authorities bundle 2, tab 30, paras.99 to 100, and that is p.1336, I think. Yes. So my Lord, Lady, you may not need to read this. You may wish just to mark it up. I would just like to draw your attention to subparagraphs (5) and (6), the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which may require him to consult outside bodies with a particular knowledge or involvement in the case but does not spring from a duty of procedural fairness to the applicant but from the Secretary of State's duty to inform himself so as to arrive at a rational conclusion. Then (6), and this we rely on:

F “The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it.”

Yes, also 141 of the judgment:

G “The court engages in a two-stage inquiry. First, the court must establish what material was before the decision-maker [and that is why I have taken you through so much] and what he or she knew when he made the decision. Second, the court must decide whether no reasonable decision-maker, possessed of that material, could have proceeded to make a decision without making further inquiries.”

A Of course, that slightly begs the question as to whether the decision-maker himself knew that the enquiries had not been made but I am assuming that it is intended to mean that that also is known so that if the Secretary of State is told that-- told something, she is assumed also to know that that was reached without certain information having been sought.

B The claim-- the defendants claim that the court should afford UKEF a substantial margin and they rely on several reasons. Not one of them, we say, is support of such a claim. It is at para.55 of their skeleton. First, they say they are entitled to a substantial margin because UKEF was taking a decision in an area that accorded a significant discretion and that is at 55 of the skeleton and 37 to 39 of the detailed grounds. Now, that ignores the point made by Hallett LJ at 106 that I have just shown you in *Plantagenet* that the wider the discretion, the more important it is that the decision-maker have all relevant material before it to enable him or her to properly exercise that discretion. The challenge is to that failure to have the relevant material before them sufficient to enable them to exercise their discretion rationally. Accordingly, as Hallett LJ said, it is all the more important that UKEF had the necessary material before them when exercising their discretion and we say they did not.

D Secondly, they claim a substantial margin because they say they were balancing a number of public interest factors at a high strategic level but that, my Lord and my Lady, ignores what we are actually challenging under ground 1(b). Our challenge here is to the failure to have regard to essential relevant considerations and other fundamental errors in the decision-making. It does not matter how high level or strategic the overall decision to finance is if essential elements necessary to reach it are fundamentally flawed or missing. The defendants say that their assessment of climate change impact was inherently predictive and in quotes they say, "Requiring an exercise of judgment as to what might happen having regard to scientific and/or technical material including the advice of independent consultants." Yes, my Lord, my Lady, we agree but this is precisely why it mattered so much that the necessary scientific and technical material was considered. Our criticism is that it was not. Rather, a wholly inadequate, erroneous approach to the predictive exercise was carried out and this is fully explained in the expert witness statements of Mr Muttitt, Mr Anderson and Mr Balcombe.

G LORD JUSTICE STUART-SMITH: Can I make a suggestion in relation to particularly Mr Muttitt but I think it applies to the others, picking up a suggestion of Fraser J? To my mind large tracts of Mr Muttitt's statement are advocacy and submission and are not expert evidence. I do not ask you to do this before the end of the hearing but I think, and I have not

discussed this with my Lady, but I think it would be appropriate, certainly in the case of Mr Muttitt, if you would indicate which sections you rely upon him for expert evidence.

A MISS SIMOR: My Lord, it would be very helpful if you were able to indicate the parts that you consider are opinion because, certainly----

LORD JUSTICE STUART-SMITH: Well, I have not crossed them all out in my copy.

B MISS SIMOR: No. Well, it would be very helpful because, certainly, I mean we take that view in relation to a large part of Mr Hawkes' evidence, I should say, for the interested party, but Mr Muttitt gave his evidence very much as a top expert in this field and our understanding and our view, for what it is worth, is that his evidence is certainly all his expert evidence.

LORD JUSTICE STUART-SMITH: I have written "argument" against para.40 and "advocacy" against the end of para.40.

C MISS SIMOR: 40? 40?

D LORD JUSTICE STUART-SMITH: 40. I have written "horrid advocacy" against 44, since you ask, and I think I then gave up marking the passages that I particularly did not like. It may be that you think that it is all admissible expert evidence, in which case that is fine, but if there are passages which, on reflection, you think are not necessarily expert evidence but cross the line, then it would help us, I think, if you indicated those passages which you do not really seek to rely on.

MISS SIMOR: Certainly. We will look at it----

E LORD JUSTICE STUART-SMITH: And I think the same goes-- the same goes for the other side. If there are passages which on reflection are not relied upon as expert evidence or inadmissible-- admissible evidence, then that would be helpful. You are not going to get a decision on Friday so there will be plenty of time for us to sort this out.

F MISS SIMOR: All right. Well, we will review it. Certainly, our intention and our understanding was that it was all expert evidence so we will certainly review it. So----

LORD JUSTICE STUART-SMITH: Anyway, your submission which I so rudely interrupted was that your expert evidence demonstrates the deficiencies of the process that was undertaken.

G MISS SIMOR: Yes, but my next sentence is, however, it does not require experts to see the flaws which at some points are glaring. So, quite apart from the experts, we say some of this is manifestly irrational. Conclusions are reached for which there is absolutely no evidence and we made a very detailed Part 18 request and we were told that there is no further material or methodology so you have what there was. What you see before you is the analysis and the evidence on which it was based.

H

A It is not contentious that there are two aspects to irrationality. One is substantive, is the decision one that was not open to a reasonable decision-maker; and the other is essentially procedural, a demonstrable flaw in the reasoning which led to it, for example, relying significantly on an irrelevant consideration or an essential relevant consideration being left out of account or that there was no evidence to support an important step in the reasoning or that the reasoning involved a serious logical or methodological error and I do not need to give you case law for that. If I do, please indicate and I will bring some.

B
C Our submission is that the substantive decision was vitiated by demonstrable failings in the reasoning process and this was not a question of what weight should be given to any one factor. There was a wholesale failure to consider relevant factors as well as a failure of reasoning, a jumping to conclusions for which there was no evidential support. We say the conclusions reached could not reasonably have been reached having regard to the complete lack of evidence for them.

D The defendants' response at para.56 of their skeleton is fourfold. First, they say that that cannot be so because it was informed by expert opinion and extensive discussions. Now, that is plainly no answer but it is actually not correct either. UKEF itself said that it did not have the necessary climate expertise. The experts advising UKEF from (inaudible) were of the view that its own CCR was not credible and, as I have already shown you, the Wood Mackenzie report was not a relevant expert and was not giving relevant expert advice.

E
F Secondly, it says that it relied on Wood Mackenzie but did not just accept it but, as I have explained, Wood Mackenzie was not a climate expert report and they were not qualified to give such a report and, on top of that, UKEF went beyond Wood Mackenzie in a way wholly supported (sic) by any evidence in finding that the project would lead to a reduction in emissions. As Mr Muttitt explained, there is no evidence anywhere for that and that is para.42 of his witness statement.

G
H Thirdly, it says that the climate change report was the first time it had ever carried out such an exercise but that, of course, is not a basis for saying that it cannot be unreasonable for very obvious reasons. Fourthly, it says that the African Development Bank and other ECAs did not do any further analysis. Again, we cannot see how this assists. Of course, the United States

was outside the Paris Agreement at that time anyway but, in any event, this court is not looking at what other countries did or, indeed, on the rationality laws of other countries. It is-- or the standing laws or anything of the sort. It is notable too that the UK is, of course, on the board of the African Development Bank and had a role in persuading it to fund this project.

So turning to the fundamental errors, my starting point is scope 3 and that is at 72 to 82 of our skeleton and 112.3 of our grounds.

LORD JUSTICE STUART-SMITH: Just give me the skeleton reference again.

MISS SIMOR: 72 to 82.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So the defendants concluded on the balance of probabilities that the LNG from the project would result in a net reduction in global emissions and that is at CB2/59, last line, 27 February 2020, different letter, and CCR report, CB2/253. I have taken you to that. It was also on that basis that they concluded that its financing aligned with the Paris Agreement low emissions pathway. It is undisputed that this conclusion was reached without any quantification of scope 3 emissions. That is the global emissions from the fuel itself. It also cannot be disputed that the decision-makers were informed that-- decision-makers, that is the ministers, were informed that scope 3 emissions could not be quantified. You saw that in the ESHR and in the CCR and I can give you the references again but perhaps I do not need to. Perhaps I will give you that in a note just to give you all those references because there are quite a number.

In addition, the defendants did not even think about the scope 3 methane emissions from leakage from the energy producing plants, let alone quantify them, and this is fully set out in Mr Muttitt's statement at paras.31 to 35. I am not going to go to it because of time. It is at CB1, p.296 and in Mr Balcombe's statement CB1, p.148, paras.9 to 30 and this has nowhere been addressed by the defendants in their case. There are two points to make on this. First, as I have already said, it is simply not true the scope 3 emissions could not have been quantified and statements to that effect in the CCR and the ESHR submissions to ministers were simply wrong. This is explained by Mr Muttitt in paras.46 to 49, core bundle 1, p.301. Again, I was going to take you to it but I do not think I have got time.

The interested parties agree with this. That is Mr Hawkes, CB1, p.274, paras.31 to 34. It is not surprising that they agree to it because Total has to account for its emissions, including

A scope for emissions-- 3 emissions and does so annually and we have put those emission reports into the supplementary bundle. It is in fact an obligation, I believe, that derives from French law but also from EU law and from also their decision to comply with the TCFD which includes an obligation to monitor and account. There is no question it is possible.

B The second point I want to make is that the consequence of not quantifying scope 3 emissions was to render any conclusion as to the climate change impacts of the project wholly arbitrary. Such conclusions simply lack a vital element, and I emphasise "vital", for any meaningful analysis. The claimant's case on this is simple. It is not possible to reach a reasoning conclusion that LNG from this project would lead to a reduction of global emissions and from that then to conclude that it would be in alignment with the Paris Agreement low emissions pathway without quantifying those emissions. Put another way, no decision-maker properly directing himself could conclude that the LNG would have a net impact of displacing higher emitting fuels without estimating the quantities of emissions from the fuel that the project will produce and this is fully explained in Mr Muttitt's statement at paras.4(a) and (b), paras.37(a), C 38(a), 39 and 45 and I already pointed you to 46 to 49. Without that vital initial step of D quantifying scope 3 emissions of the project, no reasonable conclusion as to whether the project could lead to a net reduction and was therefore Paris Agreement aligned could be reached.

E So the defendants' response to those points. The defendants accept that in order to assess climate change impact it had to consider the emissions from fuel produced by the project. What it says, however, is that in relation to scopes 1 and 2, the quantities of these emissions were worked out and that, in relation to scope 3, it could reasonably assess climate impact F without actually working out what they would be. In relation to scope 3, which it accepts (inaudible) scope 1 and 2, it carried out what it calls a qualitative analysis of quantities. So a qualitative analysis of quantities was good enough. It decided, therefore, in determining quantity, to take what it called a high level qualitative approach and that is at CB2, tab 21, p.253.

G LORD JUSTICE STUART-SMITH: CB2, tab 21?

MISS SIMOR: 253. That is the CCR. We have been there.

LORD JUSTICE STUART-SMITH: Okay.

H MISS SIMOR: Now, this makes no sense to us and is frankly absurd. It is plain common sense that before you can start thinking about how the project will impact on the climate, you have to

have an estimate of how much CO2 equivalent will be produced as a result of the project in terms of both scope 1, 2 and 3 and the government clearly agrees with that in principle. It considered scope 1 and 2 and quantified it.

A LORD JUSTICE STUART-SMITH: Can I just-- because I may be in danger of losing it again.

B If your-- if it were the case that the decision-maker concluded that there would overall be a reduction if this project came on stream, you say that is impossible for them to have assessed without a baseline figure and I can see the substance of that argument. If the correct interpretation of what they found was that there was going to be a net positive-- plus contribution of greenhouse gas emissions if the project went on stream, forget all the stuff I have been taxing you with before about whose world is it anyway, but if they had found that the project would lead to an overall increase, notwithstanding the fact that there might be some net reductions because of displacing other fuels, why could that not be the basis for a conclusion that even so this was a project that they were going to support?

C MISS SIMOR: So this is a question that is extremely difficult to deal with because there is obviously a disconnect between----

D LORD JUSTICE STUART-SMITH: Well, I am sorry to ask difficult questions at 4.21 p.m. but--

MISS SIMOR: No. It is a fundamental question----

LORD JUSTICE STUART-SMITH: Yes.

E MISS SIMOR: -- because, obviously, one has the global emission-- global carbon budget that remains for us to use up before hitting the temperature target and it is not very much. When you look at each project, you could say, well, that is okay because, in this case, I believe Mr Anderson considers it is about 0.85 percent of the remaining entire carbon budget left for the world, this project, which he considers to be enormous. Someone else might say, well, that is nothing else.

F LORD JUSTICE STUART-SMITH: Yes. Depending on which side you are on, you can use whatever adjectives you like.

G MISS SIMOR: Yes. So that is a subjective view. If the project was smaller, it would be smaller and so you could say, well, with each project you cannot really say it is not on a low emissions pathway because you need to put all the projects together to make that assessment and that in itself is also very difficult because you do not know what all the projects are and you are not all sitting down and discussing who gets to use this budget up. So it is a very difficult question to answer and a very difficult question to answer for any analyst and something that people are struggling with but there is-- this is where, in a sense, the production gap is so important, the

H

A production gap report, because there is no suggestion that if you put up these emissions, there are going to be other fossil fuel plants that will close down and, therefore, you will necessarily add and contribute to the increase. So, essentially, the modelling should have considered the other projects and this is set out in Mr Muttitt. We will find it overnight, the relevant bit. He does not set it out in quite as much detail as I would have liked but it is modelling that needs to be done to determine whether this project can come on stream.

B What you cannot do is for every single project to say, "Well, we are only sending up a little bit," and you see that, actually, in the *Gloucester Resources* case, everyone saying, "Well, we are not contributing that much so it does not really matter." So it is a difficult question that Paris does not answer and deal with in a technical way. But it is something that had to be
C grappled with.

LORD JUSTICE STUART-SMITH: But it would in principle be possible to have a rational decision that, given the particular circumstances of Mozambique, and this is a 0 point whatever percent, that in-- that is tolerable, which is a different-- I am not disagreeing with your suggestion that in one sense you cannot deal with it without knowing what the whole
D production is going to be.

MISS SIMOR: Well, it is an analysis that would have to have been done because, of course, you would have to put the counterfactual which also comes in in these assessments and I believe the OECD common approaches annex showed this, is that the counterfactual should have been
E developing renewables in Mozambique. My junior is mentioning the additional complication of the fact that it is a thirty-year project----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- and so it overshoots in terms of even the timescales----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- for the emissions pathways.

LORD JUSTICE STUART-SMITH: Fiendishly complicated.

MISS SIMOR: Which is why you need to apply your mind. If the defendants had determined that, "Well, looking at this, we think we cannot decide whether it is going to increase or
G decrease emissions. It might increase them. Let us look at it in terms of increase," precautionary principle, whatever, it would have to have done that analysis and it has not done that analysis and we say it is telling that the conclusions reached were a net reduction because the thinking is that projects should not come on stream if they are going to increase the
H emission levels, that projects should only come on stream if they are going to reduce the

A emissions levels, and that, presumably, is why the CCR concluded, ultimately, a net reduction, rather than saying, “We really do not know.” In relation to that, I should point out that it is interesting-- perhaps-- it is interesting that UKEF considered that it was too uncertain to determine what scope 3 emissions would be but it was sufficiently certain for the balance of probabilities to conclude that there would be a reduction in emissions.

B LORD JUSTICE STUART-SMITH: Okay. I just want to make sure I have understood your submission correctly. I have written down, “It is a consequence of Paris that projects should only be funded if they are going to reduce the aggregate global emissions level.” Is that right?

MISS SIMOR: Yes, my Lord, that is our submission.

LORD JUSTICE STUART-SMITH: Good. I have now put that in highlight because I think that is a clear statement. Thank you.

C MISS SIMOR: And that, we say, aligns with 2(1)(c) and, indeed, the way things are going in terms of what the EBRD, the-- we put that in our skeleton, UKEF etc. That aligns with policies being adopting by banking-- international banking institutions----

LORD JUSTICE STUART-SMITH: Yes.

D MISS SIMOR: -- and national ones. So it considered scope 1 and 2 have to be quantified. It considered scope 3 had to be assessed. It tried to get Wood Mackenzie to do that, apparently, although we have not got that in the documents, but it is said in the evidence and in the CCR. Now, the obvious response by the defendants to that position would have been either to obtain a quantification from a qualified expert or to decide that no conclusions could be reached as to climate impact and then to decide what to do on that basis. If it wanted to comply with the Paris Agreement obligations applying the precautionary principle at least it would have refused financing. If it did not want to comply with the Paris Agreement obligations, it would have had to have explained that decision and the Chancellor of the Exchequer would have had to have agreed to that and the Secretary of State for Trade and perhaps neither would have been willing to do so. What it could not do, however, was ignore this vital element and simply go ahead claiming that the project and its financing would result in a net reduction in emissions and thus be aligned with Paris. To do so was to reach a conclusion that was necessarily arbitrary and to draw conclusions as to the net impact on global emissions without an estimate of quantity to be produced is unreasonable however you look at it. It is unreasonable if you apply what we say is the proper approach, which is to look at the cumulative additional emissions - for that you obviously need to know the quantity - and it is unreasonable if you pursue the defendants’ what we say is improper approach, which is to ask yourself about displacement, whether it will displace higher emitting fuels, rather than simply calculate the

A emissions. As I have said, you cannot work out the extent to which that is likely without
estimating the quantities produced, the other markets and the relevant-- relative emissions in
those other markets including their likely trajectories in terms of energy use. For example,
Japan has a net zero pledge 2050. Europe has very stringent pledges. And, thirdly, the SPA
markets were also ignored in this analysis so they ignored these markets in preference for the
assumption that the LNG would go to India and China when, in fact, the SPAs only show 13
percent for China and 9 percent for India and 22 percent to Europe and some global and the
B government has provided no answer to this point.

C All the defendants can say in response is that there is no law or policy that mandates that they
must quantify scope 3 emissions and it was reasonable for it to make a judgment on this and
decide not to do so considering what Wood Mackenzie had told them and it says this in many
places. I will just give you some references: detailed grounds of defence, paras.53 to 58;
paras.115.3 to 115.4; 117.1 to 117.3; and if I can take you just to two, core bundle 1, p.78,
para.53 says, well, it was not required by any specific standard to quantify them and, therefore,
D it did not do it. But, in fact, that was not the reasoning----

D LORD JUSTICE STUART-SMITH: Could you just hold on a second?

MISS SIMOR: Sorry. It is p.78 of core bundle 1.

LORD JUSTICE STUART-SMITH: Yes.

E MISS SIMOR: Paragraph 53. The question is not whether they were required to quantify it. It
was whether they would reach a conclusion without doing so, which is a totally different
question, and then if we go to p.96, 117.1 to 3 and point 5-- and then 117.5 and then at 117.7 it
was an exercise for them to decide. It was an exercise of judgment. Well, we say it was an
irrational exercise of judgment and, in that regard, the GHG protocol was a well established
F way of quantifying scope 3 emissions and we have set that out in para.76 of our skeleton and
we have also set out in our skeleton the fact that the environmental audit committee in 2019
told UKEF that it had to use the GHG protocol to estimate scope 3 emissions and that it did
have to or should estimate scope 3 emissions.

G But we say all of these arguments miss the point. Without a quantification, the decision-
makers simply could not reach a rational conclusion on reduction of emissions globally and,
unsurprisingly, previous attempts to avoid quantification of scope 3 have been deprecated as
quashed as arbitrary in other cases and a number of cases are referred to by Preston CJ in his
H judgment in the *Gloucester Resources* case and if I can just give you the reference, perhaps

A you can have a look at those paragraphs. It is authorities bundle, tab 4, (sic) p.54, paras.507 to 512 and 515. Indeed, UKEF's experts themselves were advised that such an approach could not reasonably be adopted. EGAC experts said that this was not a credible approach and that quantification was a vital first step in the analysis and I do not know, my Lord, whether we need to stop in terms of ushers.

LORD JUSTICE STUART-SMITH: Well, I think you should be looking for a convenient moment in the next half hour or so but probably rather sooner than that.

B MISS SIMOR: Well, it is entirely-- I am entirely in your hands.

LORD JUSTICE STUART-SMITH: If you are coming to the end of a point in the next five minutes or so then finish it. Otherwise, I think we need---

C MISS SIMOR: Well, I think it may-- it may be better just to-- well, perhaps I will just take you to the notes from Ben Caldecott of EGAC and then we can stop after that.

LORD JUSTICE STUART-SMITH: Okay.

D MISS SIMOR: So these are the internal notes of the expert. If we go to CB2, 105, this is an email that was sent on 14 April to UKEF and EGAC is the UKEF's own expert. Ben Caldecott is founding director of the Oxford Sustainable Finance Group at the University of Oxford Smith School. He is associate professor. He is principal investigator of the UK Centre for Greening Finance and has numerous other titles and since 2019 he is seconded in the Cabinet Office for the strategy for finance for COP 26 so he is about as senior as you can get and has, indeed, been working on these finance methodologies. Now, you will want to read the whole document itself but if you could go to 107 you will see in comment box BC7:

F "Carbon lock-in of the assets (Cumulative Committed Carbon Emissions) is how we should assess whether projects are (in)compatible with Paris or not. %age reductions relative to other fossil fuels is actually not very important. Future CCCE is the key metric and of course that is influenced by carbon intensity, but also by usage and remaining carbon budgets."

And then if we go to 112, we see his comments. So we-- this is an email to people in UKEF Finance from UKEF Finance:

G "Overall, Ben has summarised his thoughts below:

H *I'd just say that this didn't seem to me like a 'framework'. A framework would have more clarity on what was and what was acceptable (and why), how outcomes of the analysis... The template doc and pro forma... I would also provide a clearer structure: climate risks and impacts followed my mitigation...*

The assessment of macro and long term costs/benefits to the Mozambique economy seemed quite rough and ready... What are the underlying studies and literature...”

A That is actually not the one I wanted. Then if we go to 102----

LORD JUSTICE STUART-SMITH: 1 what?

MISS SIMOR: 102.

LORD JUSTICE STUART-SMITH: That is in the previous tab.

B MISS SIMOR: You could-- yes, could be. Sorry, p.102, (ii) in 1, “Draft framework is too lite on climate,” comments from counsel were noted, then scope 1:

“Alistair posited that the current information on Moz LNG’s scope 3 emissions was insufficient.”

C

And then I am going to stop there because I actually wanted to take you to the one bit where they say they need to quantify scope 3 and that is not there.

LORD JUSTICE STUART-SMITH: Okay. Thank you very much and does anybody find ten o’clock more objectionable than usual? All right. In that case, because you have all been so polite, we will start at ten o’clock tomorrow morning. Thank you very much.

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(4.42 p.m.)

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No. CO/3206/2020

Royal Courts of Justice

Wednesday, 8 December 2021

Before:

THE RIGHT HONOURABLE LORD JUSTICE STUART-SMITH
THE HONOURABLE MRS JUSTICE THORNTON DBE

B E T W E E N :

THE QUEEN
on the application of
FRIENDS OF THE EARTH LIMITED

Claimant

- and -

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

First Defendant

- and -

CHANCELLOR OF THE EXCHEQUER

Second Defendant

- and -

TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA

Interested party 1

- and -

MOZ LNGI FINANCING COMPANY LIMITED

Interested Party 2

P R O C E E D I N G S

(Hybrid hearing via CVP)

A P P E A R A N C E S

MISS J. SIMOR QC, MISS K. COOK and MISS A. DAVIES (instructed by Leigh Day) appeared on behalf of the Claimant.

SIR JAMES EADIE QC, MR R. HONEY QC, MISS H. HIGGINS and MR C. FEGAN (instructed by the Government Legal Department) appeared on behalf of the Defendants.

MR A. HEPPINSTALL QC and MISS F. FOSTER (instructed by Latham & Watkins LLP) appeared on behalf of the Interested Parties.

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PRELIMINARY MATTERS

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SUBMISSIONS

MISS SIMOR (continued)

3

SIR JAMES EADIE

59

(Transcribed from a poor quality recording of Mrs Justice Thornton)

(10.03 P.M.)

A LORD JUSTICE STUART-SMITH: Miss Simor, I am going to take about five minutes of your time, but you can push into the luncheon adjournment, if you will forgive me.

B Sir James, I wonder if I could just raise something with you which I do not necessarily want an answer to now, but, as you can imagine, we have nothing better to do than to think about your case overnight. 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,

C "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".

D And at 75.3 you say,

E "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."

F 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,

G "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.!"

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

A 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.

B 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.

C 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.

D 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: We have looked in great detail. Now, the other thing, could I just before we go back to Miss Simor, in our essential reading bundle we were given the climate change report, we were also given the submission to the minister, which is at CB/2145.

E SIR JAMES EADIE: Yes. I have got it in two places.

LORD JUSTICE STUART-SMITH: I am sure that you do not need to look at it. We were also given the ESHR report. Am I right in understanding that those are, if I can put it in a construction phrase, the critical path documents which show the decision-making process?

F SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: And then Mr Taylor gives his evidence to which we give such weight as we think appropriate about what he thought he was doing.

SIR JAMES EADIE: Yes. We know about the case law that deals with that, if it is genuinely exercised (inaudible), if it is explanatory, it is not acceptable, as it were.

G LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: But yes, is the answer to the question.

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

H SIR JAMES EADIE: That is no longer the case.

LORD JUSTICE STUART-SMITH: But, if you were not intending to say that, it is still your case that it is a net reduction----

A SIR JAMES EADIE: To the extent that.

LORD JUSTICE STUART-SMITH: -- to the extent that.

SIR JAMES EADIE: Exactly so.

B LORD JUSTICE STUART-SMITH: Right, thank you very much. Unfortunately, my computer has switched off so I cannot see what the time is. Miss Simor, it is about seven minutes past. Do you want to push in to about five-past one by all means do?

MISS SIMOR: Thank you. Obviously, that interaction between your Lordship and my learned friend is of some relevance to us.

C LORD JUSTICE STUART-SMITH: I thought that it might be. That is rather why we decided to raise it now rather than when you sat down at one o'clock.

MISS SIMOR: Well, quite. This case has proceeded on the basis that the position of the defendants is that this project will lead to a net reduction in global emissions.

LORD JUSTICE STUART-SMITH: And that is aggregate overall global reduction of scope 3.

D MISS SIMOR: Yes. Now, if their case at this stage is now "No, no, it was only going to lead to 1 kilogram of CO2 deduction in emissions compared with some alternative -- what was the word?

LORD JUSTICE STUART-SMITH: Counterfactual.

E MISS SIMOR: Counterfactual, the counterfactual. Obviously, we are in slightly different territory but I need to think about the implications of that. If it is simply being said, "Well, there will be an increase of emissions of 360 million kilogrammes of carbon dioxide over the 30 years of the project, but compared with the counterfactual of everyone using coal or China using coal, it will result in 359 million kilogrammes of CO2 rather than 360, we are in very different territory.

F LORD JUSTICE STUART-SMITH: I am not sure that it is helpful if I make any observations at all but I am going to make one, which is that certainly to my eyes, although we have been discussing it, neither of us has come to a concluded view, to my eyes, the case that I have clarified with Sir James Eadie this morning is - I am going to put it completely neutrally - at least more consistent with the climate change report, which we have studied with as much care as we can muster. Do you want to take a minute or two?

G SIR JAMES EADIE: Whilst my learned friend is considering that question, can I just remind the court, I hope the court got a timetable from both of us.

H LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And you will have seen from the timetable the expectation that we were going from 10.30 onwards.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: My learned friend was going to sit down at 12.30.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Obviously, we have gained an extra half hour because we sat early.

LORD JUSTICE STUART-SMITH: Yes, all right.

SIR JAMES EADIE: And I said to her yesterday I am not going die on the pitch over any of this, because she can take the time it takes. If she goes to lunchtime, I am content.

LORD JUSTICE STUART-SMITH: All right. We will make a condition. Do you want a minute?

MISS SIMOR: I do not think it is going to help us. Our submission on the climate change report is consistent with the summary grounds and the detailed grounds, so our interpretation was the defendant's interpretation in the summary grounds and the detailed grounds. It may be that it has now changed. We were proceeding on the basis of the summary and detailed grounds.

LORD JUSTICE STUART-SMITH: Yes, okay. I mean, you will appreciate that one of the reasons why we have raised it this morning, from my interaction with your yesterday, is that I was troubled about exactly where we were going, so that is why we have dealt with---

MISS SIMOR: Yes, well, I mean, it is obviously important and that way that this case developed, also, of course, in terms of disclosure, was complex. So we only got the climate change report before our amended statement of facts and grounds. We wanted the Wood MacKenzie report. We went and sought specific disclosure of it. We were refused the specific disclosure of it and, therefore, we only got the Wood MacKenzie report after the detailed grounds, so, when we came for permission, all we had was the climate change report. With that absolute finding, there will, in international terms, be a net reduction. Of course, when you look at it in the light of Wood MacKenzie, you see it potentially slightly differently, but that did not then lead to the detailed grounds being amended compared with the summary grounds. But, actually, I am not going to take any more time. I think that I need to really press on, but I do think that this is something pretty significant that needs consideration.

LORD JUSTICE STUART-SMITH: Yes. I think that the only assurance that I can give you is that this court has, as an absolute determination, to reach the right result on the real issues and not to be diverted by who said what, when, where.

A MISS SIMOR: Completely. What is crucially important is that you reach the right conclusion on the basis of what the ministers understood. The Chancellor of the Exchequer and the Secretary of State for Trade, in light of the fact that the Foreign Secretary, the Prime Minister, Secretary of State for BEIS and the Secretary of State for DFID were against this project.

LORD JUSTICE STUART-SMITH: Okay, thank you very much.

B MISS SIMOR: Now, my Lord and my Lady, you have on your desk the CV of Ben Caldecott, who is the EGAC specialist, who advised UKEF. You also have a couple of excerpts from his reports. They are dated 2018. This man is a pre-eminent specialist in this particular area, finance transition, gas, etc. I will not spend time on them, but you will see the first one carbon lock-in curves in South-East Asia. If you turn to the first page of that, the third bullet, C that talks about an -- I am dealing here, really, my Lord, with a response to some of the issues you raised yesterday in relation to the gas as transition. If you could just highlight that third bullet and then the other page is the first page, p.17, but it is for your background information. Obviously, there is a lot to take in in this area.

D But I am going to start with his comments, and that is why it is an appropriate moment really to give you his CV. I am going to go back to his comments on the first draft framework document which is at CB/2, p.105.

E Now, you will recall that this is a document that he sent to -- it was sent to him and he sent it back on 14 April, just before a meeting, the minutes of which I am going to take you to, and I think that it is convenient just actually to look specifically at what he says here. First of all, please note that this is the original framework and you will see the questions in it in the left- F hand column are relatively slim, so there is no detailed consideration at this stage of Paris obligations.

G So there is a credit risk review first. Then he says in the second column - there is an exception there highlighted in pink about the extent to which gas is going -- fossil fuels are going to provide energy and he puts next to that "potentially strong claim". Then the claim about gas growing, so this is just the demand -- you will remember the reports about the growth in gas demand, which obviously is not determinative of what can be used, and he says, "Lots of other claims reasonable people in the energy industry could debate"

Then on the next page----

A LORD JUSTICE STUART-SMITH: Do I understand that “potentially strong claim” relates to current long-term industry projections and he is saying that that is potentially a strong claim?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: By that, does he mean it is too strong or a good strong?

B MISS SIMOR: Too strong, because the SDS -- no, it is not the SDS this. This is a -- you will recall in the RAD it said that gas is going to grow by 4 per cent and that is a strong claim in the light of the need to move to net zero and the possibility of gas continuing in that scenario.

C Then, if we go to 107, I have already taken you to comment BC7, carbon lock-in and the need to actually work out the actual amount of carbon which is going to go up, which rather goes to the earlier discussion we had. You actually need to know how much is going to go up there.

Then, interestingly, he says,

D “However, current demands for energy cannot be met for the foreseeable future without oil and gas. Gas is, therefore, fundamental in enabling the energy transition without massive disruption.”

E He says, “Highly debatable, so, taking this as a given could be problematic”. Then the next box,

F “Mozambique is currently a low-carbon economy that is considered particularly vulnerable to climate change impacts. This Project cannot be viewed as mode for fossil fuels transition for Mozambique as it will significantly increase its emissions and support the development of fossil fuel infrastructure within the country.”

That is lock-in. That is called lock-in. Then,

G “However, globally, the Project can be viewed as contributing to fossil-fuel transition/ lowering of carbon emissions”

H Which is the ultimate -- we say, the ultimate conclusion in the report, that, actually, globally it results in reduction. Interestingly, the prior sentence just goes, although there is no evidence as to explain why it just disappears and suddenly----

LORD JUSTICE STUART-SMITH: The conclusion that is reached is that it will to some extent act as a transition material because it will take the place of biomass and oil.

A MISS SIMOR: Exactly. But there is no evidential change between the 14 April and 29 May.

We have asked for everything and we have not had anything.

LORD JUSTICE STUART-SMITH: Does there have to be?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I mean, people can change their minds.

B MISS SIMOR: Not without evidence.

LORD JUSTICE STUART-SMITH: Well, do you need specific new evidence to change your mind and conclude that there is going to be displacement of biomass and oil?

C MISS SIMOR: Yes, my Lord. I am not saying that this is necessarily right, but whatever you say has to be founded in evidence. So you cannot, as a decision maker, simply stick your finger up in the air and say, "We think this might happen". That is not good enough. That is fundamental, we say.

D Now, if the position at this stage was that it cannot be viewed as a transition fuel in Mozambique - and that makes sense - because Mozambique is currently a very, very low consumption economy. So per capita the carbon used by each person is so low that gas in such an economy will not lead to transition, it will lead to an increase in energy use by gas. Now, that is economic development. It is the point you raised.

E LORD JUSTICE STUART-SMITH: Well, that was accepted, was it not, in the ultimate report?

MISS SIMOR: That?

LORD JUSTICE STUART-SMITH: The ultimate view was that what you have just said is right, albeit that there would be a degree of displacement or there might be a degree of displacement of biomass and oil.

F MISS SIMOR: Well, the forensic analysis is important: what actually was decided? And at this stage they are saying categorically that it cannot be viewed as a mode of transition. Now, at that stage that was their view. All I am saying is that what we need to see, and we have asked for it - we have been told it does not exist - is some kind of basis for these views.

G If we go then to the next bit of pink,

H "It is expected that a significant quantum of the gas commercialised by this Project will, therefore, help reduce reliance on coal-based power generation, i.e. China and India."

A Then Ben Caldecott comments, “Based on what third party analysis and are there countervailing views?” He is asking for analysis.

Then the next page,

B “Mozambique is one of the poorest countries in the world. Revenues from this Project are expected to significantly increase Mozambique’s investment in climate resilient infrastructure”.

And he says,

C “How? And, again, big assumption about tax take and then future fiscal policy of a third country.”

D Now, I took you to the evidence that said, “This will gain Mozambique 13 billion”, but I also took you to the evidence that may actually be in the CCR, which says that there is no evidence in relation to the policy or plans to use that 13 billion.

LORD JUSTICE STUART-SMITH: We will check that, but I think that I have seen it overnight, but I may be wrong.

MISS SIMOR: I believe that I came up in the CCR, I think. Then the next bit,

E “Strategy envisages using gas-to-power as baseload power to make viable investments in fluctuating solar and wind energy.”

F And he says, “And is this likely given changes in the economics of other technologies?” What he is talking about there is the fall in price in renewables.

Then we go to the last pink,

G “They also considered the contents of the World Energy Outlook 2018 Report, which also posits gas as a transition fuel”.

And he says, “which is seriously out of date”.

H Then the next page, “Summary”,

“The Project will significantly increase Mozambique’s carbon emissions which may also be projected to grow.”

A Comment:

“Can you include growth relative to current emissions as well as absolute numbers?”

B So what he is saying there is that they use 5 to 10 per cent but, because of moving to a gas-based economy, that may well grow, as the economy grows, and, therefore, it might actually be much more than that. He is asking for some numbers.

C Then the next page, “Lost UK contracts and jobs”:

“Is the UK input really 100% dependent on UKEF support? How substitutable is the UK share of the work and would it be substituted?”

D Well, we know it is probably not.

LORD JUSTICE STUART-SMITH: Can I just ask where this is going? As I understand it, this report or this draft has gone to someone who is very eminent for comments and he has come back with comments.

MISS SIMOR: Yes.

E LORD JUSTICE STUART-SMITH: What does that mean? What does the Government have to do then? What is the court going to say the Government has to do in response to this? Does it have to then deal with every point in this----

MISS SIMOR: No, no, no, my Lord.

F LORD JUSTICE STUART-SMITH: I am just not quite clear where we are going.

G MISS SIMOR: It is important because the defendants -- the crux of the defendants’ defence in the witness statements and the grounds is that “We did what we had to do. We relied on experts, internal expertise, you cannot question it. It is a matter for us. It is our judgment.” And our case is, yes, fine, but you have to do the analysis, you have to have a rational basis for your decision and, if, in fact, the reality is that internally they were being told, not that everything was fine, but that actually they had failed in their analysis and that their analysis did not stack up, then that supports our argument that this conclusion -- the conclusions reached were arbitrary and unreasonable.

H LORD JUSTICE STUART-SMITH: Thank you.

A MISS SIMOR: And then we get the biodiversity point, that was ground 2: we did not get permission on that. Then the marine exclusion zone saying that that was a biodiversity argument.

If we go now to p.102, we get the minutes of the meeting that followed in submitting that. It is the same day. So he sent that at 8.30 in the morning.

B LORD JUSTICE STUART-SMITH: We looked at this yesterday.

MISS SIMOR: Yes, but I was I think just too tired and I was very unclear. So, if you do not mind, I would like to go back to it.

LORD JUSTICE STUART-SMITH: Well, it did not occur to me that you were being unclear, but I will take your word for it.

C MISS SIMOR: So, if we just go to the middle of 102, we get the point by Alistair Clark. He is chair of EGAC. He is actually more of a sustainability person. He says,

D “Alistair expressed his view that the latest draft framework is too lite on climate change and too focused on E&S and other considerations. Additions to the framework suggested by Alistair, Ben and Counsel ere noted and are now being implemented.”

LORD JUSTICE STEWART-SMITH: That bit is Caldecott’s, is it?

MISS SIMOR: Yes. And that -- well, I will take you to that next. Okay, the next one,

E “Scope 3 emissions.

F “Alistair posited that the current information on ... scope 3 emissions was insufficient [and that did not change from this point]. As such, Alistair asked the group whether we could capture, i) what markets the gas will be exported to” -

something that I raised yesterday -

G “ii) what energy sources it will replace.”

something I also raised -

H “Without hard data, Alistair suggested we pursue a ‘What if’ modelling approach based on rational assumptions.”

For example, you might take each of those jurisdiction, like India, China, Europe, and you might say what are their trajectories? So Japan has a net zero target. Is Japan really going to -- are emissions really going to reduce if Japan purchases this gas, etc.?

A

It is obvious how you would do it. You would need someone who was good at maths and analysis.

B

“II, in response, Joe explained that this would be difficult to achieve and that Wood MacKenzie [a specialist consultant] was unable to answer these questions despite being hired to do so. As a result, WoodMac is now looking at how this project will contribute to overall world climate change (2C) instead.”

C

And we have been told there is nothing else. This is 14 April and the WoodMac report is 27 February. So I am not sure what WoodMac was doing now, but certainly either nothing was produced or nothing that it produced was actually used.

D

Then the next page “Benchmarking”.

“Louis highlighted two critical questions for the group to consider: 1) what information are we gathering for assessment and 2) what are we benchmarking this information against to reach a decision?”

E

That is something again that I emphasised yesterday. You have got to benchmark information and our little exchange this morning illustrated why. A difference between 59 and 60 is totally different to a difference between zero and 60. You need to know what you are talking about.

F

Then,

“On the second point, Esi explained that it difficult to determine appropriate benchmarking ... there is no clear internal/external guidance to follow and we do not have in-house expertise related to climate change.”

G

So all the witness evidence claiming expertise is here undermined entirely.

LORD JUSTICE STUART-SMITH: Who is “we”?

MISS SIMOR: “We”, UKEF. You will see the discussion on the left.

H

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR:

A

“This point was echoed by Gordon.

III In lieu of clear guidance on benchmarking or an accepted threshold on fossil fuel emissions, Alistair explained that we will need to balance that climate change impact of the project on the geographic area, the scope 3 emissions, the relevant NDCs. Etc.”

B

You have got to do the work. Then para.4,

C

“... Alistair suggested that we should not discuss weightings about -- [you know, how much weighting the climate change assessment has in the decision at this point]. But what is important at this stage is that we can show we have fully acknowledged the climate change risk of this project.”

And then 6,

D

“Alistair noted that there are specialist climate change assessment companies now opening that can model lots of different climate change considerations to understand the impacts of a project. This would help the decision making for Mozambique LNG. However, it was accepted there is not enough time left to engage consultants for this project.”

E

Well, you will remember that the CCR says, and the ESHR, “no further due diligence will help”.

LORD JUSTICE STUART-SMITH: It says, “no further”, what?

F

MISS SIMOR: No due diligence will assist. Now, following this, we got the bigger framework draft that I took you to and my Lady asked me the date of it? I believe that that was developed, according to the beginning of these minutes, that was developed in response to counsel and Ben Caldecott’s comments. That framework includes all the bits about Paris and one and a half degrees and NDCs, etc. You find that at CB2, p.132 and I do not need to take you to that.

G

Then on 2 May we get an email with further track changes by Ben Caldecott and that is at 117. And you see the first page.

LORD JUSTICE STUART-SMITH: Hold on, I am behind again. CB2/117?

H

A MISS SIMOR: Yes, this is version six. The one that we looked at before was version two and this one we know, version six, was given to the ERICC Committee when the ERICC committee when the ERICC committee decided to go ahead, it had draft and it had draft V6.

LORD JUSTICE STUART-SMITH: Where do you want us to go?

B MISS SIMOR: 117. So there is the draft climate change assessment framework. This is the new framework and BC2, Ben Caldecott says, "I'd expect that this" - delivering against the framework of the taskforce - "would be an annex available for review."

C You will remember that I took you to the annex to the common approaches that said that there should be an annex with all the data in it. That was right at the beginning of my submission. Especially if it was used to inform the framework, you would expect some kind of databased annex.

"I'd also expect to be able to see which [financial institutions] FIs were reviewed and how were they engaged systematically."

D i.e. what did you do to discuss this with other financial institutions? Because you will see at the beginning of our skeleton, and there is also a report in the supplementary bundle by E3G, at tab 12 of the supplementary bundle at the back, you will see a table with what the financial institutions' approach is to these issues.

E Then, if we go to the next page, 118, looking at the NDC, Ben Caldecott says,

"Supplementary questions for the UK: is their NDC good enough? Does the project help support NDC ambition and ratchet?"

F i.e. specifically the questions they should be asking under Paris as we are submitting.

BC4. This is crucial. They say that they cannot estimate scope 3 emissions. Ben Caldecott says, "I think this is a big gap in the analysis."

G I should emphasise that all of this came in response to our specific disclosure, so what we are now finding is that our grounds are backed up by the pre-eminent expert in this field.

H Then his comments about oil price --

“The impact of oil price crashes has been considered in Wood MacKenzie’s analysis”. He said,

A “Oh yeah. Would like to see it! I doubt anyone has done a downside risk analysis of the kind generated by Covid”.

And then, “Does the project contribute to fossil fuel transition?”

B “At the Mozambique level, the Project does not lead to fossil-fuel transition nor does it lead to a reduction in carbon emissions. At the global level, it cannot be concluded with any certainty whether it does or does not contribute to a fossil fuel transition or a reduction in carbon emissions. This is due to the flexibility...”

C Then there is nothing more on that.

LORD JUSTICE STUART-SMITH: What do you take from his comment “that is quite a statement”?

MISS SIMOR: “That is quite a statement”----

D LORD JUSTICE STUART-SMITH: If you apply the same sort of forensic approach as you have been applying so far, that suggests that he doubts that statement.

MISS SIMOR: Yes. He does not accept----

E LORD JUSTICE STUART-SMITH: So what do we take from that, that he doubts whether the project does not lead to fossil-fuel transition at a global level or that he doubts that it cannot be concluded with any certainty whether it does or does not contribute to a fossil-fuel transition or a reduction?

MISS SIMOR: Well, where the line is I would say that it is probably the latter.

F “At the global level, it cannot be concluded with any certainty whether it does or does not contribute to a fossil fuel transition or a reduction in carbon emissions. This is due to the flexibility of the SPAs.”

G He could well be doubting that it is not possible to reach a conclusion on that, if you apply the proper analysis.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Now, I am not making any assumptions as to what conclusions he says would be likely reached.

H

A Then, if we go to -- I just want to go quickly back. We asked why there was not enough time to consult the climate consultants in response to those minutes. If you go to the supplementary bundle 1592, you get the answers to our Part 18. It is 1592, it is the question above 50.

“Please explain why it was too late to engage consultants for this project”

B we asked, and it says,

“This was largely because signing of the project was expected imminently and the due diligence work was already well progressed. UKEF was not aware of any other consultant that could have been procured and would have been capable of producing an analysis in the period of time ...”

C So they did not think that they could find somebody quickly enough. Then, if you turn to the next page, on 1594, “lack of benchmarking”.

D “Why on 14 April was it already considered too late to seek external expertise? We note that on 27 February signing was expected in April. We also know that the CCR was not completed until 29 May”.

E That is six weeks later. And the answer is given that they would have had to use public procurement rules so they could not do it. It would have taken too long.

If we go then to 115, CB2/115----

LORD JUSTICE STUART-SMITH: Forgive me, I am so sorry. I am so engrossed in your last submission that I did not get the reference for this one.

F MISS SIMOR: Well, I am hoping that it is the right reference. No, it was actually not the right reference. it is 114.

LORD JUSTICE STUART-SMITH: CB2/114?

MISS SIMOR: Yes.

G LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Actually, it is not, it is 115. I was right. So it is 115. It is an email from Ben Caldecott and he says - this is May, 1 May -

H “I sense that the LNG project is driving the creation of the climate change assessment. Ideally, the framework would be developed first through an

appropriate robust and comprehensive process and then we'd apply it to this project (and other projects) systematically.

A

“As it stands (unless there are further materials I'm not seeing) the 'framework' is really just some questions. I'm not sure these questions are the right questions or that all the issues we'd want to cover are covered.”

I am not going to read the red because that is UKEF's intervention.

B

“I'd also like to understand the [finance institution] peer analysis that is meant to be benchmarking this”.

Then at the end he says,

C

“I haven't been close to the process, so apols if there is a framework doc separate to what I have seen, it would be good to see if so.”

Then on p.114 you get the response from Helen Meekings, who is UKEF and she is sending to her team for a meeting.

D

“Generally I suggest that we focus the conversation firstly on the CCA framework itself and the issues that we should be considering and currently don't (also clarifying we're working at pace hence the overlap of framework development closely followed by the Moz LNG assessment) - It's a fair point from Ben's side that it doesn't set out to 'assessment' the climate impact of a project in the traditional sense of an environmental impact assessment – what would be the baseline for example. But the impact would essentially be the result of all the GHG emissions expected from the project, hence Ben's point around Scope 3. I know this is something that has been discussed as a group before and the emissions are what they are and their impact is global, which is why this is such a difficult thing to look at. Would be really interested to get Ben and also Alastair Clarke's thoughts on how to do.”

E

F

Then we have 5 May. It is at p.121. We then get the updated version of the climate change assessment. Then we get a statement there from Miana Capuano.

G

“I have added additional text that (hopefully) makes the complexities in accurately calculating scope 3 emissions clearer. Scope 3 calculations are dependent on a number of variables, [etc.]”.

H

Now, that we know is incorrect at a basic level. The carbon will always be the same, subject to situations where it is actually used, for example, to create chemicals. Then she recognises below that

“It is a separate issue whether the project displaces more polluting fossil fuels is considered under the transition fuel argument section. It is not considered in the calculation of scope 3 emissions as it will not change the scope 3 emissions.”

Exactly our point. Then we get the response about----

LORD JUSTICE STUART-SMITH: Your point is that, subject to any displacement - subject only to any displacement - scope 3 emissions are going to be very high.

MISS SIMOR: They are going to be calculably high, yes.

LORD JUSTICE STUART-SMITH: You say they are going to be calculably, but you say they are going to be very high and that should be taken into account.

MISS SIMOR: Yes, and the defendant now neither deny that they will be high, they have never denied that - but nor do they deny that they could easily be quantified. In fact, they did it in 24 hours for the Prime Minister.

LORD JUSTICE STUART-SMITH: I am just wondering about the impact on a ministerial decision. Is it realistic to say, for example, that a minister should have presented to them the million tonnage or is it sufficient to say to a minister, “The impact will be -- or the scope 3 emissions will be very high”?

MISS SIMOR: In this context, what mattered, I would say, and it is dependent and there is case law, there is some case law on that, but in this context what we are crucially concerned with, which is why it is so important how this court views the CCR, are the conclusions in the CCR and you will recall that the conclusions, as we understand from the CCR, that there will be net global reductions, there are comments in documents that I have shown you saying that the Foreign Secretary or whatever had not seen that climate change report. So, for our purposes, what matters is that we say that the decision makers were informed of that net reduction in emissions. Therefore, the alignment with Paris.

Now, whether they needed to know that it was x million tonnes. They might have needed to know what that actually meant, so, if they were told that that means a reduction in the likelihood of meeting net zero by x per cent or that means that the United Kingdom is arguably not acting in good faith, in terms of meeting its obligations under the Paris Agreement or this does not establish that there will be a reduction in emissions in line with

the pathway under Article 2(1)(a) -- if they had been told something meaningful, that is what I am saying, and I understand your Lordship's question because what your Lordship is saying is, it may not be meaningful for a minister to be told how many kilogrammes.

A

LORD JUSTICE STUART-SMITH: I have one other point sort of in the back of my mind at the same time, which is that the one thing that I think is probably common ground is that it was impossible to predict the extent to which, if at all, Mozambique's liquid natural gas would displace more polluting fossil fuels.

B

MISS SIMOR: It was impossible they say to accurately conclude.

LORD JUSTICE STUART-SMITH: To predict the extent -- they make the assumption that there might be some displacement and will argue -- and we have the arguments about what the climate change report actually says about that. But I thought that the one thing that would be or was common ground that you would not be able to predict with any degree of accuracy the extent to which Mozambique's liquid natural gas would displace more polluting fossil fuels. Is that not right?

C

MISS SIMOR: That you could not predict it.

LORD JUSTICE STUART-SMITH: Yes, you could not predict it.

D

MISS SIMOR: You could not predict it but---

LORD JUSTICE STUART-SMITH: Your case is that you could predict the emissions because that is the carbon content of the fuel, but you could not predict the extent to which, if at all, there would be an offset if you can put it in that sense -----

E

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- because of displacement of more polluting fossil fuel.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Have I understood the position correctly?

F

MISS SIMOR: Yes. That, I understand, is their position.

LORD JUSTICE STUART-SMITH: What is your position?

MISS SIMOR: Well, our position is that you had to do some kind of analysis, so you could not---

G

LORD JUSTICE STUART-SMITH: No, can you just answer me this? Is it your position that you could accurately predict the extent to which Mozambique LNG would displace more polluting fossil fuels?

H

MISS SIMOR: Our primary position as set out in Mr Muttitt's expert evidence is that that is the wrong approach in Paris - in the context of Paris - to looking at climate change. Our second point is -- sorry, it is not a direct answer to your question, I appreciate that.

LORD JUSTICE STUART-SMITH: All right, I am sitting tight.

A
MISS SIMOR: So, if you are going to talk about it in the context of Paris, you have to address it on the basis that you do not know. So, yes, we can accept that, of course, if gas goes on to a global market -- even if gas goes on to the Chinese market, we actually do not know what the Chinese are going to do in 20 years. We do not know whether China -- China has now committed, I believe, to net zero in 2060. Yes, China has now committed to net zero in 2060, so it is trajectory in terms of moving to renewables may be such that it actually does not use gas at all, in which case gas goes where in the market? It is obviously predicted. You obviously cannot do it accurately.

B
LORD JUSTICE STUART-SMITH: You know I like to try and get things firm in my mind, sort of anchor points that I can hang on to. I have written down "claimant accepts that you cannot predict the extent to which, if at all, Mozambique LNG will displace more polluting fossil fuels, but, if you do not know, you should say so".

C
MISS SIMOR: And proceed on the basis that you do not know. So you cannot proceed on the scenario that it is more likely than not that it will. And certainly not proceed on the basis -- so you cannot say under Paris, "Well, we do not know but, you know what, we think it is more likely so we are going to proceed on that basis." That is not good enough for Paris. And of the three scenarios, if we look at the three scenarios, in the climate change report, I made this point yesterday, they say it is too uncertain to estimate the quantity of scope 3 and yet it is certain enough to choose the mid-case scenario.

D
E
MRS JUSTICE THORNTON: I have not gone back to the ministerial submission, but, if there is a disconnect in this respect between what is in the CCR and the ministerial submission - in other words, the ministerial submission is more vague, it just says "We looked extensively at climate issues", what should we draw from that?

F
MISS SIMOR: Well, the ministerial submission to both the Chancellor and the Secretary of State for Trade specifically, at least the submission of Mr Taylor, which I believe was put in front of the Chancellor, specifically said to them that they should pay special attention to the CCR.

LORD JUSTICE STUART-SMITH: Yes. So they ducked the issue in that respect.

MISS SIMOR: There is no clear----

G
LORD JUSTICE STUART-SMITH: They said, "Here is the report, read it".

MRS JUSTICE THORNTON: And what do you say about that in terms of (inaudible)?

H
MISS SIMOR: Well, we say that the ministers reading it, thinking in terms of alignment to Paris, saying themselves that, perhaps, if the DIFID minister saw this, they would change their mind and, in light of the position of the Treasury on finance, etc., read that believing that

A global emissions overall would be reduced. Therefore, it was in alignment with Paris and, on that basis, they agreed to fund it. That was the position inside Government. If it was not the position, it should have been stated clearly, because at the moment we do not even know what is said. And I obviously use the ridiculous example of one kilogramme. But we really do not know even from this morning what actually is being said.

B LORD JUSTICE STUART-SMITH: So the ministerial submissions said “Read the report” and your submission is that the ministers would have read the report as meaning that, overall, Mozambique LNG would reduce aggregate local emissions.

C MISS SIMOR: Now, if we had a witness statement from anybody on the other side saying what the position was, what the Secretary of State understood, if we had a witness statement from someone in the Treasury, the permanent secretary to the Chancellor or permanent secretary to the Secretary of State saying, “Yes, she understood that we did not really know what effect this would have. It would likely increase emissions overall, but that it could displace a bit”, so it would cause 250 million tonnes of carbon, but 40 might be -- so it might be 210 if 40 is displaced. Well, we would need a witness statement from the -- I do not know, permanent secretary or Mr Taylor saying that she understood that, in fact, this would cause a global increase in the carbon emissions.

D LORD JUSTICE STUART-SMITH: So as things stand, this submission depends upon our interpretation of what the CCR is saying.

E MISS SIMOR: It also depends on -- I am sorry to say this, but the summary grounds and the detailed grounds. These are also -- I do not know whether defences are sworn by statements of truth, but certainly claims are.

F Now, I am moving far too slowly. I am getting very anxious. Okay, I am going to quickly go to the meeting of the whole team and Ben Caldecott on 7 May 2020. No, that apparently led to further track changes, there were no minutes. There was then apparently another meeting: CB2/123. These are short-form minutes of 7 May meeting. This is about cumulative emissions. “Is an asset compatible with a given carbon budget?” I am going to come to that argument. “You take an asset” -- this is really important, this is what I tried to explain, my Lord, to you yesterday,

G
H “You take an asset in a sector, you estimate its current and future emissions (to do that you have to make a bunch of assumptions around future operations and efficiency) (should get this from the project), figure out remaining carbon budget for the sector [the global carbon budget] in which the asset is operating. A lot of this has been piloted in the power sector, different sectors have different pathways and allocations.

What's the size of the overall remaining carbon budget (which one are you using)? And what is allocated to...

A

This is a sensitivity analysis... if the carbon budget is bigger, It's more likely the asset will be covered."

So, if you can fit within it, you are probably all right.

B

"This can done fairly easily for the power sector.

For the LNG project, can't do this work, although he's sure people could do the work."

So he is saying that he cannot do it.

C

"Compatibility with carbon budgets is complex".

You need to pay someone to do the work. If you want to do a proper analysis, for a sector where this hasn't been done before, this is a substantial piece of work. HM: is it our responsibility to do this ..."

D

Then, if we go to p.315----

SIR JAMES EADIE: Can I just invite you to read the bottom of p.123, whilst you are there, under the bold bit?

LORD JUSTICE STUART-SMITH: Thank you. What the last two paragraphs?

E

SIR JAMES EADIE: The last three, really, the last two full ones and then the final one. It is really the last two.

LORD JUSTICE STUART-SMITH: (pause) Thank you. You wanted us to go to where?

MISS SIMOR: 315. Now, this was when they did a rapid calculation of scope 3 for the Prime

F

Minister and you will see at the bottom it is an email from the FCO to someone at the private office in BEIS. So Kwasi Kwarteng is the minister for BEIS, a special advisor, and the FCO person says,

G

"In case the Secretary of State asks about the Scope 3 emissions, I've just received a helpful extract from the Climate Change Report..."

And then it says that famous bit from Box 13. Then we get the response from Julian Critchlow, who is DG for energy transformation and clean growth in BEIS. I have looked up his CV as well and he knows a lot about climate change. You will see at the top of p.315, he says,

H

“This statement undermines the credibility of the Climate Change Report in my opinion.”

A

I realise that I forgot to tell you something about 123. So those minutes that we were at at 123. What I forgot to mention to you was the explanation given by either Ben Caldecott or Alistair Clarke, probably Ben Caldecott, in the first paragraph - I am sorry to go back - as to how you do that, how you do the assessment, the pathways. That first paragraph is effectively what Mr Muttitt says at para.37 of his statement which is core bundle 1, p.297.

B

LORD JUSTICE STUART-SMITH: What is the reference to Mr Muttitt, which paragraphs of his statement?

MISS SIMOR: Paragraph 37 of his statement.

C

LORD JUSTICE STUART-SMITH: Thank you.

D

MISS SIMOR: So we agree that the CCR is not credible. The claimant’s experts agree. Mr Muttitt and Mr Anderson agree. The reality here is that the internal advice was that quantification of scope 3 was vital and that lack of such quantification undermines the credibility of the report. I want to make perhaps an obvious point on this. The excuse that they did not have time to do so is not a good one. Firstly, it cannot justify a baseless conclusion. They had to proceed on the basis of effectively the precautionary approach, best available science. They could not just jump to the conclusion because they did not have time. We say there is no evidential basis for the change in the CCR from the position in Wood MacKenzie. Secondly, the whole thing was, in any event, spurious because a quantified assessment of scope 3 could have been done very quickly. Transition is obviously a much more complicated exercise, as is mapping against the pathway which is what you just saw in the minutes of 7 May. Those are two more difficult exercises but the quantification is a simple one and a simple way to do it is by reference to the greenhouse gas protocol which is exactly what they used for scopes 1 and 2. I should also note that Parliament was told, and it is stated in the defendant’s pre-action response letter, that scope 3 emissions could not be quantified and the reference for that is SB1, p.20, para.54 and I will not take you to it now.

E

F

G

I am going to move now to the second part of ground 1B, the fundamental failures in the assessment which led to the conclusion that the project was aligned with the low emissions pathway, such that financing could be granted. Now, as explained by Mr Anderson and Mr Muttitt, there is one central point that matters in mitigating climate change and that is the cumulative amount of carbon that is allowed to enter the atmosphere. It is the cumulative

H

amount of carbon dioxide equivalent in the atmosphere that determines how much temperatures will rise by and you can find that at Mr Anderson 1, CB1, p.30, para.10.

Indeed, Mr Caldecott himself advised UKEP that that was the case in his comments at CB2, p.107. This is well established and incontrovertible and you can find the summary of the position in the *Urgenda* case.

LORD JUSTICE STUART-SMITH: Could you give me the reference to Caldecott that you have just done?

MISS SIMOR: CB2, p.107.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And you find this incontrovertible principle in the Supreme Court case in The Netherlands. I do not have time to read it, but I would like to take you to it so that you can sideline it, if I may. It is in AB/4, tab 55 and if you go to para.4.5 -- well, perhaps, while I am here I will just tell you the bits that you will want to look at. If you start at p.2760, if you just mark up along the Paris Agreement and then UNEP reports and then, if we go to paras.4.5, 4.6 and 4.8, which are at p.2768, if you mark up 4.5 and 4.6 and then 4.8. Then could you also sideline 5.7.2. It is on p.2773, 5.7.1 through to 5.7.5 and then 5.7.8. I just want to emphasise 5.7.4,

“At the annual climate change conferences held on the basis of the UNFCCC since 1992, the provisions mentioned above in 5.7.3 have been further developed in various COP decisions. In each case these are based first and foremost on an acknowledgement of the above understanding: all countries will have to do the necessary. Articles 3 et seq. of the 2015 Paris Agreement reiterates this in so many words.”

Then 5.7.8,

“Also important in this context is that, as has been considered in 4.6 above about the carbon budget, each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible.”

And the reverse applies equally. Every increase is significant.

LORD JUSTICE STUART-SMITH: You refer to this authority from the Supreme Court in The Netherlands as reflecting a common understanding.

A MISS SIMOR: Yes. There is not a lot of authority. There are a lot of databases that give you the global authorities on the Paris Agreement. There are a large number of cases but this is the first case on this point, where this point has ever been considered, as far as we are aware, in the world. So we are pulling what we can to try and help you.

I should have also asked you to mark-up para.7.

B “It follows that you cannot determine alignment with Paris Agreement compatible with low emission pathways without considering carbon budgets”
LORD JUSTICE STUART-SMITH: 7?

MISS SIMOR: 7.

LORD JUSTICE STUART-SMITH: 7.1?

C MISS SIMOR: I have just written 7 in my note. I do not know whether it is a long section, perhaps, on Paris. I have now closed my bundle.

LORD JUSTICE STUART-SMITH: If you want us to read the whole of s.7, then----

MRS JUSTICE THORNTON: You have taken us through the main paragraphs.

D MISS SIMOR: The important point for the court’s understanding is that carbon budgets are at the heart of the entire system. In fact, they are one of two elements in low emission pathways. Low emission pathways are made up of two elements: carbon budgets and time. Different pathways exist because each one makes different assumptions about Government and human behaviour and technological developments. With that in mind, emissions
E pathways are carbon budgets by reference to time having regard to assumed scenarios of behaviour.

F So it really is as simple as saying that, in a context such as this, a potentially massive source of GHG emissions, if you do not consider carbon budgets, you cannot assess alignment with a low emissions pathway. Essentially, it is necessary to quantify the emissions from the project - scopes 1 to 3 - assess these by reference to the sector and the relevant available carbon budgets in the sector. And we saw that explained by Mr Caldecott in the rough
G minutes of 7 May at CB2/123. Mr Muttitt explains it at 4(c) of his statement and also Mr Anderson explains it at 23 to 26. There is nothing new about it. The IPCC reports, for example, the previous assessment report AR5 set out carbon budgets by reference to time and the IPCC report gives those in relation to 1.5.

A Currently, the most important report is that IPCC 1.5, which was commissioned by the decision adopted in the Paris Agreement. I will take you to it. Then there is the UNEP production gap report which took 18 actually of the 80 scenarios in the IPCC report.

B These are essential relevant considerations that had to be looked at to assess the project and we find that also in the *Gloucester Resources* case which is a New Zealand case, which is at authorities bundle 4, tab 54. I am afraid I am going to ask you also to mark this up.

B Paragraph 439, if you could mark----

LORD JUSTICE STUART-SMITH: I am sorry, this is an Australian report.

C MISS SIMOR: Yes. Is it -- oh! Yes, New South Wales. 439, p.2679, and this explains in quite a lot of helpful detail carbon budgets and if you read right through to 450. The Paris Agreement budgets and related emissions pathways----

C LORD JUSTICE STUART-SMITH: Hang on. You are wanting us to sideline this and read it?

MISS SIMOR: Please, I am sorry.

LORD JUSTICE STUART-SMITH: So 439 to what?

MISS SIMOR: To 450.

D LORD JUSTICE STUART-SMITH: Thank you, we will.

E MISS SIMOR: So these budgets, these budgets by reference to time are set out in the IPCC special report which is in the first authorities bundle. If you can go to tab 4, please. If you just look on the first page, I think that I may have taken you to this already, p.67, you will see the point that I have made, that this is connected directly to the Paris Agreement.

F Then, if you go to p.88, you will see the title "Mitigation Pathways" in the context of sustainable development. That is what we are looking at in 2.1(c). Then, if we could just read the top right-hand corner,

G "Limiting warming to 1.5°C depends on greenhouse gas emissions over the next decades, where lower GHG emissions in 2020 lead to a higher chance [that is the point I made, if you move faster, you have a greater chance of hitting 1.5] ... Available pathways that aim for no or limited (less than 0.1° overshoot) keep GHG emissions in 2030 to 25-30 gigatonnes of CO2 equivalent per year in 2030 (interquartile range). This contrasts with median estimates for current unconditional NDCs of 52-58 ... in 2030. Pathways that aim for limiting warming to 1.5°C by 2100 after a temporary temperature overshoot [so you would overshoot early and then you would come back to 1.5] rely on large-scale deployment of carbon dioxide removal -

So the idea would be that you would overshoot your temperature goal, but then you would suck the carbon out of the atmosphere with CDR measures -

“which are uncertain and entail clear risks. In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO2 emissions decline by about 45% from 2010 levels ... [etc.]”

I will not read the result of that, but the next thing, “Limiting warming”, and this answers my Lord’s question of yesterday,

“Limiting warming to 1.5°C implies reaching net zero CO2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO2 forcers, particularly methane (*high confidence*). Such mitigation pathways are characterized by energy demand reductions ...”

LORD JUSTICE STUART-SMITH: Forgive me, the high confidence, is a reference to the statement before, is it?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: That is a statement that is made with high confidence.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And I think that it is above 66 per cent to be high confidence. I believe that that is the case. Some of this is very difficult, because it involves complex----

LORD JUSTICE STUART-SMITH: Do not get distracted by that.

MISS SIMOR: I think 66 per cent is considered high confidence. We will check that.

LORD JUSTICE STUART-SMITH: That is an interesting point in the context of this case.

When I say “do not worry about that”, I meant implicitly saying the qualitative assessment of high confidence is more important to me than the 66 per cent. But you should not read anything into that at all.

MISS SIMOR: This is not at all qualitative, because what the IPCC did was it took 80 scenarios. Some of those scenarios included scenarios where basically you could pretty much carry on using fossil fuels, because technology has developed so much that you could get the carbon out. It is very complicated. I have spent too much time trying to understand it and I am not very good at maths and I have not succeeded, but this is scientific. This is accepted science.

LORD JUSTICE STUART-SMITH: Well, you know that we will come back to this when you have departed for other things and we are trying to put a judgment together.

A MISS SIMOR: So we have the emissions and other fuels, electrification -- That is all I wanted to go to on that. Then 91, the top three, just the three bolds, under Future Emissions in 1.5°C Pathways. Mitigation requirements” - mitigation means reduction, effectively.

“Mitigation requirements can be quantified using carbon budget approaches that relate cumulative CO2 emissions to global mean temperature increases.”

B So there is a strong understanding that there is a direct correlation that the causative -- it is not even correlation, it is causation.

C “Cumulative CO2 emissions are kept within a budget by reducing global annual CO2 emissions to net zero. This assessment suggests a remaining budget of about 420 GtCO2 for a two thirds [66%: oh, it is medium confidence] chance of limiting warming to 1.5°C and of about 580 GtCO2 for an even chance ...”

D So 66 seems to be high confidence and then, if you have 580 gigatonnes of CO2, you get an even chance and that is medium confidence, 50:50.

Then the next one,

E “Staying within a remaining carbon budget of 580 GtCO2 implies that CO2 emissions reach carbon neutrality in about 30 years, reduced to 20 years for a 420 GtCO2 remaining carbon budget ...”

So, if you narrow the budget, you reach net zero more quickly, which I suppose is obvious.

F Then, pp.94 to 95, this is what I tried to explain to you. In the second column, starting with “a large number of scenarios”, just under the bullet,

G “A large number of these scenarios were collected in a scenario database established for the assessment of this Special Report Mitigation pathways were classified by four factors: consistency with a temperature increase limit (as defined by Chapter 1), whether they temporarily overshoot that limit [so the idea of bringing back the carbon] the extent of this potential overshoot, and the likelihood of falling within these bounds.”

H So they took those 80 scenarios and they put them into four classifications.

Then at the bottom of that column,

A

“The comparison of these lines of evidence shows high agreement in the relative temperature response of pathways, with medium agreement on the precise absolute magnitude of warming, introducing a level of imprecision in these attributes. Consideration of the combined evidence here leads to medium confidence in the overall geophysical characteristics of the pathways reported here.

B

In addition to the characteristics of the above-mentioned classes, four illustrative pathway archetypes have been selected and are used throughout this chapter to highlight specific features of and variations across 1.5°C pathways ...”

C

LORD JUSTICE STUART-SMITH: Forgive me, where are you now?

MISS SIMOR: I am sorry, I am at the bottom of 94, the last two lines,

“ These are chosen in particular to illustrate the spectrum of CO2 emissions reduction patterns consistent with 1.5°C ...”

D

And then the next page,

E

“ranging from very rapid and deep near-term decreases, facilitated by efficiency and demand-side measures that lead to limited CDR [that is carbon dioxide removals] requirements, to relatively slower but still rapid emissions reductions that lead to a temperature overshoot and necessitate large CDR deployment later ...”

Then you see in the box above the scenarios they considered. And the middle one, “OS” means low overshoot.

F

“Pathways limiting median warming to below 1.5°C in 2100 and with a greater than 67% probability of temporarily overshooting ...”

G

So these pathways have -- if we now go to 99, we just read under the title “Remaining 1.5 ° carbon budget”, at 2.2.2.1, “Since AR5” -- I have mentioned AR5, that was the 2014 assessment, so it proceeded Paris and led to Paris or was connected with Paris.

H

“Since the AR5, several approaches have been proposed to estimate carbon budgets compatible with 1.5°C or 2°C. Most of these approaches indirectly rely on the approximate linear relationship between peak global mean

temperature and cumulative emissions of carbon (the transient climate response to cumulative emissions ...”

A And I think that I said that at the beginning of my submissions, that there is a direct or
approximate linear relationship between how much carbon you put up and how much
temperature rises. I am not going to say much more on this, save that the pathways are here
B in this report and then developed in the UNEP report. Obviously, it is a technical field to
assess against those pathways and we were shown how it should be done, albeit that there are
many methodologies. We are not saying there is a specific methodology.

LORD JUSTICE STUART-SMITH: When you refer to “UNEP report”, are you referring to tab
5 or tab 6?

C MISS SIMOR: I am. I will come to it as well. So the defendants’ case, I am going to turn to, we
say that none of this should be in the slightly bit contentious, but, extraordinarily, in the
detailed grounds of defence, the defendants say there are no published budgets for the Paris
Agreement and that is core bundle 1, tab 2, p.88. That is continued in the skeleton at para.69
D of the skeleton and para.67, as well. They do not even try to show that this project falls
within the carbon budget. They deny the existence of any budget at all.

E As to the UNEP and IPCC reports, in 71 to 72 of the skeleton, they say that neither of those
reports were so obviously material that it would have been irrational not to have taken them
into account. We disagree. Indeed, it is surprising that they should say this when that
document itself is referred to in -- at least the IPCC report is referred to in their draft
framework as one of the documents.

F These were crucial documents without which no relevant assessment could have taken place.
You could not have analysed pathways without considering them. And, interestingly -- well,
I have already shown you that the UNEP report is referred to also in *Urgenda* and I think that
I asked you to sideline that. But it is also referred to in the UK Government’s document on
climate finance. I am just going to give you the reference at supplementary authorities
G bundle tab 7, p.159, and then in its CBC document, and the CBC you will recall ended
funding for unavailable fossil fuels on 1 July 2020. That is the day after this decision. That is
at supplementary authorities bundle tab 10.

LORD JUSTICE STUART-SMITH: Do you want us to go there?

H MISS SIMOR: Yes, please. It is p.186. You will read on p.184, “The carbon budget”. Then
186, “Overview”.

A

“Since the Paris Agreement came into force, extensive work has been undertaken by the Intergovernmental Panel on Climate Change and others to set out the types of global GHG emissions pathways required to achieve the Paris temperature goals. This evidence provides a critical basis for considering whether, and in what circumstances, infrastructure such as natural gas power plants can be considered consistent with global temperature goals.”

B

LORD JUSTICE STUART-SMITH: So this is December 2020?

MISS SIMOR: Yes. The law did not change. Then we have consideration of the IPCC’s special report on the rest of that page. I do not have time to read it. Then, if we go to 190 -- perhaps actually 188. You will see at 2 and 3,

C

“the small remaining global carbon budget and rapid reduction in global emissions required for 1.5°C implies a globally limited role for new gas plants over the next two decades, with gas plants transitioning over time from providing baseload and mid-merit power to providing peaking capacity and system services. The timing of the transition depends on the individual starting point and the broader potential of each individual country. This, in turn, suggests gas plants without CCS can only be considered as ‘Paris-aligned’ if they are the only viable option for providing essential supply and system services in a context where low carbon technologies are being pursued alongside a clear shift away from higher carbon fossil fuels [and they are talking about specific countries] ...

D

E

Transition risk – ... transition risk must be considered .. [etc.]”

F

So we are not saying that a particular methodology had to be adopted -- I have not gone to 190, sorry. I need your Lordship to go to 190. There you see it set out, “Compatibility with Paris-aligned decarbonisation pathways”. But you will no doubt want to look at that document in some more detail.

G

There is no climate science that does not use carbon budgets. It is notable indeed that the CDC, and if we can go to tab 5, p.144 and 145.

LORD JUSTICE STUART-SMITH: Mr O’Donohoe?

MISS SIMOR: Yes. And you will see there in the second column last line -- well, the second column, second paragraph:

H

“So what does that mean in practice? [This is alignment with Paris] Like any investor, we need to operate within the remaining global carbon budget to limit ...

A So the CDC recognised that, the middle column, second paragraph. Then the last paragraph,

“Crucially, we will not make new investments – either directly or through a fund – in fossil fuel sub-sectors that we have classified as misaligned with the Paris Agreement.”

B
LORD JUSTICE STUART-SMITH: What relevance to your submissions is there if we were to accept that the project is going to go ahead anyway and, therefore, the decision at best makes no difference to emissions?

C MISS SIMOR: We say that that is incompatible with the United Kingdom’s obligation under 2(1)(c) and its duty of good faith and its duties to developing countries in relation to Articles 4, 3 to 5 and 9(1) of the Paris Agreement.

D LORD JUSTICE STUART-SMITH: Shall I take the answer to my question as you say that it makes no difference?

D MISS SIMOR: It makes no difference.

LORD JUSTICE STUART-SMITH: That is quite a surprising proposition in the context of this sort of decision.

E MISS SIMOR: No, my Lord, it is not, because the requirements and needs of Paris are that Government -- the entire financial system changes. It is one of the core parts of Paris and it is one of the changes from Paris as compared with UNFCCC and Kyoto. It is the realignment of the whole financial system so that it does not go into developments that increase emissions or are in misalignment, I should say, with the low emissions pathway. It does not fit either with the Government’s view of the law, because the Government itself, and I am going to take you to that, now, in the context of UKEF, is talking about decarbonising its portfolio and what it explains in its document is that it is effectively going to disinvest so that its portfolio becomes net zero and, therefore, it is going to look at the scope 3 emissions of its investment which is also what banks are doing more and more, but, of course, only the state is directly bound by the Paris Agreement. So we are talking about legality here rather than would it practically make a difference? And that legality is specifically recognised by the Government in terms of its accounting for scope 3 emissions of its investments.

G
LORD JUSTICE STUART-SMITH: Yes. I may not have needed to ask that question, because I think that your answer is consistent with the answer that you gave yesterday afternoon.

H

MISS SIMOR: I hope so.

MRS JUSTICE THORNTON: And is that analysis of Paris, in terms of the realigned to finance, do you say that that is on any interpretation of Paris a tenable or a correct interpretation?

MISS SIMOR: Our interpretation we say is correct. We do not know what the---

LORD JUSTICE STUART-SMITH: It is standard. If this court is going to interpret Paris, do you say the way in which we should look at Paris is whether the defendant's interpretation is tenable or we must arrive at our own interpretation or are you going to come to that?

MISS SIMOR: I will hopefully have time. We say that for the purposes of our succeeding in this case, it does not matter, because their interpretation is not tenable, but we say in law the correct approach is for you decide what the law is, not whether -- "They might be wrong, but we think that it could be right". We say that your role and function under the case law is that you determine the law. But we also say in relation to that that we have still not had any interpretation by the defendant. The only interpretation that we have had - and I was going to take you to all the references - is Paris does not really mean anything. It is a political declaration with people sort of getting together to discuss things, its aspirational, it is vague. Now, we say that is not tenable. I opened that and I did not actually go further.

LORD JUSTICE STUART-SMITH: We looked at p.144.

MISS SIMOR: I am terribly sorry to take you back to it, tab 5 -- but this is important because this is the Government's understanding of the Paris Agreement. It is all very well the defendant saying things in front of this court, but in the end this is what the Government says that the Paris Agreement means.

LORD JUSTICE STUART-SMITH: And the date of this?

MISS SIMOR: This is also December -- it may not be December, it may be a little earlier. Sometimes these documents are not dated. It is quite irritating.

LORD JUSTICE STUART-SMITH: Okay. Well, leave it for now.

MISS SIMOR: Anyway, on 1 July the CDC stopped funding fossil fuels, so the day after the decision. Then 149 -- so 146, "We will operate within the remaining carbon budget". That is the second heading. Then 149, we get the point, "Decarbonising our portfolio". So accepting responsibility under Paris for the emissions of projects they invest in and what does this mean in practice? That is on the next page, 150.

"We are currently baselining our portfolio emissions this year and will use this to develop a carbon budget and roadmap to net zero emissions ..."

A Now, this is the CDC. It is still UK financing under Paris and, of course, the Paris Agreement does not care whether it is CDC, ODA or UKEF. It is all UK financing. It is July 2020. So this perhaps was released on 1 July, the decision was finally made on 13 June in our case.

Then p.155 in the next tab, “*Gas*: standalone upstream gas exploration and Production” - misaligned with Paris.

B LORD JUSTICE STUART-SMITH: Where are you?

C MISS SIMOR: It is p.155 and it is the far left column, the bright red, traffic light red, “standalone upstream gas exploration and Production” - misaligned. Then you will see in the middle column some more conditional points about gas. “... we will only pursue investments in gas-fired power stations and gas midstream projects”. So that is power stations rather than actually taking more gas out of the earth and they are going to apply a particular tool to assess whether that can be done. So that is the use of gas rather than an exploration and development of gas fields.

D The same applies in the clean-growth strategy which actually makes clear that the UK invented carbon budgets. We should also say that it is for the United Kingdom or the defendants to show that the emissions from this project would not exceed the global budget and, if I can take you to the *Sharma* case, that is in authorities bundle 4, tab 56, p.2825.

E LORD JUSTICE STUART-SMITH: That is another nice short Australian authority.

MISS SIMOR: Sorry.

LORD JUSTICE STUART-SMITH: Another nice short Australian authority.

MISS SIMOR: Yes, very diligent.

LORD JUSTICE STUART-SMITH: It is a national characteristic.

F MISS SIMOR: Then, if you could just mark 83 right through to 88, and I just want to go to 85 to 87,

G “The Minister sought to challenge that submission in a number of ways. First, the Minister characterised the applicants’ case as dependent upon demonstrating that the 100 Mt of CO₂ from the Extension Project would be emitted outside the available budget of emissions necessary to meet a 2°C target. The Minister contended that it is likely that the 100 Mt of CO₂ would be emitted compliantly with the Paris Agreement and thus within a lower than 2°C target.

86 Putting aside ... [etc.] ... The Minister called no evidence. The Minister essentially contended that the Court should infer that the 100 Mt of CO2 would likely be emitted in accordance with the Paris Agreement. There is no sufficient basis for that inference. The Minister relied upon little else than speculation, in circumstances where the evidence showed that at least one of the potential consumers of the coal is not a signatory to the Paris Agreement.

87 Further and in any event, there is evidence before me which tends to support the proposition that the 100 Mt of CO2 will not be emitted as part of the available carbon budget necessary to achieve a 2°C target. Professor Steffen's opinion was that it was 'obvious' from the carbon budget analysis, that "no new coal mines, or extensions to existing coal mines, can be allowed. There can be no doubt that in making that statement Professor Steffen had the Extension Project in mind."

LORD JUSTICE STUART-SMITH: Professor Steffen, did we not see his name in the last Australian case? He clearly has a sort of presence in this.

MISS SIMOR: Yes. Well, he is a world-leading expert. We, in fact, have the witness statement that he produced for this case. We did get a copy of it, but we do not know -- we have been trying to find out whether we are allowed to adduce it in this court, not because of this court, but because of that court. So far we have not had an indication as to whether we are allowed so. So it has been shared with us, but we cannot, I am afraid, at this stage give it to you.

LORD JUSTICE STUART-SMITH: Which I think adds up to the fact that he is an extremely "expert expert", but we do not have any evidence from him.

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: My point in relation to this is that it is for the Government to show, not to speculate, but at least to apply some methodology to actually show that this LNG will be emitted within the remaining global budget that I have shown you, as assessed in the IPCC report. And it has not done anything close to that. Indeed, it denies the existence of budgets.

So I am going to wrap up grounds (c) and (d) of 1B in our skeleton as quickly as I can to try and move on to the other ground. They are 92 to 107 of our skeleton. But I think that I do need to deal with it briefly.

SIR JAMES EADIE: I am sorry, just before my learned friend moves on, can I just invite you to note the context and the nature of the claim that was being made in relation to that Australian case you have just seen?

LORD JUSTICE STUART-SMITH: All right.

SIR JAMES EADIE: As you may have picked up from the judgment, it was a negligence claim.

There was a great long section about whether a duty---

LORD JUSTICE STUART-SMITH: We will come back to that. Thank you.

MISS SIMOR: Yes, that is important. The *Sharma* case concerned a claim that harm was being done to people in Australia, I think it was, as a result of these global emissions, and one of the big questions was causation, that, if you chuck something -- it was quite similar to *Urgenda* in that way. If you put it up into the world and it causes harm locally, how can you even connect it?

LORD JUSTICE STUART-SMITH: That is fascinating. Fortunately, I do not think that we have to deal with it.

MISS SIMOR: It is very difficult, but now established in Holland as something you can do, although done through human rights rather than directly, so it is indirectly in relation to Paris.

LORD JUSTICE STUART-SMITH: Right. Now you want to go back to round off your submissions on ground 1, do you?

MISS SIMOR: Yes. I want to go to (c) and (d) of my skeleton, 92 to 107 of the skeleton. I do just want to remind myself of it. (pause) This really is about the analysis or the findings in the climate change report regarding emissions. I want to make three points. First of all, Wood MacKenzie, as I have already said, did not carry out a climate assessment report and you will have read the criticisms of that report in Mr Muttitt's 37 to 38. It looked at potential displacement of greenhouse gases and I showed you the scope of works. However, I actually have not shown you Wood MacKenzie.

LORD JUSTICE STUART-SMITH: Well, I think you can take it that we have read it.

MISS SIMOR: Good, and you will have read it in the context that it effectively slides -- it says 2°. You will read all the detail of exactly what it says that it is doing. Certainly, it provided no basis for the conclusion reached in the CCR that the mid-case scenario was most likely. In fact, we say that it did precisely the opposite. We say that Wood MacKenzie said that you cannot reach any conclusion, and those are the terms of its report. It is a conditional report. It says that it could potentially displace carbon in China. It takes the highest-emitting scenario and a lower-emitting coal plant. And that is what it does. But it absolutely does not conclude that there was any evidence or basis for taking the mid-case scenario taken by the defendants.

A Now, quite apart from the fact that the concept was methodologically flawed, in terms of looking at displacement, we have seen that from Ben Caldecott and Mr Muttitt that the SDS was very out of date. What we say is extraordinary is that the climate change report effectively rejected Wood MacKenzie. It did not state that “Wood MacKenzie has told us we cannot take a view”, it, instead, took a view - and we say that it concluded - that there would be a net reduction. Obviously, we discussed that this morning.

B Now, Mr Griffin in his statement at para.44, p.211, state that,

C “Whilst the Wood Mackenzie Report was a useful input for UKEF’s consideration of climate change in its decision making relating to the Project, it did not cover all matters we thought relevant and so we decided it was most useful for UKEF to prepare dedicated climate change report that could be submitted to the Accounting Officer as part of the due diligence process, mirroring the practice of the ESHR reviews. The information provided by the Wood Mackenzie Report was fed into the CCR together with information gleaned from the other lines of enquiry ...”

D And that information is set out in para.55 of his statement. We say that not one of those pieces of information provides any evidence that there would not be a net increase in emissions or that it would be within the global budget or that there would be an overall net reduction. We can start with the US EXIM where we can find the relevant emails and that is in supplementary bundle p.624. They are asked for help on due diligence and that starts at E 624 and feeds back to 623. Eventually it is provided, but it is explained that there was not effectively a climate change due diligence and, of course, the US was outside Paris at this time. It is very difficult to read. I do not know whether your is better than mine.

LORD JUSTICE STUART-SMITH: I am looking at p.623?

F MISS SIMOR: Sorry, 621, this is the final response. You will probably want to read back in the thread before.

LORD JUSTICE STUART-SMITH: Are we looking at the email stating, “My apologies for the delay”?

G MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR:

H “To be upfront we did not produce a separate document regarding CO2 emissions. Our work product consists of technical and E&S Board Memos, which are presented to our Board with the rest of the EXIM staff document

A

packages. So our documentary CO2 analysis is found in them. We also answer questions and do further research as requested by our Board members during the pre-board briefing process, and CO2/coal was one of the requests. We used two methods to determine Project CO2 equivalent emissions in tonnes CO2eq/year. This is a mandated calculation in accordance with EXIM's Charter and Policies."

So they did actually work out scope 3.

B

"First we compared this project to historical and concurrent projects in our portfolio with similar technologies, and scaled against LNG output. The second method used the IFC Carbon Emissions Estimation Tool ... This was the last edition of this tool, and, whilst outdated, still provides a conservative estimate. Both agreed reasonably well.

C

The second analysis we performed was focused on coal displacement as a proxy for CO2 emissions. The initial ask [the Board] was an analysis of how many coal plants would be closed and replaced with LNG plants fuelled by this project, and the net reduction in CO2."

D

So how are we actually reducing emissions globally?

E

"We used China as a proxy for the region into which the gas will be delivered. We quickly realised, given the growth of that market, it is unlikely that coal plants would shut down simply to replace them with LNG fired plants. As such we focused on future coal use. We used data from the US Energy Information Agency International Energy Outlook 2017 ... "

F

The 2019 was released too late to include the Board approval process, so they used the old one. "This report projects energy production ..." Then you get some figures. So they did not actually -- they did it in terms of forward use not actually reduction. And they made the assumption that all growth energy would be coal. So they assumed that, instead of coal being developed, albeit an increase in energy, LNG would be used (i.e. there would be no net reduction).

G

We then turn to the AfDB's approach which is another thing that Mr Griffin says they relied on. You can find this at p.625 of this document. If you just go to 625, first you will see they rely on the 2018 World Energy Outlook Report.

LORD JUSTICE STUART-SMITH: Forgive me, think that I must have misheard, supplementary bundle----

H

MISS SIMOR: 626.

LORD JUSTICE STUART-SMITH: Which starts with a nice redaction.

A MISS SIMOR: Yes. So this is the other thing that Mr Griffin says is relied on, although, oddly enough -- well, I suppose it does not really matter. But, anyway, it refers to the World Energy Outlook. You will recall that Mr Caldecott put a comment next to that saying “Seriously out of date” in reference to this. Then the next page, 627, the third bullet,

B “The SPAs signed in this operation suggest that most of the cargos will be directed at the Asian market, where a number of governments are currently undertaking active decarbonization efforts. It is expected that a significant quantum of the gas commercialized by this Project will help reduce reliance on coal-based power generation (i.e. China, India) and serve to support the process of substitution away from coal. As a point of reference, given that an estimated one-third of all CO2 emissions today result from coal-based energy, and given (i) above, if we were to substitute all coal-based generation by natural gas, we would achieve a global net reduction of CO2 of about 20%.”

C I mean, that is not a basis for making any assessment at all, if we were to substitute all coal-based generation by natural gas. Then, just to turn over to 628 for the two trains point, the last bullet down,

D “The Project will initially construct 2 LNG trains aiming to be operational from the 2024-2025 period; but has potential to expand to 6 trains. The ESIA studies provide an estimate of the potential annual emissions for 1, 2 and 6 LNG trains.”

E Then the other document referred to you will find at 658, para.3.33. If you can just sideline that. It does not have anything to do with this, because it is about the effect on the project.

LORD JUSTICE STUART-SMITH: What is 658?

F MISS SIMOR: It was referred by Mr Griffin, it is part of the AfDB documents, I believe.

LORD JUSTICE STUART-SMITH: And the relevant paragraph is 3.33?

G MISS SIMOR: Yes, and then again at 689 -- no, these are the RINA documents. They are another document set out by Mr Griffin in that paragraph and 689 is climate change, but, again, it has nothing to do with scope 3 emissions. It is all about scope 1 emissions.

LORD JUSTICE STUART-SMITH: Okay. Do you want us to read those references in what is sometimes called “our leisure”?

MISS SIMOR: Well, they are referred to, so, insofar as they are referred to -- 766 is the next one.

H LORD JUSTICE STUART-SMITH: And your point on 698 is that that is talking about scope 1 and not scope 3, is it?

MISS SIMOR: And 766 is actually the RINA document. That is at para.3.53 and that has nothing to do with it either.

A I took you to the clear warning by Mr Murton -- did I, COP? No, perhaps I have not actually taken you to that. This is at CB2, p.293. This is a warning from John Murton, who is export promotion in Africa and energy, now co-ordinator in diplomacy, COP26. As we understand it, it is a record of a phone call with, I believe, Joe Shephard of UKEF. It may not have been.

B It is certainly somebody in UKEF. I take you to this because it shows that internally even as at 10 June it was not -- the analysis that had been done was not accepted.

This is just a note of the call, there is nothing --

C “main areas - inconsistency in the business model used and the climate matters a lot of modelling out there that the levels of price are not consistent with Paris only so much Co2 can [I suppose to be sold at that price] ... more oil will be exploited than keep below 2C not doing enough ... [etc.]

D have taken huge accounting knock downs to take account of Paris - taking account but all the assumptions in the business plan are not aligned with Paris modelling not correctly the likely markets for gas - got to have likely trajectory of carbon pricing & related, good accurate modelling on pricing for renewable energy [this is all transitional lock-in, stranded assets stuff] - solar & wind costs going down rapidly - really powerful now renewables ... battery storage ... [etc.] gas to displace coal - but is in fact renewables [so that is the undercutting the Paris objective] - ... displace up-take of renewables [so it stops the uptake of renewables gas, it is no longer considered a transition fuel]. ... - UKEF is current business model prejudice against renewables ... [and then further down] renewable projects tend to be smaller - disaggregated model - smaller units ... [etc.]

F UKEF role in putting finance in where other finance is hard to come by...”

That is also a point, my Lord, in relation to the question of, well, does it make a difference anyway? And that is the whole point in Paris, that private banks are less and less willing to fund this stuff, because of the transition and stranded assets risk. It is the countries that step

G in and that is why EBRD, World Bank, CDC and now UKEF and many others - the Scandinavians - had already removed this funding. Then

H “Stock models ... can check if the financial modelling and see if Paris has been taken into account.”

A So he is obviously not convinced. Unfortunately, it is not a very good note. At the bottom, “can help with TCFD and be a bit more rigorous and COP unit can help.” Unfortunately, it was a little bit late, but not too late for the final decision. It was just by then the Secretary of State for Trade had not made any decision. I suppose she could have revoked it, potentially. There were plenty of warnings internally that this had not been done properly.

B Now, in light of the fact that it is 12, I am going to just going to skip over the two trains point, the stranded assets point and the transitional risk point.

LORD JUSTICE STUART-SMITH: Well, you have covered them in your skeleton.

C MISS SIMOR: The skeleton is pretty detailed. If there are additional references, we have not put in there, perhaps we will hand up just a note with references and nothing more. I know that you have got a lot to deal with.

D I am going to then go to ground 1A. I am going to deal first with the error of law challenge. Under this ground, we say that the defendants erred in considering that the granting of finance to this project was consistent with the United Kingdom’s obligations under the Paris Agreement to align all financial flows with a low-emissions pathway and to assist Mozambique in achieving and augmenting its commitments under the Paris Agreement. You find that ground set out at core bundle 1, p.23, 76 to 106 of our grounds, and para.38 onwards of our skeleton.

E Now, the crucial starting point for this ground is that the defendants took their decision on the basis that the project was consistent with the low-emissions pathway and sustainable development in Article 2(1)(c) and that, accordingly, UKEF financing was in accordance with the United Kingdom’s obligations under the Paris Agreement.

F Secondly, that the provision of finance to Mozambique would assist Mozambique to meet its commitments under the Paris Agreement and to augment those commitments such that it was compatible with the UK’s obligations to assist developing countries to meet and augment their NDCs.

G I put references to the defendants’ statements to that effect. They are basically paras.75 of the detailed grounds of defence and we set them out in para.43 of our skeleton. You have

also seen the conclusions in relation to the Paris Agreement that are set out in the CCR. I have taken you through that.

A We say that the conclusions in that report were first that it was consistent with the UK's obligation under the Paris Agreement to assist developing countries meet their NDCs because it would help Mozambique since, one, it would provide for energy transition - gas as a transition fuel in line with NDC - and I note that that is not what the climate change report said in its first two drafts. Two, later peaking of global emissions in developing countries are allowed. That is core bundle 2, p.56.

B And, three, without finance from fossil fuels it is unlikely that Mozambique will have the money to pay for renewables and that is core bundle 2, p.269.

C Secondly, that it was also consistent with the UK's obligation to make all finance flows consistent with a low-emissions pathway, as provided in 2(1)(c). That is core bundle 2, p.275 to 277. We say that -- it says that it was done on the basis that there was some net reduction in emissions and, therefore, alignment with the 1.5° pathway.

D Now, it may be that the position either was not that or -- well, that the position was misunderstood in relation to that. In which case we need to understand how it was in alignment with the low-emissions pathway, because, of course, it is easy to understand why a net reduction in global emissions is in alignment with the low-emissions pathway, but it is much more difficult and complex to understand why an increase in global emissions, albeit a potential net displacement of future growth, is also in alignment with the low-emissions pathway.

E LORD JUSTICE STUART-SMITH: Your submission I think is that, in order to determine whether something is in alignment with the global emissions pathway, one needs to take a global view and understand exactly how this particular project fits into the global pathway.

F MISS SIMOR: You will have seen at the top of the minutes of 7 May, when Ben Caldecott was explaining -- unfortunately, it is very crunched the explanation, but he explained that you take the project, you look at the budget for that sector, you look at the pathway for that sector and you consider whether you can fit within that.

G

A Now, I cannot explain that to you because that is something that is done by experts. But what I did understand, originally, from the detailed grounds and the climate change report, I did understand that the argument was being made that, overall, this will result in a net reduction. Therefore, it is in alignment. Now, that I can get my head around. What I cannot get my head around is it was still in alignment even though it will result in an increase in global emissions.

B LORD JUSTICE STUART-SMITH: Okay. But, in principle, the recognition that developing countries are going to peak later and the recognition of the potential inequities that arise must allow for the possibility that an individual country's global emissions will increase.

MISS SIMOR: My Lord, we say "no".

LORD JUSTICE STUART-SMITH: You say "no".

C MISS SIMOR: We say "no".

LORD JUSTICE STUART-SMITH: Okay.

D MISS SIMOR: We say in relation to 4.1 that the peaking of emissions in that context relates to national emissions. So the United Kingdom when it accounts for its emissions does not account for the emissions of its sold North Sea oil or gas. That is not part of its nationally - as far as I understand, I will be corrected if I am wrong - but, as far as I understand, when the United Kingdom accounts to the UN for its emissions, it does not put in that account the scope 3 emissions from fuel it has sold to other countries.

MRS JUSTICE THORNTON: So how does that help us in this context?

E MISS SIMOR: Because, I believe that my Lord's point was that poorer countries are allowed to peak later under Article 4.1 of Paris and, therefore, they must be allowed to take stuff out of the ground and sell it: that must be included in what is meant by peaking in 4.1. And we say that that is not what is included in peaking in 4.1. What is included in 4.1 peaking is national emissions, so what----

F LORD JUSTICE STUART-SMITH: Scopes 1 and 2?

MISS SIMOR: Yes, so what you are allowed to do is you might -- so in countries that are very undeveloped, like Mozambique, where-----

LORD JUSTICE STUART-SMITH: So where -- I am so sorry, I interrupted you.

G MISS SIMOR: No, no, I am going on. I mean, countries that have very low energy use, like Mozambique or India. People who do not actually have electricity. What it is accepting is that those countries are entitled to develop in terms of energy. What it is not accepting is that a country that finds vast reserves can take those reserves up.

H

LORD JUSTICE STUART-SMITH: So where are scope 3 emissions covered in the Paris Agreement?

A

MISS SIMOR: Scope 3 emissions are not covered in NDCs and I believe we agree on that.

LORD JUSTICE STUART-SMITH: But does that mean that----

B

MISS SIMOR: Sorry. What I said was wrong. It is not that they are not covered. Scope 3 emissions are emissions that are not directly from your product, so they are covered. In fact, I found the 2009 DEFRA report for accounting for scope 3 emissions. So, if you are a farmer and you sell some product, you still have to account for the use of that product. So there is accounting but, when it comes to the -- The issue here is exports, essentially.

C

MRS JUSTICE THORNTON: Sorry, just to get this in context, and I understand where this debate is going, is your point that, when Lord Justice Stuart-Smith said that it is okay for emissions to go up, they can still be aligned with Paris (i.e. this project) even if the emissions went up, you were saying, “no”, because this is a global project and Mozambique is only allowed to increase its emissions nationally not in respect of a project of which 95 per cent is going to be sold globally. Is that the context of the debate?

D

MISS SIMOR: Sort of yes, sort of. It is not that Mozambique is not allowed to. It is not that Mozambique is not allowed to do this. Mozambique has its NDC. It should comply with its NDC but, actually, it is a conditional NDC, so it is not -- we are not really concerned with Mozambique. Let us take the United Kingdom. It develops another oil field in the North Sea. Insofar as it exported that oil, the emissions from that exported oil would be accounted for by the country that uses that oil. The United Kingdom would not account for them. So Mozambique does not account for the LNG that it exports. It is not part of its peaking. It only accounts for the LNG that it uses.

E

LORD JUSTICE STUART-SMITH: So scopes 1 and 2.

F

MISS SIMOR: Yes, except it is using 5 per cent.

LORD JUSTICE STUART-SMITH: So your submission is that----

G

MISS SIMOR: Yes, but it is not just scopes 1 and 2, because scopes 1 and 2 are the infrastructure that brings the stuff up. It is the factory. It is the LNG plant. Scope 3 are the boilers in the Mozambiquans' houses.

LORD JUSTICE STUART-SMITH: So, to the 5 per cent that is kept in Mozambique----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- those scope 3 emissions you say are - are they covered by the peaking later?

H

MISS SIMOR: Yes. And that is the whole point.

A LORD JUSTICE STUART-SMITH: Okay. So the 95 per cent, what you are actually saying is in circumstances where you do not know, because of the nature of these framework contracts -- because you do not know where the -- or despite the fact that you do not know where the gas is going to go and where it is going to be used, you have to assume that it is going to lead to an increase in overall global emissions or what?

B MISS SIMOR: So what they have to do -- the UK under 2(1)(c) is doing two things. It is looking both at global emissions, under 2(1)(c), which is the emissions pathway, which is the point in *Sharma, Gloucester Resources* and *Urgenda*, but you cannot just say, "Oh, it is only a bit". You have got to look at the entirety of the emissions and you have got to determine whether those emissions will fall within the remaining global budget and the low-emissions pathway, for the purposes of finance flows.

C Then the second point is Mozambique. So Mozambique has its own NDC and what it does is bore it, essentially, but what the United Kingdom has to do it has to consider Mozambique's NDC and consider what its NDCs would want to be in five years and ten years and 15 years, according to the ratchet effect, so how it is going to increase its commitments to reduce
D emissions. And it has to ask itself whether financing this project will assist Mozambique to both meet its NDCs and augment them. The answer to that is obviously "no", because the answer to that is that what this will do is lock Mozambique into fossil fuels and that the way to assist Mozambique to meet its commitments and augment them is to finance renewables or
E give technology.

LORD JUSTICE STUART-SMITH: Would a fairer way of putting that be to say that it runs the risk of lock-in while, from what we understand from Mozambique, providing them with the finance to transition to greener energy?

F MISS SIMOR: I would say that it would be fairer on our evidence -- our evidence is that it is not a sensible way and that it will cause lock-in, but I would certainly say that there is a high risk of lock-in. So I do not think -- it is an evidence-based discussion and, unfortunately, we do not have the evidence. We simply have the criticism of the lack of evidence, including by the
G internal expert for UKEF, who says, "Where is the evidence? Where is the plan?" Then we have John Murton, the diplomat that I just showed you, talking about all the transaction risks and the lower costs of renewables.

H LORD JUSTICE STUART-SMITH: Speaking entirely for myself, I think that I would find it helpful, because I do not want you to feel pressure by time more than is necessary, I think that I would find it helpful if you, the claimant, could say by fairly early tomorrow morning,

by which I do not mean outrageous, but before start of play -- could put onto a sheet of paper your explanation of how scopes 1 and 2 and -- scopes 1 and 2 and domestic, what I am going to call domestic scope 3, on the one hand, and what I am going to call international scope 3 are affected by Paris.

A
MISS SIMOR: Yes.

B
LORD JUSTICE STUART-SMITH: I think that I understand -- at the moment, I am hanging on by my fingernails, but I think that I understand your submissions on scopes 1 and 2 and domestic scope 3. That is caught by 2(1)(c) or its governed by 2(1)(c). The area which in my mind is a complete fog, and it is probably my fault, is how one looks at the acknowledgement that different countries will peak at different times and what you have called the potential injustice, and how that works for the different scopes, dividing the scopes as I think we now have.

C
MISS SIMOR: I fear that it is actually me who has caused the confusion. I should not really have -- there is a much simpler way of looking at this.

LORD JUSTICE STUART-SMITH: Okay.

D
MISS SIMOR: And that is, internal use, national use, and exports.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: NDCs cover national use.

LORD JUSTICE STUART-SMITH: Internal use?

MISS SIMOR: Yes. So they measure what a country uses, scopes 1, 2 and 3.

E
LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: Exports are not part of national use.

LORD JUSTICE STUART-SMITH: No, so, if they sell some liquid natural gas to us and we burn it, then it comes into our projections and so on.

F
MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: All right.

MISS SIMOR: So the 25 per cent of this LNG, which is coming to Europe, will form part of European countries' NDCs. So it will be accounted for in that way.

G
LORD JUSTICE STUART-SMITH: And will be subject to the downward pressures of which those countries use.

H
MISS SIMOR: Exactly. And that is why there are things like -- that is why there is a risk of stranded assets because, as countries push down the entitlement to burn gas and push down their emissions, there will be an increasing excess -- there is already an excess, we know from the UNEP production gap, but there will be an increasing excess and stranded assets

will derive from the fact that that excess becomes unassailable and the assets become stranded and Mozambique potentially is in debt distress.

A

LORD JUSTICE STUART-SMITH: I think we understand the sort of concepts of lock-in (inaudible) debtors.

B

MISS SIMOR: But I need to make very clear that 2(1)(c) is aimed at global emissions. So what 2(1)(c) is concerned with is the entirety of this gas, both the gas produced by the plant, the methane leakage, which is nowhere accounted for or even considered by the defendants, and the scope 3 use of the gas. So that is the cumulative impact of this project over 30 years on the remaining carbon budget that we have before we hit 1.5°.

C

LORD JUSTICE STUART-SMITH: So, although we are now helpfully dividing between let's call it domestic and international, you say that 2(1)(c) applies to both.

MISS SIMOR: 2(1)(c) is how are changing our financing so that you do not finance projects that increase emissions, they must now be on a downward trajectory, according to the paths set out in the IPCC, in order to hit net zero in 2050, which is the global aim? It has been suggested that you go to our skeleton, p.11, p.4 of the quote. I believe that is from our witness statement, is it? It is about the emissions and production excess.

D

LORD JUSTICE STUART-SMITH: Could you give me that paragraph reference?

MISS SIMOR: It is para.31 of our skeleton, where we have set out a chunk of the production gap report that I had hoped to be able to take you to.

E

LORD JUSTICE STUART-SMITH: Para.31 of your skeleton starts, "UNEP".

MISS SIMOR: Yes, "UNEP". It is the production gap report.

LORD JUSTICE STUART-SMITH: Okay.

F

MISS SIMOR: So this is my point about how production is already in excess of what can be used globally. If everything that is being produced now is used, temperature will be exceeded by whatever.

G

MRS JUSTICE THORNTON: And is the UNEP report an interpretative aid to Article 2(1)(c)?

In other words, do we interpret Article 2(1)(c) (inaudible), the analysis there?

MISS SIMOR: We say that, by reference to the recycles that I took you to in the UNFCCC and the Paris Agreement, but the scientific changes in analysis that come subsequent to these treaties are how the treaties have to be applied. So they are an integral part of it and, as the science develops, that is why they are dynamic, I think I took you to the bit of the treaty that referred to that, but it is effectively a dynamic rather than a static exercise because the science is changing all the time. And there was a point -- the point in Paris, it was a different----

H

LORD JUSTICE STUART-SMITH: (pause) Thank you.

A MISS SIMOR: Well, you will have seen that quote. You will also know, and I do not want to confuse you more, but you will also know that the commitments in NDCs have been assessed, the cumulative effect of those commitments, and they are not sufficient to meet the temperatures.

LORD JUSTICE STUART-SMITH: Hence all the palaver - I do not mean this derogatorily - all the palaver at COP26.

B MISS SIMOR: Well, it is a difficult problem for obvious reasons.

LORD JUSTICE STUART-SMITH: I agree.

C MISS SIMOR: So the defendants accept justiciability in terms of ground 1A, so we are not concerned with justiciability. But they do argue -- and we do not indeed need to argue, and this is important -- we do not need to argue whether it would have been lawful for the defendants to agree the finance of the project in circumstances where either (a) they had not considered Paris Agreement obligations or (b) had found that the project and its financing were not compatible with the UK's obligations under the Paris Agreement. Neither of those scenarios are relevant or before the court. Here the defendants set out to consider Paris Agreement compatibility, they considered that compatibility, they concluded that the project and its financing were compatible with the UK's obligations under the Paris Agreement in two important respects, and, on that basis, decided to finance the project. Accordingly, the only issue in ground A for this court is whether the decision involved one or more errors of law.

E There is a dispute between the parties, however, as to the standard of review that you should apply to that exercise. I am probably not going to have enough time to go into that in detail. We understand why the defendants take that approach, having regard to the facts, but, in our submission, whether one applies the test of correct in law or tenably correct in law, the decision is vitiated by errors of law.

F
G Moreover, whatever standard of review the court ultimately concludes that it is obliged to apply, it will have, nonetheless, to determine what the relevant provisions mean, whether that be what they actually mean or what they could tenably mean. And it is notable that the defendants have not set that out. It is difficult for you to determine whether their position is tenable if they will not state what that position is. Of course, all the legal advice as to the position has been redacted.

H

A Now, before this court their position appears to be that the terms of the Paris Agreement are basically meaningless and we say that this court must reject that. So it is sensible to start by considering what the effect of those provisions are. I was then going to turn to the standard of review. I may skim this very quickly and possibly hand you another note. I hope there is enough in the skeleton. We will check back. But, first of all, as we have already mentioned, he Vienna Convention is the relevant interpretive instrument for your purposes, Article 31 and 32 and Article 26, the duty of good faith. We have put those at authorities bundle 1. If B there is any doubt about that, the cases to go to for your note are the case of *Al-Malki* at authorities bundle 3, tab 34, paras.10 to 12, Lord Sumption, and the *Horvath* case, authorities bundle 1, tab 19, p.508 C to F, Lord Clyde, and p.495, A to C, Lord Hope.

LORD JUSTICE STUART-SMITH: Those references are in the skeleton, are they not?

C MISS SIMOR: I am not sure. I can send them up to you. We will put them on a note. They should be.

D Now, I just want to turn to 2(1)(c) and you need to read it in the light of Article 31 of the Vienna Convention. We find it in tab 3. It is p.53 of the bundle. The Vienna Convention requires you first to look at the ordinary meaning. Well, it was ordinary meaning in the context. Let me actually get the words of Article 31.

E “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”.

F So the recitals and annexes, all of those elements, are the context that you can look at or include.

G “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(c) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

H (b) any subsequent practice in the application of the treaty ...

(c) any relevant rules of international law applicable in the relations between the parties.”

A Then, of course, if you need to, you can have recourse to supplementary means of interpretation, including preparatory work, if there is ambiguity or obscurity or the result that you achieve, applying Article 31, is manifestly absurd or reasonable. That is Article 32.

B So we go first then to the ordinary words in their context. Article 2, this agreement - and I emphasised that when I opened yesterday - it is enhancing implementation of the Convention. And the Convention -- we are in tab 3 of the first authorities bundle. So it is enhancing the UNFCCC. So you can look also at the recitals and the preamble that I took you to of the UNFCCC. And it is aiming to strengthen the global response in those prior treaties, UNFCCC and Kyoto, in the context of sustainable development. That is not in contrast with, it is all part of the same thing. Sustainable development and climate change are integrally related, particularly in countries like Mozambique, and I took you to the relevant bits of the UNFCCC in relation to that, where this country falls very much into a country of extreme vulnerability to the consequences of climate change.

C

D

E So the key objective at (a) holding the increase to well below 2° and aiming for 1.5. These are the three core objectives. Increasing the ability to adapt to adverse impacts and foster climate resilience and low greenhouse gas emissions development. That is in (b). Then making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient developments. So they go together: sustainable development and climate change. This was a huge and significant change from the UNFCCC because it brought finance right into the centre of the treaty.

F

G One of the contexts -- in the original skeleton you had piles and piles on all the prior decisions, but we decided to take it all out, because, of course, there are numerous decisions from the moment that they decided to develop Paris through to 2000 and -- the CP 21 decision. I have got the original decision of 2011 when the parties decided that they should enact a new agreement to enhance and strengthen because of the urgency that had been established in the reports showing the gap between what was being achieved and what needed to be achieved.

H

The context -- we can also go to the recitals to the Paris Agreement. Again, I took you to those. I do not think that I need to go through them again. We will hand you up those. This is the 2011 decision when the parties decided that they needed to draw up a new agreement.

A LORD JUSTICE STUART-SMITH: So what is the relevance of it?

MISS SIMOR: That is context in terms of -- it shows you the context for what the Paris Agreement was, why it was being (inaudible).

LORD JUSTICE STUART-SMITH: Thank you.

B MISS SIMOR: So, if we go, for example, to recitals 2 to 3, on the first page, you will see also

“decides to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties [it is the second page second recital] through a subsidiary body under the Convention hereby established.”

C Then 3.

“Further decides an ad hoc working group for enhanced action shall work as a matter of urgency and shall report to sessions on the progress of its work.”

D Then the recital at the top,

“Recognising that climate change represents an urgent and potentially-irreversible ... [etc.] widest possible co-operation ...”

E And then, “Noting with great concern”, this is the recital to the----

LORD JUSTICE STUART-SMITH: I am terribly sorry where are you?

MISS SIMOR: I am sorry, it is the recital to the decision right at the top. It is under decision 1, CP.17.

F LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: So this is the decision in which the parties decided to start the process to draw up a new agreement.

LORD JUSTICE STUART-SMITH: Yes.

G MISS SIMOR: And, if you look at the second recital,

“Noting with grave concern the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases and aggregate emissions pathway with having a likely chance of holding the increase ... to below 2° or 1.5°.”

For that reason, because of that concern, they drew up Paris as a matter of urgency.

A I am not going to take you to the recitals in the Paris Agreement. I have already taken you to them. Recital 4 emphasises the effectiveness. Article 3 also emphasises the effectiveness. So you find effectiveness all the way through. You find the concept of effectiveness also in the UNFCCC.

B Object and purpose are clearly to enhance and strengthen. All of this we say must be applied in the light of the ever-revolving science as set out in the IPCC and UNEP. Accordingly, we say states cannot pursue a higher temperature goal than that in 2(1)(a). They have agreed to pursue well below 2°. That is an agreement binding in international law and actions by states in good faith must pursue that commitment.

C Secondly, states cannot make some finance flows consistent with obtaining that temperature goal but make others inconsistent with it or, to put it another way, they cannot with one hand act to achieve the Paris Agreement goals while, with the other hand, they undermine those goals.

D So, in our submission, the ordinary meaning of 2(1)(c) accords with the object and purpose of the provision read in its context. The UK cannot use public finance in a way that undermines the objectives of the Paris Agreement, that is the temperature goals in 2(1)(a) and the obligation to assist developing countries to meet and augment their Paris commitments in the context of sustainable development.

E That was made clear -- I took you to the standing committee on finance of the Paris Agreement, which is set out in our skeleton as well, where they make exactly that point. It needs to be -- all finance flows need to be consistent. That is not to say that all finance flows need to result in reduced emissions, but what they must not do is undermine the objectives of the Paris Agreement.

F The Government plainly agrees with this, because that is the test that it appears to have set itself, we say, in the climate change report and, moreover, it accords with Government policy as set out in the Green Finance Strategy, and that is at supplementary authorities 4----

G

H

LORD JUSTICE STUART-SMITH: It is tab 4.

MISS SIMOR: It is supplementary authorities bundle tab 4, p.92.

A

LORD JUSTICE STUART-SMITH: You took us to that a few minutes ago.

MISS SIMOR: It is aligning with -- yes.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Now, that policy was submitted to the UN by the United Kingdom under its obligation under Article 9(5) of the Paris Agreement and we can find that at tab 11 of the supplementary authorities bundle.

B

LORD JUSTICE STUART-SMITH: Is this referenced in your skeleton?

MISS SIMOR: I am terribly sorry to say I cannot remember whether -- I may have. We will check. So this is a document that is submitted by the United Kingdom under Article 9(5) of the Paris Agreement.

C

LORD JUSTICE STUART-SMITH: What page?

MISS SIMOR: I am going to go to p.210. This is what the United Kingdom is telling the UN it is doing.

D

LORD JUSTICE STUART-SMITH: In December 2020.

MISS SIMOR: So in the second paragraph down,

“The Green Finance Strategy (GFS) states that Paris Alignment of all ODA will be achieved through: (1) use of carbon pricing in bilateral programme appraisals (2) ensuring investment for fossil fuels is in line with Paris temperature goals (3) a proportionate approach to climate risk assessment and (4) ensuring programmes don’t undermine countries’ NDC and adaptation plans. The approach to integrating GFS commitments into the practice of the UK’s ODA spending is underway. For example, in FCDO new related programme controls are being introduced, complemented by a more strategic approach ...”

E

F

LORD JUSTICE STUART-SMITH: Why do I think that this is to be read in the context of a policy change between the date of the decision we are concerned with and December 2020? Am I wrong about that?

G

MISS SIMOR: Well, this is what they are doing. The ODA was already aligned. It is in the Green Finance Strategy in 2019. So in 2019 the UK decided that ODA funding should not be for fossil fuels and should be aligned. This is the report to the UN under Article 9(5) setting that out and explaining that all that finance is in alignment. So that is not a policy change, that is just a report of what it was doing since 2019. It is not saying here the new policy in relation to UKEF, which was announced in December.

H

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Then we have the point about the FCDO which is the second paragraph,

A

“Beyond UK practice, the FCDO is also working with multilateral partners, such as International Finance Institutions to strengthen Paris Agreement ambition, including through the publication and dissemination of plans for full Paris Alignment.”

B

And the Foreign Secretary makes the point that we cannot persuade people to do this if we fund this Mozambique project. Then the last paragraph.

Then 214, if you could just sideline 4.2, and then read 4.3,

C

“The UK views this mobilisation and enabling environment support as an important step towards Article 2.1c of the Paris agreement; in which all parties committed to collectively align finance flows with low greenhouse gas and climate resilient development. Without the fundamental shift in the financial system as a whole, the climate goals of the Paris Agreement cannot be met.

D

Then 4.4, again if you could sideline, but perhaps quickly read the first and third bullets.
(pause)

E

So it is unsurprising, in our submission, that the United Kingdom has now taken that policy up in relation to UKEF and, if you can turn to tab 14, you will see that here we have aligning UK international support for clean energy transition. If you go to p.258, you will see under “Scope“

F

“Under this policy the UK government will no longer provide new direct financial or promotional support for the fossil fuel energy sector overseas¹, other than in the limited circumstances outlined in this document, and align its support to enable clean energy exports. This policy applies to any new Official Development Assistance (ODA), investment, financial and trade promotion activity ...”

G

LORD JUSTICE STUART-SMITH: I am sorry, I must be getting confused. We are dealing with the 2020 decision and this document says at the top of the page that you have taken us to -- it sets out the details of the new policy of the UK Government to support - blah-blah-blah - effective from 31 March 2021.

H

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Why are we seeing this?

A
MISS SIMOR: We are seeing this because, in my submission, 2(1)(c) makes no distinction
B
between the kind of the name given to the national funding. So 2(1)(c) does not say “any
development funding must be in alignment with Paris”. It says, “make all finance flows”. So
C
2(1)(c) does not care what a country calls its finance. What I am saying is that the
Government recognised as far back as 2019 in relation to development finance that what
alignment with Paris meant. In fact, they agree with us as to what -- insofar as they have
articulated it in these documents, they agree with us as to what it means. That was followed
by the CDC removing all funding for fossil fuels on 1 July and UKEF then in December. So
now no UK finance is going to fossil fuels overseas save for in exceptional circumstances.
My submission is that their interpretation of the law as it applied to ODA, subsequently
CDC, and now UKEF, is the same and the correct interpretation of the law. And the law
applied to this decision.

D
If we turn, my Lord, to p.261, at the bottom of 261, para.3, we will see what is being
prohibited and what exceptions are being allowed. “Support for unabated [that is without
carbon removal technology] gas fired power generation”. So it is not the development of
liquid natural gas project. It is generation.

E
“... is conditional on a country having a credible NDC and long-term
decarbonisation pathway to net zero by 2050”

So that is what they would expect to see, which is what Mr Caldecott expected to see, but

F
“support does not delay or diminish the transition to renewables; that the risk
of the asset being stranded has been assessed and managed; that the project
intends to follow best practice ... etc.

Exceptional support will only be allowed if all of these conditions are demonstrated.

G
“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 ...”

H
Because, of course, if you create a grid network that is dependent on gas and cannot be
converted to renewables, you have by definition created a lock-in situation. But

“it contributes to domestic energy security; and that it is consistent with a realistic transition pathway to net zero ...”

A So they want to see that the country has done that.

“including demonstrating that mitigation measures have been considered, preferably at asset level.

B *Allowed (example):* Support for gas power where this supports decommissioning of coal, alongside a rapid increase in renewables, and where renewables cannot meet total demand immediately. This would help a country onto a science-based net zero pathway.

C *Not Allowed:* Support for gas production, distribution and power generation into the global market.”

That is for all the reasons that I have explained in relation to 2(1)(c).

MRS JUSTICE THORNTON: What do you mean by “all the reasons I have explained”?

D MISS SIMOR: Well, the reason being that the UK will not fund countries to develop or sell energy externally, to export energy. This is actually about energy creation rather than actually taking new stuff out of the ground. But it will not fund revenue and we heard this is 13 billion -- it is worth 13 billion to Mozambique. In the scale of the consequences of climate----

E LORD JUSTICE STUART-SMITH: Sorry, what is 13 billion?

F MISS SIMOR: We saw the figure that the net revenue to the Mozambique Government as a result of this project would be 13 billion. The United Kingdom does not consider it is in alignment with their Paris obligations to fund those kinds of revenue -- to do that. That is not what this is about. It will fund any energy for security purposes and when there is a clear transition to net zero.

The policy was implemented on 31 March and you find that in tab 13----

LORD JUSTICE STUART-SMITH: We find that on p.258.

G MISS SIMOR: Page 250. It decides to move very, very quickly, the last line on p.250.

H Now, the defendants’ answer to this is they say that we have taken the interpretative -- the “purposive construction”, in their words. They say we have taken the purposive construction in Article 31 of the Vienna Convention “too far”. I put it in inverted commas I should say.

A Now, we do not understand what that means. The ordinary meaning of 2(1)(c) is clear. It is even clearer when viewed in light of its object and purpose. As we say, the defendants doubt that 2(1)(c) means anything at all. You find that at para.39 of their skeleton. They say, “Considering consistency with the Paris Agreement is not a quantitative or numerical exercise.” And this is a plain misdirection of law.

B Assessing consistency with the Paris Agreement is necessarily a numerical and quantitative exercise. That exercise must be carried out by reference to the best available science, pathways consistent with the temperature goals are numerical or quantitative assessments of available carbon budgets by reference to time.

C The defendants sought to establish that the project would lead to a global emissions reduction for precisely that reason, we say, although I take it that that position has changed. But we say that, if it were different, they would simply have adopted the actual findings of Wood MacKenzie. They would not have needed to go so far as to actually conclude there was some kind of reduction. They would have been content with “there could be a reduction”.

D At 42.2 of their skeleton, the defendants suggest that they did not conclude that the net effect of the project would be to reduce net global emissions.

E LORD JUSTICE STUART-SMITH: I am sorry, did you say para.40.2?

MISS SIMOR: Yes, it is the point you raised this morning and it is very difficult for me to argue with it now because that----

LORD JUSTICE STUART-SMITH: 42.2?

MISS SIMOR: 42.2.

F LORD JUSTICE STUART-SMITH: I am sorry, my mistake.

MISS SIMOR: We say that, if the defendants are now saying that, in fact, they concluded the net global emissions would be increased, then the decision is vitiated for that reason, too, because we do say that the decision makers, the Secretary of State for the Department of Trade and Industry and the Chancellor, were not explicitly told that.

G LORD JUSTICE STUART-SMITH: Well, they were if they read the climate change report.

MISS SIMOR: Not in our view. In our view, the conclusions in that report suggest a net reduction. But, I mean, it may be that we are reading it by reference to the detailed grounds, but----

H LORD JUSTICE STUART-SMITH: Well, that is entirely possible.

A MISS SIMOR: I will look again at it, but that is the way that it was approached in the summary grounds and the detailed grounds and, as I have said, I do not understand how it is said to be Paris compliant, if it leads to a net increase in global emissions. It has to lead to a net reduction, necessarily.

LORD JUSTICE STUART-SMITH: Well, rather like you, we are not expressing a final view, but it was our concern about what the CCR actually said that prompted the little bit of work that we did and the question I asked Sir James Eadie this morning.

B MISS SIMOR: (pause) I actually have not got any time I do not think to deal with the point about Mozambique. We will look back at our skeleton and see whether there is anything that we absolutely must get across to you that we have not got across to you in that, if I could have your leave just to -- we will not burden you with more paper but if there are one or two bullet points----

C LORD JUSTICE STUART-SMITH: All right. Well then you will need to have a word with Sir James about that. In principle, as I have said, we want to get this right and we want to get it right having understood what the case is about. I think, although we have not discussed this, I think this court will make reasonable allowances if people find at the end of what is quite a compressed but not unduly compressed timescale, if there is something of burning importance which they think that they have not done justice too, a short note can be submitted. Not as a prelude to responses and this, that and the other, but I mean, we have had a 51-page skeleton argument from you.

D E MISS SIMOR: Yes. Well, it is a highly-complex case. It is an extremely complex case compared with a standard judicial review. It is complex legally, it is complex factually, it is complex scientifically. If I may push to five-past, I just want to make a couple of comments on the social rented of review.

F LORD JUSTICE STUART-SMITH: Any compelling objection to going to five-past?

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: Thank you.

G MISS SIMOR: So, as I have already said, tenability we say is not the correct test and we consider that it is difficult for this court to take a view on the law, but hold that a decision is lawful even though it does not necessarily agree with that analysis of the law. We say that it is, in principle, wrong for all the reasons set out by Lord Justice Green in the *Heathrow* case which we have referred to in detail in our skeleton.

H We say that it does not matter, because, essentially, there is no tenable interpretation here by

the defendants as to the meaning of 2(1)(c), 3, 4(3) to 5 and 9 of the treaty.

A We also say that it is wrong as a matter of principle for a court generally to accept the idea
of a tenable and unarticulated interpretation of the law. It is important in that context to be
aware that there is a need for clarity globally as to the meaning of these provisions and
unarticulated interpretations by Governments accepted by national courts is not going to
help that clarity. National judgments do become part of the international discourse and
B generally across the world arguments about subjects like tenability in the context of
reasonable analyses are not helpful ways of interpreting international treaties. It is the role
and duty of the courts even in hard cases to interpret the law, which is precisely what Lord
Sumption said in the *Benkharbouch* case and Lord Justice Green in the *Heathrow* case, both
C of which were concerned with international law interpretation. It is unhelpful and
dangerous for national courts charged with that interpretation not to take it on and do it.

So that is where I want to end. As I said, for our case, we say that it does not actually
D matter, so it is not something that is determinative in the facts of our case, but we urge you,
nonetheless, to apply your minds to actually giving meaning to the relevant provisions.

LORD JUSTICE STUART-SMITH: Thank you very much indeed. Thank you for your
patience in dealing with predominantly my interruptions. We will start again at two clock.
(1.06 p.m.)

E (Adjourned for a short time)

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: My Lord, my Lady, I am going to structure my submissions if I may by
reference to the order in which the grounds are pleaded against us. So I am going to deal
F with ground 1A first, which is that we committed an error of law. I am going to start where
my learned friend effectively ended with the applicable standard of review and I am going
to do that because it is quite a big constitutional issue, as you can appreciate, there cannot in
truth in relation to this sort of issue be subject matter distinctions. And my learned friend's
G submissions proceeded on the assumption that the correct position in law was that if only a
decision maker takes into account a provision of international law, that provision of
international law as a result becomes in effect part of domestic law. By that I mean,
becomes part of domestic law, so that the court can without more judge whether the
interpretation applied to that provision by the decision maker was correct or not.

H LORD JUSTICE STUART-SMITH: There is a variant on that. I am sorry to use that word, but

there is a variant on that submission, which I think is also in play which is, if a decision maker, even though they did not have to treat something as material, does that not import the need to interpret the thing that they did not need to take into account but have done? So, if, for example, you did not need to take Paris into account----

SIR JAMES EADIE: Yes, yes.

LORD JUSTICE STUART-SMITH: -- but you said----

SIR JAMES EADIE: I do.

LORD JUSTICE STUART-SMITH: “I am going to and I do”, then is it not still necessary for the people reviewing the decision (i.e. us) to form a view about what Paris means.

SIR JAMES EADIE: That is exactly the issue that I am addressing. No one is suggesting that we had to take Paris into account. Everyone is agreeing that we could have said we are not. It would have been a pretty odd thing for a Government to do, no doubt, but in lots of different areas, international law guides governmental decision making, because on the international plane the UK is bound. So I am starting from the premise that that is the position and the issue I was seeking to describe was exactly the one that my Lord has put to me.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: Is it enough to bring in effect those international standards so they become binding and plausible standards for you to interpret and apply, as courts in the United Kingdom; is it enough simply that the decision maker has taken them into account? That is the very issue I am going to address.

LORD JUSTICE STUART-SMITH: And in that are you going to take into account or help us with the related question which is, is there another stage where to bring it to the facts of this case, what you do should not be characterised as saying “I am going to take Paris into account” or “I am going to ensure that my decision was Paris compliant”, but the slightly more subtle response which is---

SIR JAMES EADIE: It is a subtle----

LORD JUSTICE STUART-SMITH: -- “I am going to do things which are in relation to Paris but I may set my own terms”, if I can put it like that. I am not expressing it terribly well, but I hope you know what I mean.

SIR JAMES EADIE: I do exactly. You are positing a position in which the decision maker does not say, or at least does not clearly say, “There is the initial standard, I am going to conform to it”. The decision maker, rather, says something more nuanced, which is “There is the international standard, I am going to take it into account in order to see what flavour it

has without necessarily reaching some kind of complete final view on the evidence, etc., etc,
etc.

A LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: That position I am going to come to.

LORD JUSTICE STUART-SMITH: Thank you. Because, if the claimant is right, if there is a
right interpretation of Paris, and if you did not satisfy the right interpretation of Paris, you
need that as a fallback position.

B SIR JAMES EADIE: I do. So one has to cover that, but it is obviously amongst the range of
things that the decision maker can properly do, I respectfully submit, but the starting point,
and I am going to give you the propositions and then I am going to work through the case
law, because it is not an uncomplicated issue, but the starting point is that -- well, nothing
C for my Lord is complicated---

LORD JUSTICE STUART-SMITH: No, I take it as a threat.

SIR JAMES EADIE: Yes. No, I had not got to the threatening bit. The threatening bit is the
breadth of the application of the principle were you to go against me.

LORD JUSTICE STUART-SMITH: Yes.

D SIR JAMES EADIE: So there is the threat. But, my Lord, can I take it as a starting point, as it
were, that we are all agreed that we do not have to take into account the international
obligation here. The threat is a serious point because, as I said at the outset, there cannot
really be subject matter distinctions. It is either good enough or it is not.

E LORD JUSTICE STUART-SMITH: I understand it to be common ground -- I think we
understand it to be common ground that Paris is not independently incorporated into English
law.

F SIR JAMES EADIE: Yes, unlike, for example, the - and there are myriad ways in which it can
be done, but, unlike, for example, the Vienna Convention on Diplomatic Relations, which
was the subject of the Supreme Court's judgment in *Malki*, which I am going to take you
back to for the interpretation under the Vienna Convention principally, but there the
technique for incorporation was the Diplomatic Privileges Act 1964, I think it was, which
actually scheduled various but not all of the provisions of the Diplomatic Convention on the
G international plane. So there are ways in which it can be done.

What I was going to do was to start at least with that issue of principle, as defined, and I was
going, if it is helpful - and I hope this is a convenient way of doing it - I was going to give
H you six or seven propositions of principle and then come to the cases, if that is an acceptable

way of doing it.

LORD JUSTICE STUART-SMITH: Yes.

A
SIR JAMES EADIE: The first submission is that the correct starting point is dualism. The correct starting point is not that error of law is correctable and it is not that error of law is correctable, because that begs the very question which the analysis is aiming to answer, which is whether or not the treaty is law or creates - and/or creates - domestic legal standards. The Paris Agreement is international law and has not, as we have been
B discussing, been transposed into domestic law by any legislative act and the starting point, and it is important that it is the starting point, is that set out in the famous passage from Lord Oliver in *J H Raynor*. I am sorry to start with an authority which was only recently provided to you, but I hope that it made its way to you, the recent Supreme Court judgment
C in *SC*.

LORD JUSTICE STUART-SMITH: It did, but I think that I may have left it behind. We have got *Balajigari*, which is my favourite case this morning.

SIR JAMES EADIE: You have got *Balajigari*, but then *SC* I think was provided a day or two ago.

D LORD JUSTICE STUART-SMITH: I have got it electronically.

SIR JAMES EADIE: Do not worry. If not, there is a hard copy here. Does my Lady have it?

MRS JUSTICE THORNTON: I have it on an email.

SIR JAMES EADIE: You do not need another one.

E MRS JUSTICE THORNTON: Well, I will -- yes.

SIR JAMES EADIE: If it is there. I am sorry, it is a wedge of paper but I am only going to go to some short paragraphs.

LORD JUSTICE STUART-SMITH: Thank you.

F
SIR JAMES EADIE: This was a case in a completely different context and concerned the two-child rule, so far as the payment of benefits was concerned. But the Supreme Court was concerned in that context about the way in which the courts had been analysing human rights issues by reference to international instruments. In that context, the United Nations Convention on the Rights of the Child. So it went out of its way to emphasise various
G things by starting its substantive judgment with three preliminary issues, as they put it - I am going to the title above para.73. The second and third of them do not trouble us, because they are to do with margin of appreciation and all of that and the use of Parliamentary materials. But the one that is of interest is the title above para.74. Can I invite you to read that to yourselves, if you will, because it will be quicker, paras.74 through to the end of
H

para.79? It is not quite the end of the section, but from para.80 onwards they come to an issue which does not concern us, which is how you go about using international law under the Human Rights Act, so to the end of para.79, if you would. (pause)

That will all be very familiar stuff I am sure, but you will see the basic analysis, if I can summarise up to the end of para.78 in a single sentence, that is a strong reassertion of the correctness of dualism. When they get to 79 and the following paragraphs, the question they are there addressing is to what extent that otherwise sound position on dualism is altered by the introduction of the Human Rights Act with the Convention rights attached and, therefore, the approach that the ECHR applies when interpreting the rights in the Convention.

So the principle is not, we respectfully submit, and, consistently with that basic starting point, could not be, that whenever a public body has regard to an unincorporated international convention it is for the court, in effect, to treat that convention as if it were part of domestic law; in other words, by treating it as imposing domestic public law obligations which it is the court's function to interpret and apply as creating such standards. That would be to create, in effect, treaty obligations as, in effect, domestic obligations. That is highlighted, we submit, that starting point - still under the first proposition - as a feature in this case. You have seen in the witness statement of Maxwell Griffin - core bundle 1, p.198 and following, tab 12 in your essential reading bundle - a very detailed analysis of various policies in place to do with climate change, to put the matter at its broadest.

On the logic of my learned friend's argument, none of that really matters. The only thing that matters is that you have some international standard or treaty which the decision maker has had regard to. Of course, if you set out a range of policies, by definition, in public law terms, they are there to be taken account of by decision makers. That would be, let us be very, very clear about the logic, not to threaten again, but be very clear about the logic, that that would be to create a situation which was both surprising and extremely concerning constitutionally, especially given that you would not expect the Government to ignore international treaties, namely, that the whole suite of treaties and standards - and there are very many - are effectively transposed into domestic law.

LORD JUSTICE STUART-SMITH: Or could be.

SIR JAMES EADIE: Or could be, but very often will be, if you are dealing with a range of

A policies which may be taken into account or may not be. I will come more directly to the situation where the decision maker does take them into account, because there are undoubtedly some cases where that has been treated as a significant factor by the courts. But the breadth of the submission made by my learned friend is simply the decision maker takes it into account, ergo the thing creates a domestic legal standard even though it used to exist only on the international plane, and that applies across the range, on the logic of her argument.

B That is the first point. The second point is that there is a very good constitutional reason for concern about such a course. And the best exposition, if I may respectfully say so, of the nature of that constitutional concern is the article - it might be thought now reflected in the ringing endorsement of dualism in *SC* by Lord Sales, when he was still Philip Sales, in the article that you will have seen reference to in *Cornerhouse*. That is behind tab 57 of bundle 4 of the authorities, if I can invite you to take that up briefly. It does not really matter with what level of authority Mr Sales, as he then was, was speaking in this article, but it might be thought that this had become his specialist subject on the basis that he had spent some considerable period of his tenure as Treasury Devil arguing about whether the ECHR prior to the HRA was an interesting thing or a non-interesting thing so far as domestic courts were concerned. But he starts, as you will see, on p.2952 in the second full paragraph between the hole punches, "In a dualist state". Can I invite you just to read that paragraph? (pause) Then over the page, on p.2953, under the heading "The constitutional context", he sets out the basic constitutional reasons that underpin dualism. Why is it that treaties - in effect, agreements on the international plane entered into by the executive - why is it that they are regarded as being on a different plane? Can I just invite you to read from the beginning of that page at the top down to the end of the paragraph just by the second hole punch? Where it says "L.Q.R 391" you can stop. (pause)

D LORD JUSTICE STUART-SMITH: I cannot remember. Was this cited in *Miller 1*, I think it was, was it not?

E SIR JAMES EADIE: I am pretty sure it was. It certainly would have had this. We had *Corner House*, we had the---

F LORD JUSTICE STUART-SMITH: I certainly have read it for the purposes of this hearing and it has a familiar ring about it.

G SIR JAMES EADIE: Yes. I do not think that they cited from it in *Miller 1*, but it is all consistent with that. Indeed, it may be the case of proclamation which created the big echo

in my Lord's mind, because that certainly was the rock on which everything I tried to submit foundered.

A LORD JUSTICE STUART-SMITH: It foundered. Yes.

SIR JAMES EADIE: But you will see the note of caution that rings out of that paragraph by the second hole punch is based on the principles, the two core constitutional principles, previously set out and described.

B Then over the page, on 2955, if I may, you will see, if I can just invite you to read the two sentences at the end of that second paragraph on the page, beginning "There is no general obligation", just the last two sentences of that, "The House of Lords reaffirmed" to the end of that paragraph.

C MRS JUSTICE THORNTON: I am sorry, where are you?

D SIR JAMES EADIE: I am sorry, my Lady. Page 2955, under the heading "Unincorporated treaties", that paragraph, just the last two sentences. By all means read it all if you wish, but -- (pause) Then he picks up the no direct effect aspect of that. Overleaf on p.2956 you will see the title about a third of the way down the page, you will see the principle described in the first paragraph under that heading of "No direct effect" and to the authorities that are cited in the first sentence of the next paragraph, "This principle was reaffirmed by the House of Lords" and so on, citing *Brind*, *Lyons* and *McKerr*, all of which were pre-HRA cases, to which can now be added *Miller 1*.

E Then he comes to various permitted uses of international law, including on p.2958 "Unincorporated treaties as an aid to statutory interpretation". I am simply going to ask you to note the title. These are the permissible uses all thrashed out, as I say, on the anvil of pre-HRA/ECHR debate. Then "Unincorporated treaties and the development of the common law", so a clear distinction between uses by the courts in exercising a judicial discretion and developing the common law and "Unincorporated treaties and the exercise of administrative discretion", which is different. That is the bit that concerns us.

G I am sorry to keep asking you to read things, but I suspect that it will probably be quicker to do it that way. Can I ask you to read from the final paragraph on p.2958 over to end of 2959? Could I also invite you just before you start that to put a little bubble around footnote 77 which is at the end of the first sentence of that little paragraph, the last line of p.2958.

H That is *Brind*. That is a reference to *Brind*. So down to the bottom of that page and then

A down to the bottom of the next page, if you would, 2959. (pause) It is this article - this thinking - that is the start of the tenability theory, as you can see. (pause) Perhaps the key bit is the second part of that page, starting from “Part of the problem here is that the executive may not have any practical option but to direct itself by reference to international law”, down to the end of the paragraph. (pause)

B You see what is being done, he is starting from a position of dualism, he says “That is a strict and accepted position”. He notes that in at least one case at that stage, which was *Ex Parte Launder* - perhaps also *Kebeleine* as well. In those cases the courts had gone and examined in an ECHR context, which is very important to bear in mind, international law even though not part of domestic law, on the basis that it had been taken into account by the decision maker. The rest of that paragraph is, as it were, *dubitante*, at least the breadth of that approach and trying to fashion or to shape some form of constitutional compromise that, on the one hand acknowledges dualism, the strictness of that principle, but, on the other hand, acknowledges the point my Lord was putting to me, “Well, what do you do if the thing that has been taken into account is a material consideration?”

D LORD JUSTICE STUART-SMITH: The two mechanisms being marginal appreciation and tenable. Can I just ask a very basic question while I am about it? Is there any difference between tenable and rational or not to be rational?

E SIR JAMES EADIE: No, I do not think so. It is just acknowledging margin. It is acknowledging that the primary decision maker is the executive, for this purpose, even though slightly strangely, because it is an issue of law -- or at least international law. I am falling into my own trap.

LORD JUSTICE STUART-SMITH: Thank you.

F SIR JAMES EADIE: I am not sure there is. I am not sure that anyone has strove to define it. What they are actually after is a thing that says, “This is a thing that says ...” It does not become a domestic legal standard, like any other, so that the courts would be opining on its interpretation and, indeed, application.

G MRS JUSTICE THORNTON: So, when in your skeleton you refer to “tenability”, in terms of interpretation and rationality, when it came to----

H SIR JAMES EADIE: I did. I am not sure there is much difference between the two, but the terminology in both contexts has been used rather differently. And what that was designed to do was to demarcate a boundary. You can have a debate around the interpretation of an international provision, and I am going to make my submissions in relation to that, but that

applies to its meaning and effect, if you will. It is an issue of interpretation. When the question is how to apply that, you end up weighing facts and holding lots of complex different things in your head, and that is paradigmatically rationality, because you are there dealing with the weighting of facts rather than in the analysis of what the legal framework looks like. So, although the two words may be used interchangeably, and I am not sure that they are doing terribly different things, because they are both creating margin, and both recognising constitutional primacy of the decision maker, which is the executive, there is a potentially important distinction between, on the one hand, the ascertainment of the meaning and effect of a legal provision and, on the other hand, the weighing of fact.

That is all I wanted on the Sales article, but I thought that it was important to show it to you because, as we will see when we get to the case law, this was a thing that attracted Lords Bingham and Browne in *Corner House* and, hence, the analysis, but this is the start. It comes out of Lord Sales' big brain.

That is the second proposition. The third proposition is that, where a decision maker does decide to have regard to an international convention or an international standard, that, as we have established, being an optional not a mandatory relevant consideration, perhaps to put it in public law terms, there is a choice on the case law, and that choice is as to whether or not the court's ruling on the meaning of such provision is justiciable at all - it was not, for example, in the *CND* case - or, even if it is justiciable, what approach to interpretation should be taken? And that takes one into the territory that I have just been demarking, in other words, tenability, if one wants to use that phrase - and it is the phrase used in the case law so I will stick with it, if I may - tenability for interpretation and then, plainly, rationality for application, in any event.

Fourthly, there are, or there is, a series of features on the current case law that may bear on justiciability and would, on any view, also be relevant to see what the standard of review should be. Is this one of those cases where the court should simply treat it as a domestic legal standard and rule itself or is it a situation in which a tenable interpretation approach is the right one? There is a crossover in terms of relevance as factors to that set of issues between things bearing on non-justiciability and thing going to tenability. We will see this when we get in particular to paras.164 and 166 of the *Heathrow* case. That is, it might be thought, unsurprising - in other words, that coincidence or potential coincidence of factors

between those two issues, because, ultimately, they are simply different points on a margin spectrum: non-justiciability is all black from the court's perspective. It is a "don't go there". Tenability says we accord a margin to the decision maker in working out what the standard means.

Fifthly, it is clear that, if the executive is exercising power and does not take international law into account at all - it is a point that I have already made, but it is noted anyway - there is nothing unlawful about that. That was clearly established as long ago as *Brind*. Of course, the more the courts enter this territory, as Lord Bingham points out in *Corner House*, the more disincentive there is - a slightly strange disincentive for a court to be creating - the more disincentive there is for a decision maker actually taking into the account the international standards, because the moment it does so it opens itself up to judicial review.

That fact is important in its own right - in other words, if it does not take it into account at all, there is no judicial review error, there is no error of law. It is important in its own right that that should be so, but it also provides, we submit, an indication of the right approach normally if it does choose to have regard to an international legal standard, as it will often wish to do or, in practical terms, have to do, as Lord Sales pointed out in the article.

LORD JUSTICE STUART-SMITH: Sorry, is this number six?

SIR JAMES EADIE: This is number five still.

LORD JUSTICE STUART-SMITH: This is still number five?

SIR JAMES EADIE: Yes, it is a consequence of the basic proposition that you do not have to take it into account: important in its own right, but also important because it indicates the correct approach, if they do.

It would be very surprising - which is the punchline of that latter point - if a taking of such a voluntary step immediately had the effect of transforming international law (not sanctioned by Parliament) into some form of binding rule of domestic public law. And, for all the reasons that Lord Sales pointed out in the article, there is serious constitutional objection to that.

Sixthly, there may be a need----

LORD JUSTICE STUART-SMITH: It is a sub-judicial equivalent to changing policy by

mistake, what we were talking about yesterday, with the claimant.

SIR JAMES EADIE: Yes.

A LORD JUSTICE STUART-SMITH: One of the concerns of the people involved here was that, if they went in a particular direction, although it would not actually be a statement of policy, it would have the effect of creating a change of policy by mistake.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: I think that that is -- it is a similar idea, is it not?

B SIR JAMES EADIE: It is. It is an aim(?). One can put the same point in a slightly different way as, as it were, a lighter form of constitutional concern. You are sure that the principle constitutional concern was that, if it, as it were, was all in the hands of the executive, then all these standards come down into domestic law through public law without the
C interposition of the primary maker of law in our jurisdiction, which is Parliament. To some extent the same point can be made in relation to policy, along the lines that my Lord was putting to me, as a slightly lesser species of that, because, ordinarily, under public law, the executive is the body which decides what its policy should be. As Lord Justice Laws in the
D context of legitimate expectation frequently reminded us, you can make and remake policy as Government, but that is essentially a decision which is properly for the executive and, if the consequence of simply taking something into account is "Boom! There it is, it is a standard", then there is a problem. But, yes, I agree with my Lord.

E The sixth point was to acknowledge that there may at some point be a need, and at some level, be a need for a proper rationalisation of all of the case law. On its present state, there appears to be a factorial analysis as to both justiciability and standard and there may be
F some very unusual cases within that spectrum in which the court considers that it can and should simply treat the treaty as a domestic standard. That I think has only really been done in the context of human rights cases -- query, query GATT in relation to the *Heathrow* case, but certainly in relation to the ECHR cases, those early ones, *Lauder*, *Keberline*, and you get a very different approach at the other end of the spectrum in cases like *Corner House*, where you have got the loose(?) standards and all of that. I will come to what the
G factors are in a second, but the sixth point was simply to note that at some point it may be that the Supreme Court will need to sit down and work out what the true rationalisation of principle is for all of this.

H LORD JUSTICE STUART-SMITH: I thought for one ghastly moment you were going to suggest we had to do that.

A SIR JAMES EADIE: I was deliberately making the sixth point to give you comfort that you
would not have to do that, because I was not inviting you to do that. And I suspect that it
would have to be at the very least at the level of the Court of Appeal and probably of the
Supreme Court, because lots of the authorities are from there and quite a lot of them do not
actually grapple with lots of the constitutional issues that might arise. Indeed, there was at
least the flotation of that invitation and the suggestion that even *Lauder*, even on its own
terms, might have been wrongly decided in a case called *Barclay Brothers* in the Supreme
B Court and they did not need to go there, because it went off on another point before they got
there: no doubt, because they could see it coming. So I am not suggesting that. I am going
to proceed on the basis that it is a factorial analysis. There is not, as it were, some in limine
problem or objection. So that is the sixth point.

C The seventh point is that the core factors tending towards either court abstinence through
justiciability, or non-justiciability, or constraint through tenability are those identified in
Corner House and the *ICO* case, Mr Justice Lloyd Jones, as he then was, which are then
D applied on the facts in *Heathrow* without demure as to the basic analysis. In essence, if I
could identify three of the core factors that appear from those cases, the framing of the
international measure: that is the point that goes, “the vaguer it is and the more broad brush
it is and the more aspirational the measure is the greater the likelihood of the domestic court
exercising very considerable constraint in this sphere”. That is one.

E Two is enforcement via an international court, which has developed a body of jurisprudence
to assist you on the meaning and effect of a particular provision as compared to an
international treaty in which such systems and such enforcement mechanisms either do not
F exist or have not been operated. So that the court is, in effect, operating blind by reference
to jurisprudential explanation of the meaning of the provision.

G That, perhaps, leads to the third point which is that there is no clear guidance. If there is not
any clear guidance in international case law as to how the measure should be interpreted,
that is another factor. That is all to be contrasted, therefore, and perhaps it is a key contrast,
between lots of situations that create international obligations or standards, on the one hand,
and the ECHR - or perhaps even the ICCPR as well, but the ECHR certainly - on the other,
because the ECHR does have that whole mechanism. It does have determination by the
H European Court of Human Rights as to the meaning and effect of the basic provisions in the

Convention. So you have got that body to aim at.

A The final point to emphasise is one that I have made already, but just to get it down. It is very important to bear in mind the distinction between interpretation where the issues that I have just sought to define and describe are in play, on the one hand, and application, on the other; in relation to the latter, it is plain that the right approach is rationality.

B So those are the principles and I hope that will then considerably speed up the spin through the case law. Can I start with *Corner House*, which is bundle 2, tab 25. You will recall the context of *Corner House*. The OECD was the relevant international treaty that was concerned and the context was the threat by the Serious Fraud Office to investigate some bank accounts in Switzerland which produced a direct and pretty serious looking threat to withdraw security co-operation, effectively, from Saudi Arabia.

C
D The House of Lords overturned and disagreed with the Divisional Court judgment of Lord Justice Moses and Mr Justice Sullivan. Lord Bingham's speech starts at p.1065, but the key passage for present purposes is paras.43 and 44. (pause) The claimant bases itself squarely on *Kebilene* and *Launder* and Lord Bingham, at least, is highly doubtful that they do actually provide the answer for the reasons that he gives in the second part of para.44. In *Launder* there was no dispute. In *Kebilene* there was a live dispute but there was judicial authority in the form of the ECHR structures. Then the disincentive that he draws attention to in the final sentence of 44 I hope chimes with some of the submissions that I have made as well.

E
F That is Lord Bingham. Lord Browne at paras.65 to 68 are the key passages. Can I invite you to read those because you will see -- you do not read the whole of 68 because you have read, and I particularly emphasised the bit from the Sales article which he cites at para.68. So 65 through to the end of 68 if I may invite you just to cast an eye quickly and I hope that it will not take too long, because most of those things I have covered already. (pause)

G LORD JUSTICE STUART-SMITH: How far do you want us to go?

SIR JAMES EADIE: To the end of 68 if you would, but you can miss out the quotation because you have read that already. And you will note the second half of 67. (pause) So that is *Corner House*.

H

A *ICO Satellite* is Mr Justice Lloyd Jones and that is at tab 26, so the next tab in the same bundle, I hope, and he comes at this issue in the different context of the - he comes at this international issue and someone taking it into account issue. At para.88, again, I am not going to invite you to re-read all of that because lots of it is citation from *Corner House*: 88, 89, 90 and 91 all citations from *Corner House*. Then he identifies that there is a series of circumstances in which domestic law does take into account international obligations, but that has been acknowledged throughout.

B Then the key paragraph, perhaps, which I would invite you to read, is 94, because you can see the factors developing, the dispositive analysis -- having analysed what the basic approach of principle is, the dispositive analysis is really in para.94. (pause) It is effectively taking Lord Bingham's analysis on and Lord Browne's analysis on and Lord Sales' analysis on and then applying those and describing them as policy reasons in the latter part of para.94, but you see the sort of things that are being taken into account.

C That line of case law is then applied directly by Mr Justice Dove. You can put that file away if you would and take up file of the authorities. It is Mr Justice Dove in *Elliott-Smith* tab 47 of bundle 3. Can I invite you to read para.55 and the first sentence of para.56? (pause) It is simply an application of the approach. Just for your note, I do not invite you to turn it up, but the same approach also by Mr Justice Holgate in *Save Stonehenge* at tab 49 of that bundle and the relevant paragraphs are 215 to 216.

D LORD JUSTICE STUART-SMITH: They are cited in your skeleton, are they not?

E SIR JAMES EADIE: They are cited in the skeleton, I think. Then we come to *Heathrow*.

F LORD JUSTICE STUART-SMITH: Just while we are on it, tab 47 in my bundle is the last tab,

but at p.2370 is - it may absolutely not matter - we have Mr Justice Fraser in *Good Law Project v. Cabinet Office* and the same again.

G SIR JAMES EADIE: I have got that at the beginning of bundle 4.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: 2370.

LORD JUSTICE STUART-SMITH: Okay. Well, you have the advantage of me.

SIR JAMES EADIE: I am sorry, but as long as you have them all. I suspect Mr Justice Fraser----

H LORD JUSTICE STUART-SMITH: It is obviously a very important decision, I have got three copies of it.

A SIR JAMES EADIE: Particularly important, no doubt, because I think the relevant part of it for our purposes was the one you mentioned yesterday, which is picked up and dealt with in *Gardner* by Lord Justice Bingham and Mr Justice Garnham a few months back. It is that point about experts and admissibility -- admissibility of experts and comments and how JR is not meant to be a battle of experts and so on.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: So you can at least throw away two of them.

B LORD JUSTICE STUART-SMITH: Thank you. That will make all the difference.

C SIR JAMES EADIE: It may not make much difference. But *Heathrow* is at tab 46 which probably is in the same bundle, bundle 3. The context was a pretty specific one, which was the GATT case -- the GATT treaty. The analysis in question really starts with the title above para.135. Again, I am not going to seek to question any part of this judgment at the moment because, as I say, I am not inviting you to overrule or do anything of that kind, but at some point someone is going to have to rationalise whether this actually works as an analysis.

D LORD JUSTICE STUART-SMITH: I am sorry to interrupt your flow, but is justiciability an issue as such?

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: I mean, this morning you said it was not, so we are simply looking at----

E SIR JAMES EADIE: We are simply looking at tenability and the reason I am going to the justiciability analysis here is because, as I said earlier, they are really parts on a spectrum: do you not go there at all or do you go there subject to the tenability standard? In this case we restricted the argument to tenability, but some of the analysis of the factors that bear on both you see being considered under justiciability, if that makes sense. I mean, there certainly could be a justiciability argument here, because lots of the factors that it identifies as bearing on that issue would be in play here, some of the factors I mentioned in my sixth, I think it was, submission.

G MRS JUSTICE THORNTON: So why is your case (inaudible) justiciable?

H SIR JAMES EADIE: My Lady, I think that we have recognised that the tenability standard is good enough for us and we have stuck there. I am not sure there is anything terribly principled about it. One could have gone the whole hog but we have not done. We have simply gone on to the tenability standard. I am not seeking to persuade you this is non-justiciable.

MRS JUSTICE THORNTON: So it is not to do with the fact that there was an attempt to apply Paris?

A SIR JAMES EADIE: It is not, because that is the common starting point for both limbs.

MRS JUSTICE THORNTON: Well, the other climate change cases do not have that link. This is more akin (inaudible) GATT. The Government thought that it was taking account of its international obligations, so I wondered if that is why you (inaudible).

B SIR JAMES EADIE: No, it is taking it -- Well, in all these cases it is taking account of an international obligation. That is the necessary starting point for the analysis, because, if it has not, no one can complain about it, so the starting point for the analysis is always that it has been taken into account and so, to that extent, it is similar to the GATT case, it is similar to the ECHR cases of *Kebilene* and *Launder*. It is similar to all the other cases. From that perspective, a true reason for identifying that factorial analysis and what those factors might be does, I respectfully submit, and I will come to it in due course, provide a clear distinction between the sort of situation we are dealing with in relation to GATT - or they were dealing with here in relation to GATT - and ours, because they focus, as you will recall, on the way in which the international obligation is framed, at what high level, what are the mechanisms for enforcement, how does all that work? Is there a body of case law which you can go to to inform yourself about the meaning? Those factors do provide points of distinction, I respectfully submit, in defence of my unprincipled position.

E As I say, part of it, I suspect -- I mean, part of it was really the point that I made earlier which is that at some point someone is going to rationalise how all of this works, but I am not inviting this court to go here. For present purposes, it is enough for me, anyway. Perhaps, I ought to put down a formal marker about appeals if it goes on, but I am not sure that is truly necessary. At this level, I am not saying that it is *Ex Parte Tarr* or anything of that kind. I am accepting the correctness of dishonest facts. We just say that it is different.

F So, just to show you very briefly the nature of the analysis, I mean it is a long and complicated judgment, which deals first with justiciability and then with the standard. The true and core principle, we respectfully submit, is the one identified at 143 in the citation from Lord Oliver in *Tin Council* and, of course, Lord Justice Green and Mrs Justice Whipple did not have the benefit of the wisdom that you saw in paras.73 to 76 of *SC*, reinforcing that message.

A Then the court analyses various different cases, including *Launder* at 150, *KebeLine* at 152, *Kuwait Airways* at 153, *Ecuador v. Occidental* at 154, although it might be thought that that is a very, very different case indeed, because that was about an agreement to arbitrate contained in a bilateral investment treaty. Then the explanation for non-justiciability, you will see at 155. He gives in 155 the five examples, as he describes them, of Lord Justice Mance in *Occidental*, I think it was, the five examples that do allow international law or treaty obligations to be considered. And it might be thought that describing those as

B examples, although he says they are intended to be non-exhaustive, is slightly underplayed on the basis that those principles, those acceptable uses of international law, were thoroughly thrashed out in the period, in particular, prior to the HRA coming into force and might be thought to be, if not entirely exhaustive, at least jolly close to it.

C Then *Corner House* at 156, and he cites the bits that I have taken you to from Lord Bingham and refers to, but does not cite, Lord Browne. Then he distinguishes the position in *Corner House* as you see at 157. This is back to the factors that I identified. You will see the principle basis that he deploys for distinguishing *Corner House*, which I hope chimes with the factors that I was identifying before you.

D

E Then *ICO Satellite* at 158, Mr Justice Lloyd Jones, and he cites 92 which sets out the permissible uses that had been identified and he also cites 94. You will see at the beginning of 160, prior to the citation of 94, the beginning of what I have described as the crossover between the factors bearing on justiciability and the factors bearing on the tenable standard. That is why I go through this case law, because all of those factors, as it were, can play under both, but here he is analysing them under justiciability.

F Then 161 you will see, again, his explanation of what Mr Justice Lloyd Jones was doing in *ICO* which again illustrates and bears on the factors that I identified.

G Then his analysis of justiciability, as it were, goes outwards. It does not just rely on those factors. He appears to be taking into account - and I make no criticism of him for this - but he appears to be taking into account the broader range of things that tend to bear on justiciability as an issue in 164. But, of course, it is to be borne in mind that those broader issues about non-justiciability are to some extent not quite at the heart of the issues that we are confronting or, indeed, he was confronting.

H

A From 166 onwards, he identifies why it is that in the GATT context, and applying the various factors that he does, particularly from para.170 onwards, he decides that justiciability is all about what he describes as grounding and then identifies a series of factors that he considers to be relevant to the justiciability question. As I say, some of them have strong echoes into tenability, for obvious reasons, certainly on the analysis of Lord Browne and Lord Bingham and, indeed, the other judges in the cases I have taken you to.

B Again, as I say, I make no points at this stage and at this level about the acceptability or the correctness of all of the factors, some of them it might be thought tended to generality in a way that would tend to create an almost inevitable justiciability for international law provisions, whenever a decision maker took them into account, and that would be flatly
C contrary to the approach that Lord Browne was very concerned to make clear in the second half of para.67 in *Corner House* as you will recall, if they tend too far to that direction. But you will see that many of the factors there either are non-applicable on the facts of our case (see, for example, the fourth one at 173) and, indeed, the one at----

D MRS JUSTICE THORNTON: Paragraph 173?

SIR JAMES EADIE: 173, that is not applicable.

MRS JUSTICE THORNTON: You say there is a fourth bullet point.

SIR JAMES EADIE: I am sorry, the fourth point at 173. You see the structure of the analysis.

E At 170 he is listing all the factors that he says leads to the conclusion of justiciability and that runs through to the seventh one at 176. But quite a lot of them are -- as I say, a few of them tend toward generality and, therefore, have a question mark -- at least, in terms of analysis, if I may respectfully, at least, put down the question mark. But many of them are
F not applicable on any view to our facts: e.g. the third factor at 172, the fourth factor at 173, the sixth factor at 175 and the seventh factor at 176, all non-applicable in our circumstances. The one that is of real interest, it might be thought, is the fifth one at 174, which provides a serious point of contrast.

G Then at 178 he turns to tenability. The first sentence of 178 is undoubtedly correct. They have indeed in all of the cases that I have taken you through established that as the standard, but the reason for spending a little time on the Sales article was because it explains the jurisprudential underpinnings of that. Why did they introduce it as an important question?

H And they introduced it for extremely good constitutional reasons, all of which are explored

and all of which you see then reflected in the nature of the factors that are developed by the courts to tell you where you are on that spectrum between non-justiciability and tenability.

A
Then 180, as you will see, he returns to what we respectfully submit are the key and important features which grounded the factors that I identified in my sixth submission. You see him returning to that theme, effectively, in 186 -- well, 181, first of all, just above the letter D, but there is multiple case law on the application of the GATT to indirect taxation on every argument that was raised before the court. And he returns to that theme at 183,

B
“In my judgement, in the context of this case, the issue for the court is a clear-cut question of law upon which there is extensive jurisprudence. In my view, and for the detailed reasons set out below, the analysis of the Government was correct. This means that it is therefore tenable.”

C
So he expressly endorses, correctly, the previous court learning and endorses the applicability of the tenability standard in certain contexts. He says that GATT allows for a more intrusive approach, if I can put it that way, by the court, but that is because, in particular, of lots of factors that do not bear on our case at all, on any view, and because, to the extent that there is crossover (see in particular the fifth, I think it was, of his factors about how the thing is set up), there are clear points of distinction between our context and the context being considered there.

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My Lord and my Lady, I am sorry I have taken a little bit of time on that, but I know that my Lady in your permission decision was interested in this issue and I respectfully submit for good reason. There are difficult and important issues that do provide the gateway into the issues that we then go on to consider. There is some complexity in the case law for reasons you will have seen, so I hope that that has been helpful.

F
G
I was going to go very briefly then to the way in which those principles apply here, and just try and draw some strands together so far as our context is concerned with the Paris Agreement. My submission overall, as you know, unprincipled though it may be not to go further, or submission is that tenability is the standard. On any view, tenability is the standard.

H
The features from the case law that you have seen tend towards those factors urging or tending towards greater constraints being present in spades. As Mr Griffin's statement

makes clear, I referred to it earlier, this is a fluid and developing policy area, going back to the point I was discussing with my Lord about the policy and legislative interventions, policy choices and legislative interventions, live questions at the time of the decision and still as to precisely what policies should be in place in particular departments in relation even to considering some of the standards, some of the treaties in the areas of climate change, which, of course, is a very broad area anyway. There is a massive range of such standards and treaties. There is limited and explicit transposition or adoption of some but only some of those standards in primary legislation. In other words, some but only some of those standards have been chosen to be a direct part of domestic law by Parliament. As to the rest, policy choices have been made and have been developing, and the effect of my learned friend's submission will be that all of that can just disappear. All you have to demonstrate is that, as a matter of policy or on the particular facts, the decision maker took into account the particular standard and that will be enough. That is not the case law. That is the constitutional heresy that Lord Browne was so keen to shoot down in para.67. That, we respectfully submit, through policy choice under the scheme of direction by Parliament in primary legislation, is the constitutionally-appropriate manner and process for adoption of such standards, with Parliament making the decisions as to the standards to which the executive are then held by the courts and, indeed, making judgments about the manner in which they choose to do so, legislatively. Particularly, where you are dealing with broadly-framed standards, there are various ways in which things can be done and there is genuine legislative choice about what standards, what approaches, what obligations mandating particular courses of conduct should be created, that is for Parliament and, to the extent there are lesser decisions to be made, those are decisions through policy for the executive.

LORD JUSTICE STUART-SMITH: In your submission, what attention should we pay to the documents that we were shown this morning that postdate this decision and are said to reflect policy. So, for example, the two documents referring to the change of policy on 31 March 2021?

SIR JAMES EADIE: My Lord, my submission is that they fall within the general and well-accepted principle that they postdate the decision, but, more importantly, they postdate the decision so they are irrelevant; more importantly, they are an indication of precisely the point that I have just made, which is that these are policy choices to the extent that the territory is free for them. These are policy choices which the executive is able to make and should be able to make and, if that involves a change, so be it. A change in policy does not establish public law unlawfulness of a prior decision.

A I just want to make a couple of specific points, if I may, about the Paris Agreement in the context of the debate that we have been having. I will come back to the meaning and effect of it in due course, if I may. But we do submit that, on any view, the provisions on which my learned friend seeks to place reliance, including in particular and specifically Articles 2 and 4, do not create hard-edge rules. They are cast at a very high level in terms of objective and aims and they are as much an expression of political intent as they are of legal obligation.

B They do not provide clear and specific obligations of the kind, for example, that one saw in the context of GATT, that one saw, for example, in the context of the ECHR, they are far closer to the sorts of provisions - indeed they might be thought to be *a fortiori* to the sorts of provisions that the House was considering in *Corner House* under the OECD.

C Secondly, the position is that there is, under the provisions of the Paris Agreement, a dispute resolution process, but, as you have seen, it derived from Article 14 of the UNFCCC, but, as you have seen, the principal dispute mechanism involves resolution by negotiation and consensus on the international plane. That, we respectfully submit, is entirely unsurprising. It is a concomitant of the manner and the breadth in which the basic obligations under the treaty are expressed. But true it is that Article 24 of the Paris Agreement provides that the dispute resolution mechanisms under Article 14 of the earlier UN Treaty apply *mutatis mutandis* and that those mechanisms include, at least in principle, the possibility of arbitral resolution and/or ICJ ruling. But Article 14(1) of the UNFCCC provides that the parties shall seek in the first instance to resolve disputes by negotiation or other peaceful means. That is the basic rule, therefore. And Article 14(2) of that instrument provides that disputes can be resolved by recourse to the ICJ or arbitration if both parties - so it is a consensual process - if both parties have submitted to the jurisdiction of either. As I understand it, only three states have ever filed a declaration under Article 14(2) of the UNFCCC, The Netherlands, the Solomon Islands and Tuvalu and only one has extended matters to the ICJ, The Netherlands. In practice, therefore, those dispute resolution mechanisms, as is entirely unsurprising, have not in practice led to any jurisprudence whatever, and that is the third and final point in relation to those provisions.

H There is no body of jurisprudence. There is no judicial guidance on the international plane as to what the provisions mean, what they entail, what the nature of the obligations are, the extent to which they are aspirational and/or political, the extent to which they create hard-

edged obligations - whether my learned friend is right about how you go about approaching particular issues or wrong - nothing on the international plane by way of judicial guidance. Paradigmatically, therefore, absolutely into the centre of the concern that the court has identified.

A

LORD JUSTICE STUART-SMITH: Paradigmatically?

SIR JAMES EADIE: Into the centre of the court's concern----

LORD JUSTICE STUART-SMITH: No, what was your first point? Paradigmatically?

B

SIR JAMES EADIE: Let me recast it. At the centre of the concern----

LORD JUSTICE STUART-SMITH: I referred to (inaudible) yesterday, I would not dream of describing your -- is that a word?

SIR JAMES EADIE: Paradigmatically? Yes, I use it regularly.

C

LORD JUSTICE STUART-SMITH: Well, that may not be the answer.

SIR JAMES EADIE: It is the adverb of paradigm.

LORD JUSTICE STUART-SMITH: All right. I am sorry to be so sensitive.

SIR JAMES EADIE: I hope I recast it acceptably. At the centre of the concern that we have been dealing with in *Corner House*.

D

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: But you do not have any of that. You have none of that guidance.

LORD JUSTICE STUART-SMITH: Yes.

E

SIR JAMES EADIE: Indeed, to the extent that it exists on the theoretical plane, it simply has not been taken up practically. As I say, that is perhaps entirely unsurprising given the nature and formulation of the obligations in the Convention itself. And that provides the core distinction between our situation and the situation that was being dealt with in, for example, *Launder* and *Kebilene*, because there you have human rights standards and (a) they exerted a greater pull because of human rights standards, but (b) you had a specificity of obligation, the international structure providing a dispute resolution and guidance on the meaning and the exercise of that structure, so that case law existed to inform -- so the courts could be confident of what the true meaning was: ultimately, the concern which Lord Bingham identified. So we submit that all of the features that have caused the courts concern, which have driven the courts towards the tenability standard, are present here. That is the solution.

F

G

Still on ground (a)----

MRS JUSTICE THORNTON: I am sorry, if you are moving off tenability----

H

SIR JAMES EADIE: Yes.

MRS JUSTICE THORNTON: -- what do you make of the definition of “tenability” in the *Heathrow* case? There is no definition he says. You say that is correct.

A SIR JAMES EADIE: Yes.

MRS JUSTICE THORNTON: And he says,

B “The dictionary says that it embraces a test of reasonableness *and* a requirement that the person expressing the (tenable) position is able to defend it.”

And then there is a reference to an article. Do you accept that, if we are with you on tenability, how do we go about with (inaudible) tenability? Do we do it according to that dictionary definition or do we do it some other way?

C SIR JAMES EADIE: My Lady, I would be content for that. I know that we discussed earlier whether it was markedly different or at all different from rationality. My submission is that it is not really. There may be gradations of it, because we know that rationality is to some extent, within its proper limits, a reasonable range of decision making for the primary decision maker. It is to some extent a flexible standard, so one might need something slightly different here.

D MRS JUSTICE THORNTON: But, on any view, do you accept that, in order for the decision maker here to have taken a tenable view on Paris, the decision maker would have had to form some view on what Paris means?

E SIR JAMES EADIE: Well, that rather depends what case I am meeting. At the moment, when I get to it, I am going to be meeting a case that says “Paris means you cannot provide financing into projects that are not net zero or better. My submission would be that that plainly is not in place.

F MRS JUSTICE THORNTON: Does it not start one step further back, which is what did your decision maker think Articles 2 and 4 meant? Is it that approach?

G SIR JAMES EADIE: My Lady, we are entirely content with that because they considered the Paris Agreement and they concluded that it had the flexibility to allow them to do what they did and that is enough for my purpose.

H I was going, if I may, to summarise the positive case and then I am going to come to the particular obligations that we are said to have breached and failed to realise that we had breached and erred in law in not realising that we had breached them. But, if I can just summarise briefly the positive case over a few propositions, if I may.

A The first point is that there is a need, we respectfully submit, to place the focus of this challenge within the proper context of the decision making under challenge, which is the decision by UKEF to provide support for this project. The nature of that decision and the variety of factors that were taken into account are set out extensively in the two witness statements that you have from us, first of all, from Louis Taylor, chief executive officer of the UKEF, and then from Maxwell Griffin. They are behind tabs 11 and 12 of your essential reading bundle. If I could invite you to take those up, they are also in core bundle 1.

B LORD JUSTICE STUART-SMITH: Before you start, can I tell you where I am at the moment? I thought that -- I will just deal with Mr Taylor. I thought that his witness statement was astute not to explain what he thought the Paris Agreement meant. He explains that he thought that he was permitted to do it. You may show me that I am wrong in a moment and you may say that it is consistent with the nature of your case, but he does not, as it were, answer my Lady's question from just now saying, "Well, this is what I thought it meant".

C SIR JAMES EADIE: He does not take up the passages in our material and say, "I think this means this, that and the other".

D LORD JUSTICE STUART-SMITH: Because he anchors down on the decision documents and----

SIR JAMES EADIE: Exactly.

LORD JUSTICE STUART-SMITH: Thank you.

E SIR JAMES EADIE: It may be that we are more in the negative -- and that is why I answered my Lady as I did, that we are more in a negative sense than we are in the positive sense. Does it contain a hard-edged obligation that stops you doing this? If you reached a conclusion, if we are right about that - I will come to net zero and all of that in due course - but, if we are right about that, is that a flaw? Is that wrong? Does Paris dictate another obligation?

F LORD JUSTICE STUART-SMITH: The fact of the decision implies a view----

SIR JAMES EADIE: It does. It implies a permission at the very least.

G LORD JUSTICE STUART-SMITH: Yes, it implies a view that it is not prohibited under Paris to invest in a project which, either viewed in isolation or globally, will lead to an increase in emissions.

H SIR JAMES EADIE: Yes. And it is not dissimilar to the situation you had in *Corner House*, if one thinks through that, and thinks back to that, there was the director of the SFO saying, "It is all right under Article 5", but he was saying, "It is all right under Article 5"; he was not saying, "I think the word 'and' or 'the' in Article 5 means a particular thing". It will very

A regularly be that way in relation to Government decision making. "Do you have the flexibility -- if you get to this stage, do you have the flexibility under the relevant international legal provision? If you are taking it into account or you are applying the tenability standard, do you have the flexibility under that provision to do what you have done?" Or is there something which is hard edged in the Convention which prevents you from doing that? That indeed was the argument on -- even on the Human Rights Act cases that was the argument -- the ECHR prior to HRA cases, that was the argument. You cannot send Launder back to Hong Kong because, if you send Launder back to Hong Kong, he will not have a fair trial because the Chinese are now in charge was the argument.

B
C LORD JUSTICE STUART-SMITH: One more irritating question: are we to understand that, in reaching the decision that he was not precluded from investing by what I will call Paris considerations, that it was or was not a relevant consideration for that particular point that the project would go ahead, anyway?

SIR JAMES EADIE: It was a relevant consideration that it would not go ahead anyway. It was. I will come to this and go into that.

D LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: That is going to be my final point under my summary, as it were, of the positive case, if I can put it that way.

E LORD JUSTICE STUART-SMITH: It would not be the first time at this hearing that I have been ahead of everybody, so that is fine. Right, so the Government position is simply that the Paris Agreement does not preclude investment in a project that leads to a net increase in emissions.

SIR JAMES EADIE: Yes.

F MRS JUSTICE THORNTON: Or is it more specific than that, it does not preclude investment in this project? I think that that is what you are saying. You are not even prepared to go as far as has been suggested.

SIR JAMES EADIE: Just this decision.

LORD JUSTICE STUART-SMITH: In this project even if it leads to that -- anyway, we can play with it. Yes, I understand.

G SIR JAMES EADIE: Yes. You will see in terms of what is in Mr Taylor's statement, whatever is not in Mr Taylor's statement, whether assiduous or not, you will see what is in Mr Taylor's statement, which is a recitation of the range of considerations that were taken into account in reaching this decision, because it goes----

MRS JUSTICE THORNTON: You say, because it is an extremely broad range considerations----

A SIR JAMES EADIE: It is.

MRS JUSTICE THORNTON: Are you saying that that is because Paris is so broad?

B SIR JAMES EADIE: My Lady, no, I am not sure I -- I mean, I do say that, but I also say that this was a decision in relation to which Paris was but one factor. No one denies that it was taken into account, but it was one factor in the range. They concluded, as it happens, that they were consistent with or aligned with the obligations in Paris, but some of the other factors that were taken into account were plainly relevant.

C MRS JUSTICE THORNTON: I do not think we are concerned with that, are we? The key question for us - the court - is the decision maker here decided that this decision was consistent with Paris, be that a lawful or unlawful decision. So the wider factors are not central to our analysis, are they?

SIR JAMES EADIE: They are not, but it is important that they are -- that you place the decision in the proper context. This was not a decision that solely turned on Paris.

D MRS JUSTICE THORNTON: But lawfulness does not depend on -- you might have taken account of (inaudible), for example, but that would not detract from whether the decision on Paris is consistent or not consistent.

SIR JAMES EADIE: Well, it does not touch that, my Lady, no.

E MRS JUSTICE THORNTON: So do we need to consider these broader factors? Is it just background context?

F SIR JAMES EADIE: It is background context but it also places the decision in its proper context, because this was not a decision -- I do not know whether this does or does not play -- I am not sure that I have got a positive submission to make, whether it does or does not play into the sort of factors that you are considering, my Lady, that you would need to consider in relation to tenability. But this was not a decision that said, "Here is the international standard, it is the only thing we need to worry about, yes/no". This was a decision that was multifactored. It took into account a range of things, including things that had no bearing on Paris, like UK financial benefit.

G LORD JUSTICE STUART-SMITH: But, once you accept that it is a material consideration and you are not running the case, which is that the decision would have been the same anyway----

SIR JAMES EADIE: Then the focus is on Paris, I accept that.

H LORD JUSTICE STUART-SMITH: -- then my Lady is surely right in saying that the other factors can only be contextual.

SIR JAMES EADIE: My Lord, I am not going to quibble with that.

MS SIMOR: Perhaps I might assist, we are not challenging the rationality. We are not challenging the rationality of the decision outside the Paris argument, save in relation to the stranded assets decision.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: What I think that it may be right to emphasise, I am not going to take you through all the other considerations that were taken into play, and I was not intending to anyway, but you have seen the various other considerations that were in play. Climate change and the Paris Agreement and the impact of the project emissions were considered as a relevant factor. The fact that that was done is at para.69 of Mr Taylor's statement. But he emphasises, and again I am not sure necessarily this tees up any form of legal submission, but it is appropriate at least to note it. He did so in effect so that people could be fully sighted rather than treating himself as bound by Paris (see para.84) and both he and Mr Griffin emphasise - he does it at para.85, Mr Griffin does it at paras.64 to 72 - that consistency with Paris was not treated in any sense as being a precondition to support. Perhaps, more significantly, or as significantly, Mr Taylor emphasises at para.88 that there was no intention, as it were, to provide some form of definitive answer to the questions about the likely impact of the project.

LORD JUSTICE STUART-SMITH: That goes back to the question that I asked you right at the beginning of your submissions about the extent to which the decision maker can frame the context.

SIR JAMES EADIE: Yes, it does.

LORD JUSTICE STUART-SMITH: And that is the passage that you rely on in answer----

SIR JAMES EADIE: That is the passage we rely on, para.88.

MRS JUSTICE THORNTON: This is the witness statement?

SIR JAMES EADIE: This is the witness statement.

MRS JUSTICE THORNTON: So you say that this clarifies, otherwise (inaudible)

SIR JAMES EADIE: My Lady, I do say that it clarifies. There is no objection in principle to this. You have seen the ministerial submission, but these statements inevitably explain, when a challenge like this comes in, that it is permissible to explain more fully what the reasoning and the thinking was. Indeed, that is what the court would expect the Government to do. This is not, as it were, an *ex post facto* disagreement with what was said contemporaneously, which is the real problem, in principle.

A LORD JUSTICE STUART-SMITH: If I can truncate it, you say that if and when in our leisure we go through all the documents that we were invited to go through - the pre-decision - your submission would be that we can see that again, primarily in the decision documents, but also in the surrounding documents, the scope of the materiality that was given to them.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: That has to be your submission, does it not?

SIR JAMES EADIE: It is.

B LORD JUSTICE STUART-SMITH: It is but it also has to be.

SIR JAMES EADIE: My Lord, yes, subject to us complying with Paris which----

LORD JUSTICE STUART-SMITH: Well, you are meeting the challenge that you are and you are relying upon the scope of the consideration that you gave to it as being reasonable.

C SIR JAMES EADIE: As a strand in the answer to that.

LORD JUSTICE STUART-SMITH: Yes.

D SIR JAMES EADIE: And, if we get to the stage of saying, "Did we comply with Paris", we say that the answer is tenable interpretation does not lead to the sort of hard-edged obligation that my learned friend was contending for and, in relation to applications, it is the rationality standard and they were entitled to reach that judgment. The judgment that they reached was that we were aligned with Paris, whatever the phraseology was, which is why we are slightly baulking about whether I need that line of argument.

E LORD JUSTICE STUART-SMITH: Just give me a second. (pause) Is this a proper formulation of the decision, that what the decision maker was looking at was whether Paris considerations that he undertook precluded investment? Is that a fair reflection of what I think you are saying?

SIR JAMES EADIE: It is.

F LORD JUSTICE STUART-SMITH: It is certainly a fair reflection of what I think you are saying, but do you think that it is fair reflection of what you are saying?

SIR JAMES EADIE: My Lord, the only reason I am hesitating is because you know that we advance a positive case as well, that there was nothing inconsistent with the Paris Agreement in what we were doing, but, subject to that point, that is a fair reflection.

G MISS SIMOR: I am terribly sorry, I could not hear that, my Lord.

LORD JUSTICE STUART-SMITH: Well, you will not get it quite the same again, but what the decision maker was looking at was whether the Paris considerations that they undertook precluded investment.

H SIR JAMES EADIE: With a rider that says----

LORD JUSTICE STUART-SMITH: With the rider.

A SIR JAMES EADIE: -- if we need to establish that we were aligned with the Paris Agreement, we say that the breadth of the Paris Agreement allows us to do what we did, which is to provide financing into this project.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: You see why I make that caveat.

B MRS JUSTICE THORNTON: Why do you say if you need to align with Paris? You did not need to align with Paris, because that is what you thought, or did you (inaudible) undertook to do it?

SIR JAMES EADIE: My Lady, we are back then to the arguments about international law.

C MRS JUSTICE THORNTON: Well, I think we are back to what your decision maker thought he or she was doing, are we not?

D SIR JAMES EADIE: Yes, and they thought that they were aligning with Paris, but they undertook the assessment that they did. And the question is whether there was an error of law; that is what ground 1 asks, "Was there an error of law in that?" Did Paris preclude them from investing in this project, to make it simple -- well, from the financing parts of this project through the mechanisms that UKEF uses? (Pause)

E My Lady, I am going to come back to some of these points. I am just trying to sketch the positive case, as it were. This was the context of the decision. We have probably done that bit. I was about to say to death, but I do not mean to death, but we have done that bit. I did want to emphasise that there is some considerable need for caution before jumping to the assumption that, as a matter of policy, the UKEF had to comply with Paris. And I say considerable notes of caution because lots of the policies you have been taken to are not actually applicable to UKEF at all. They are to do with overseas development aid and/or - or to the extent that some of them are relied upon - they postdate the decision, in any event, and were not applicable policies at the time. But the position in relation to policy and Paris, and can I just give you some references into Mr Taylor's which I hope will do for this purpose? These are paragraphs in Louis Taylor's statement: 24, 77, 85 and 88 to 89. So that is the context of the decision. That was the first point.

H The second point is just simply to flag a submission to which I am going to come in more detail in a moment, which is that there is nothing in the Paris Agreement to support the key

obligation for which my learned friend contended. That is all I want to say at this stage. I am going to come back to that, but just so you note it.

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Thirdly, we are here dealing with, ultimately, a challenge to the decision to invest or to finance -- to provide financing into this project. That is the target of the attack. And, of course, that decision involves the whole range of factors that I identified earlier, whether one takes that as Paris only or all of the considerations, with strong predictive elements and a dash of expertise. One needs to be cautious, at the very least, in a judicial review about avoiding treating judicial review, in effect, as a battle between experts. That is the very strong message from *Gardner*, there is no way of resolving differences between experts in this forum with this process. That is the core message along with "Don't do comment or advocacy in your 'expert reports'". That is the core message that comes out of *Gardner*, which is, if you want it, behind tab 52 in authorities bundle 4. That is the target of the attack, ultimately. It is on the decision to finance. My learned friend stands up again and says "Well, I am not attacking the rationality of the decision", but, ultimately, that is the target.

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And she cannot escape the height of the legal test or hurdle that would plainly be applicable at that stage for all of those reasons, namely, broad rationality, if I can put it that way. She cannot escape the height of that hurdle by claiming this is a procedural not a substantive challenge. That is (a) because the substantive judgment is what is truly under attack here, whether in relation to the Paris Agreement or more generally in relation to the decision, but also, more importantly, or as importantly, because rationality is the standard when you are considering procedural challenge. The full range of rational decision making is open to the primary decision maker, here UKEF and the Secretaries of State, and that full range is open in relation to (a) what factors to take into account - even something as basic as that - that, of course, is dependent on the issue in question and how the decision maker considers it appropriate to approach and deal with the issues; (b) in relation to what enquiries to undertake or pursue (that is *Tameside*, but that also is underpinned by a rationality standard) and the (c) *a fortiori* in relation to what conclusions to reach.

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Can I just go very briefly back -- perhaps I will not go back to *Plantagenet*, because you have already seen it. But I can pick up all the bits from *Plantagenet* that are interesting in the Court of Appeal judgment which I did hand up this morning, the *Balajigari* case. I did that, because, as you will appreciate, despite the august nature of the Divisional Court in the *Plantagenet* case, it was only a Divisional Court and the *Balajigari* is Court of Appeal. The

A paragraph that I want is para.70, because that is, in effect, an adoption -- I think that my learned friend said that it was Lady Justice Hallett who was giving the judgment, I think that it was Mr Justice Haddon-Cave on behalf of the court, but para.70 basically adopts in relation to *Tameside* the analysis of Mr Justice Haddon-Cave in *Plantagenet Alliance* at the level of the Court of Appeal and expands, I think, on some of the points that are made, but that is the authoritative statement of principle.

B All of these judgments about framing the approach, framing the decision, what you take into account, what you do not, what enquiries you should make, how much modelling you should do, how much you chase down an issue or not, all of that is subject to precisely the same legal standard that the final decision is subject to and that is for the same constitutional reasons, which is that this is a judicial review, it is not an appeal, and the primary decision maker on all of those issues is the executive. That paragraph I hope will give you the *Plantagenet* bit in a nutshell.

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D The fourth point in terms of the summary of the points is a submission that the evaluation of the climate change issues and, in particular, the production of the climate change report, was done, we submit, thoughtfully, carefully and on any view rationally.

E On the nature of the assessment of the climate change matters, Mr Taylor brought his education to bear as the statement makes clear, he had sources of expertise available to him, Wood MacKenzie - as Mr Taylor points out at para.81 and Mr Griffin also deals with it at paras.37 to 38 of his statement - experts at the African Bank and within the USECA (see Taylor, para.81, Griffin, para.55) internal UKEF expertise, including from the broader governmental -- across governmental departmental bodies, the Export Guarantees Advisory Council (ECAG). That is Mr Taylor paras.74 and 87 and then in more detail, in terms of that expertise available within the decision maker, see Mr Griffin at paras.32 and 49 to 54. Still in terms of the process of that decision, as both of those witnesses emphasise, they were to some extent breaking new ground, both nationally and internationally, in doing that sort of work. There was not any established framework, as Mr Taylor points out at 83, and, as is explained in Mr Griffin's statement at 36 and 45 to 48, they were dealing with a context in which there was a range of standards----

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H LORD JUSTICE STUART-SMITH: Could you just give me the paragraph numbers for Griffin on that last one?

SIR JAMES EADIE: Yes, Griffin, 36 and then 45 to 48.

LORD JUSTICE STUART-SMITH: Thank you.

A SIR JAMES EADIE: They were dealing with a context in which they were designing that
framework against a range of standards, including in the Paris Agreement expressed in
aspirational and/or discretionary terms, so judgments within a very wide span are built into
the DNA of the international legal position, and that obviously chimes with making
B judgments about that and rationality being the standard. And they were dealing with a
context in which UKEF, as it were, were taking their decisions as the body deciding on
financing, in circumstances where they are not a research body, they are not a court, they are
not performing quasi-judicial functions, they are not an academic institution, and in which it
was obviously appropriate, we submit, to take the reasonable and sometimes non-
C determinative approach that they did (see Griffin 127 to 129) but they did produce the body
of work and they did do the analysis in the climate change report, as I have indicated.

D On the substance of that report and the conclusions so far as relevant to Paris, and again I will
come back to the themes in more detail in due course, but just to sketch it at this stage. The
conclusions of the CCR are summarised in Taylor, para.90, and Mr Griffin's statement,
para.60. As you have seen from the CCR, scope 1 and 2 and 3 emissions are acknowledged
and are taken into account. I will obviously come back in particular to scope 3 which was the
subject of extensive submissions.

E Now, those emissions could not be considered in isolation and they could not be considered
in isolation especially because of at least four considerations. One, some at least of the LNG
would be used within Mozambique to replace more concerning fuel - oil, coal and trees
F leading to de forestation - and, so far as the boarder uses globally are concerned, and
recognising all of the uncertainties, at least a part of the exported LNG was likely to be used
to replace more concerning fuel, such as coal and oil. Thirdly, the money generated by the
project, the finances generated by the project would enable not merely the basics to be put in
G place within Mozambique to enable it to harness its huge capacity for renewables, but also
would be used or could be used and would be available for defence against natural events
that cause the sort of disasters that my learned friend alighted on. Fourthly, in which those
moneys would be available, as it was put in at least one of the documents I will come back to,
as having the potential to lift millions out of poverty. You will recall that in the Paris

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Agreement there is a reference to those broader economic considerations playing into the sorts of decisions that one sees in Article 2.

A Sill on the substance, the Mozambique NDC and masterplan were considered with particular care (see Griffin 73 to 89).

LORD JUSTICE STUART-SMITH: At some stage could you, not necessarily now, identify the assertion that the NDC took into account this project? I think that it is on p.258 in the CCR.

B SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: I would be grateful to see the link, because, apart from a one line reference to liquid natural gas in the document----

SIR JAMES EADIE: I think that it refers to the masterplan is the link.

C LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: But I will check that overnight.

LORD JUSTICE STUART-SMITH: Could we do it tomorrow morning?

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: There is no rush.

D SIR JAMES EADIE: I think the paragraphs in Griffin are 73 to 89. I will see if that link is in there.

LORD JUSTICE STUART-SMITH: Yes, but I do not think -- well, to my eyes they do not drill down to the document----

E SIR JAMES EADIE: No. Can I provide greater specificity overnight on that?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: I will see if I can anyway. My understanding is that NDC then relies on the masterplan and the implementation of the project is part of the masterplan.

F LORD JUSTICE STUART-SMITH: Yes, maybe, in which case can we have the reference tomorrow?

G SIR JAMES EADIE: Yes. Then the series of points emphasised by Mr Griffin at 81 and 83 to 86 explaining why the project was needed, international finance access, with all the money coming in, especially important because it needed strong investment in the grid structure, in the basic grid structure within Mozambique and that grid structure was an essential precondition to allowing renewable energy projects to work.

H Scope 3, just to flag up some of the coal themes, I will come back to it in more detail, obviously, but, so far as scope 3 is concerned, in essence, Wood MacKenzie say - and

A everyone agrees I think - it is very difficult, if not impossible, to do at the very least impact
with any degree of real certainty. Nevertheless, UKEF probed and produced the assessment
B which they did in reliance on -- with the assistance of Wood MacKenzie so you have got
best, worst, middle cases to give some idea. A clear acknowledge that the scope 3 emissions
would be very high but with a question about offsetting and all of that transition. And then
some quantitative, to some extent back-of-an-envelope, if my learned friend is right that it is
all jolly easy, some quantitative assessment in the light of and for the purpose of assisting the
C No. 10 analysis, which was to accept that the project could be financed, in effect, but then to
say, "I want a body of work undertaken" to see whether there are other offsetting things that
we could do. It might be thought that that in itself is an indication that at the very least No 10
clearly understood that there was some offsetting that needed to be done, which may bear on
the understanding, meaning and effect that we will come to tomorrow.

MRS JUSTICE THORNTON: What was that last statement, sorry?

D SIR JAMES EADIE: No.10 asked, as you will recall, for some work to be done on offsetting and
that in itself, it might be thought, is an indication that they appreciated that there was a case
for doing offsetting, which, in effect, means that you are getting very high emissions at scope
E 3 and they want some work done to see whether something could be done about that.

Then the fifth and final summary point in relation to the positive case is that, if UKEF did not
participate, the project would have gone ahead anyway. That may not always be the position
F but here it plainly is, it is hardly surprising given the countries that were already involved in
financing, as to which see the CCR at p.286 in core bundle 2. The only consequence, the true
consequence, therefore, of the UK not financing would be that no effect on emissions
whatsoever, but the UK business would not be supported in the way that it could be and,
indeed, a potential loss of the ability - again a factor relied upon at 262 in the CCR - a
potential loss of ability to influence Mozambique and to assist Mozambique in the future in
relation to cleaner energy alternatives going forward in the attempt to try to harness those
natural resources and those renewables in the future. Again, that is dealt with in a little more
G detail in Mr Taylor's statement at paras.105 to 108. And, in circumstances in which the
project would have gone ahead anyway, there was a global point, as it were, which is that the
decision itself in truth had no impact on emissions anyway.

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A Can I then turn to the first of the ways in which ground 1A is advanced, which is that, providing export finance to the project, is said to be a breach of any obligations to make finance flows consistent with a low-emissions pathway.

B As to the meaning and effect of the provisions, I have made my submissions about tenable view, and the key issue of interpretation, it might be thought, is the one that my learned friend asserted in answer to my Lord's question yesterday: does the Paris Agreement contain a hard-edged obligation that no financing can be provided to any project anywhere in the world if it involves fossil fuel? The approach to that core issue of interpretation is the approach derived from the Vienna Convention which I do not go back to.

C What I do go back to very briefly, if I may, is the description of how those principles operate in the context of a multilateral treaty of this kind, in the judgment of Lord Sumption in *Al-Malki*, bundle 3, tab 34. As I say, the context in this case was the Vienna Convention on Diplomatic Immunity and Privileges and you will see that from the headnote. You will see the basic structure that they were dealing with which was, as I described it earlier, the 1964 Act, and I should say this passage was applied recently by the Divisional Court, Lord Justice Flaux, as he then was, and Mr Justice Saini, in the *Harry Dunne* case about Mrs Sacoolas heading back to America, the same principles being applied in relation to the same Convention. But we can take it from here because it is a Supreme Court ruling on how to go about interpreting these sorts of Conventions.

F There you have the 1964 Act which, as I say, has scheduled certain provisions of the international convention to the Act, so there was no question but that that was incorporated. The question, nevertheless, arose: how do you interpret a domestic legal principle of that kind? The answer to that was, unsurprisingly, perhaps, you interpret it on the basis of the international law rules of interpretation, because Parliament evidently intended to incorporate the international convention and that is what you do. But the key principled approach, so far as we are concerned, one can see from paras. 10, 11 and 12, although you do not need to worry for present purposes about almost the whole of p.1658, namely sub-paras.(3) and (4), because they are specific to the VCDR, referring to the diplomatic context. So can I invite you to read from para.10 to the end of para.12(2)? (pause)

A You see the basic themes and I do respectfully submit that there is a strong echo between what Lord Sumption was pointing out in this judgment, in relation to this Convention, as incorporated, and what we are dealing with here, including, in particular the point that he makes in the bottom bit of para.11, which is that, in effect, there is a limit to how purposive you can be, some strong chimes with Lord Bingham on domestic statutes, and as it might be thought----

B LORD JUSTICE STUART-SMITH: The one thing that it does not mention, which may be a slightly cantankerous note, is that, rather as with contracts, sometimes conventions and treaties are deliberately vaguely worded, so what is said about -- it may well be that every word, every sentence is pored over for hours, days, long into the night, but it may end up as could be said what we saw with COP26, all falling into place at the last minute, because a solution is found which is not specific but allows people to go away saying they have got what they wanted.

C SIR JAMES EADIE: Yes, that is possible. I am not sure that that would be dissonant with the analysis of Lord Sumption.

D LORD JUSTICE STUART-SMITH: Well, he seems to think that -- well, he seems to suggest in 12(1) that the deliberative process with minute review is going to lead to absolute precision, which I am not sure is necessarily the case.

E SIR JAMES EADIE: No. My Lord, if that is what is being suggested, I agree. There can obviously be a situation in which you compromise and that provides the answer and there can obviously be a situation where you deliberately frame your language in your treaty in a broad or aspirational sense, because you are deliberately leaving open the possibility of different countries doing----

F LORD JUSTICE STUART-SMITH: I think that that was the point that I was making.

SIR JAMES EADIE: Exactly. Well, I respectfully agree with that because I am not suggesting----

LORD JUSTICE STUART-SMITH: I just put a question mark by the words "the scope for inexactness of language is limited".

G SIR JAMES EADIE: Yes. But, even within that, if the language is not inexact, it may, nevertheless, be broad is your point.

LORD JUSTICE STUART-SMITH: Quite.

H MR ROSTRON: And I respectfully agree. What that tends to mean, therefore, is that, if you are in a situation where you have got language which is opaque or broad or aspirational, the chances are that that was either the result of compromise, in order to get something through

A the door, or it was a result or it must be taken to be the result of a deliberate decision to leave
the degree of flexibility which the broad language entails. And you bear in mind the
international context, which is that the more global it is, the more multilateral it is, the more
likely it is that people will do things in a different way and that the framers of the Convention
will be allowing for that. I mean, whether one puts it in the context of Lord Sumption's
analysis in that case or you say that you test the nature and content of the international
convention, particularly if it is multilateral, against the realities of life may not matter
B terribly, but many states are involved. There may be a hell of a job to get to a compromise,
as you rightly point out, and the question ultimately may be, well, if you harden it up, if you
try and imply into broad and aspirational language specific legal obligation, the chances are
that you would not have got agreement to that in the first place, because one or other set of
C states is going to disagree. It is not very difficult to put Mozambique into that submission. If
precluded from accessing financing to develop a key natural resource, which might be the
precondition to creating a grid which would allow it then to further exploit renewables and
take all of that forward, and, indeed, in its own terms, might have the effect of lifting millions
of its citizens out of poverty, would they have agreed to that obligation? One might think
D that that precisely explains why the sort of language which we find in Paris is in the language
that we find in Paris. So that is what we say generally by way of approach to interpretation.

E Article 2(1) then, if I can come to the specifics, of Paris simply declares, we submit, the
common aim of making finance flows consistent with a pathway towards low-greenhouse
gas emissions and climate resilient development. So, perhaps, three points to make in
relation to that alongside the headline points I have just made. First and at the most basic
level, it is declarative of an aim. It does not set down a prohibition. It is an extremely high-
F level aspiration. Indeed, interpreting it as a prohibition is or would be, we submit,
inconsistent with the core structure of the Paris Agreement, which leaves very, very
considerable flexibility to nation states to determine the concrete action that they will take in
pursuit of those aims and interpreting it as a prohibition on any particular course or species of
G financial support for any particular individual project is even more inconsistent, both with
that structure and with its terms and evident intent.

H Secondly, it is talking about a pathway "towards" low GHG emissions and the Paris
Agreement recognises that that pathway might not be a consistent downwards trajectory,
especially for developing countries (see Article 4(1) emissions peaking later and all that).

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Thirdly, Article 2 is not just about GHG emissions. There are balances inherent even on the face of the article. It is also about climate resilient development (in other words the ability of countries to withstand adverse climatic events) and it is about poverty. Therefore, to some extent it is already recognising on the face of it the necessity for states to make judgments about how to balance what might be thought to be mutually irreconcilable factors: poverty, climate resilient development, emissions and so on. Developing countries, in particular, may well need the revenue streams that could be generated from a project such as this in order to fund resilience building in order to lift the millions out of poverty and, indeed, in order to pursue the longer term agenda, which is to enable it to get off first base, so that it can get to the place of establishing, for example, a grid which can then be used as the basis for pulling in the renewables investment.

To some extent that does of course involve robbing Peter to pay Paul but that-----

LORD JUSTICE STUART-SMITH: I did not hear that.

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SIR JAMES EADIE: To some extent that does involve robbing Peter to pay Paul, but that balancing of mutually-irreconcilable factors is inherent on the face of the provision, especially, it might be thought, in relation to developing countries.

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My Lord asked yesterday about perspectives, where does Paris place the focus in terms of perspective, and our core answer to that is Mozambique. The main substantive provision of the Paris Agreement is for the countries - all the countries - to prepare their NDCs. The NDCs are the mechanisms for meeting the Article 2 objectives. What Article 2(1)(c) means, for a project in Mozambique in the light of the country's circumstances is, we respectfully submit, to be ascertained under Paris, primarily by looking at Mozambique's NDC. So Paris is set up in that way and allows, more importantly, or as importantly, for developing countries to make those sort of balance decisions and judgments. And here we know what Mozambique wishes to do.

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Article 3(1) then of Paris provides there is an obligation on states to undertake the efforts specified in the other articles "with a view to achieving the goals in Article 2". We respectfully submit that that does not add much, if anything, to the analysis of Article 2 and its nature. We do submit that there is nothing in Article 3, just as there is nothing in Article 2, which precludes a developed country, such as the UK, or indeed all of the other countries

which have provided financing into this project, all of whom will be in breach of the Paris Agreement, on my learned friend's argument, from providing financing to a developing country like Mozambique in these sorts of circumstances. So, when considering this application for financing in relation to this project, UKEF did consider the broad aims of the Paris Agreement and under the Paris Agreement and it was right to consider them as aims. UKEF took into account the emissions impact of the project, but, rightly, did not consider that to be determinative, nevertheless, 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, as we will see in due course, they weigh those - that fact - against other considerations, including, in particular, the recognition within the Paris Agreement that developing countries make longer to transition and start to reduce their overall emissions. Mozambique's own strategy for achieving the aims set out in Article 2 - that is consistent with the Paris Agreement being country driven - and it is integral, so those sorts of countries do have a choice which itself involve complex balances, including longer term views about infrastructure and poverty reduction immediately.

UKEF considered the absence of any other proposal at the time it was considering financing for renewable energy projects in Mozambique (see Mr Taylor's statement at para.125). That is important because the proposals were being considered at a time when the situation in Mozambique was a real one. It had lots of potential to harness, for example, renewables, but no grid or infrastructure in place to do so and no money to develop things, so that that could be done immediately, and no realistic prospect of getting that at this stage, given the absence of any proposal for renewable energy projects in that country. So what they have effectively done is to choose to sequence their development in the way that they have and the revenues from this project were the only likely source of foreign income which would provide them with the money to develop, both the electricity grid and the renewable energy development when it comes.

LORD JUSTICE STUART-SMITH: I think there are two separate points, are there not? There is that point, but, as a separate point, the revenue is the only means of lifting the millions out of poverty.

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SIR JAMES EADIE: It is, they are separate. They are.

LORD JUSTICE STUART-SMITH: They are two different considerations.

SIR JAMES EADIE: They are and both are legitimate, I respectfully submit, under Paris.

LORD JUSTICE STUART-SMITH: One is more immediately referable to climate change.

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SIR JAMES EADIE: Yes, and the other is not.

LORD JUSTICE STUART-SMITH: But the other is an acknowledged----

SIR JAMES EADIE: Irreconcilable----

LORD JUSTICE STUART-SMITH: - function of Paris.

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SIR JAMES EADIE: Yes. Just if you wanted a reference on the latter one, in other words, the getting the money together to develop the grid and to develop the renewables, the precondition point, see the supplemental bundle at p.627. I do not invite you to go to it now, but p.627, which is an email from a representative of the African Bank to the UKEF setting out some of the considerations that the African Bank went through in its board approval process.

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LORD JUSTICE STUART-SMITH: We have looked at that already, have we not?

SIR JAMES EADIE: I think that you may have looked at it before. There is a bullet, effectively, saying that Mozambique has got the largest power generation potential and it outlines the infrastructure needs: only 20 per cent of the population has access to grid electricity; large investment needed for hydropower.

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LORD JUSTICE STUART-SMITH: We looked at the second and third bullets and yours is the fifth.

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SIR JAMES EADIE: Yes, I am grateful, it is that. The same point is made in a Department for International Trade paper, supplemental bundle 1070, second paragraph from bottom. Renewables are not a viable alternative for an energy project of this scale, but revenues will allow investment into the infrastructure and the development of the grid.

LORD JUSTICE STUART-SMITH: You said penultimate paragraph, did you not?

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SIR JAMES EADIE: If I said penultimate paragraph----

LORD JUSTICE STUART-SMITH: "Mozambique renewables: Renewables cannot yet provide an alternative ..."

SIR JAMES EADIE: Yes.

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LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: My Lord, that may be a relatively natural break.

LORD JUSTICE STUART-SMITH: You can have your extra five minutes if you want it.

A SIR JAMES EADIE: I am very happy to go on for a bit, if you would like. I think we are going to be all right for time.

LORD JUSTICE STUART-SMITH: In the light of the beneficial effects of long skeletons, I refused the extra day, I suspect that there will come a moment tomorrow when someone feels squeezed, so let us take advantage of the time.

B SIR JAMES EADIE: Okay. I was going to address the question whether the only possible way consistent with Paris of assisting Mozambique was to provide it with funding for renewables straightaway, as it were. Why was the project necessary as a precursor to that? Why not just throw the money at renewables?

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The first point to make is that there is no obligation in the Paris Agreement on a specific country like the UK or anywhere else to give money to another country like Mozambique to develop renewable energy for nothing in return. My respectful submission is that, in the light of the materials that I identified a minute ago, it is clear that in the real world, in order to do
D (a) the lifting of millions out of poverty and (b) the development of the infrastructure that was necessary to harness renewables, it was necessary to attract very significant quantities of, in effect, foreign investment and the immediate and obvious way in which that could be done - and which Mozambique, evidently, thought was the right way of doing that - was to get and
E to provide financing for the project for that purpose.

LORD JUSTICE STUART-SMITH: Is it fair to characterise this submission as being testing the proposed interpretation by reference to the consequences rather than a pure exercise in interpretation? You have moved on from just looking at the terms of the----

F SIR JAMES EADIE: Of the Paris Agreement, I have, I have moved on to application. I am sorry, I should have probably put in a headline saying “application” or something.

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.

G 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. I am going to come back and I am going to deal with scope 3 emissions as soon as separate topic, if I may. I was going to go next to the CCR and to just show you the relevant bits. I know you have read it very carefully but what I would rather do, if I may, is take all of that set of issues in one go because otherwise I will risk at least

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giving a partial answer. I am pretty sure that I now will not give an inaccurate one, but, if I may.

A The climate change report, can I just give you some headlines, as it were? I know that you have read it, I am not going to invite you to turn it up again. If you want it, it is in the core bundle behind tab 21 and is also in the essential reading bundle behind tab 17. But the key bit, so far as it is concerned, in terms of the answer in terms of application of Paris, as it
B were, is at the UKEF -- the first point is that the UKEF did consider and they did consider with care and with inhouse and external expertise climate change issues in the form that they did. You can no doubt pick it apart and have a quibble with bits of it, but the fact of the matter is that they undertook that task and they did so with the aim of understanding the
C climate change impacts of the project in more detail. As I said earlier, in public law terms, the degree of investigation and what to take into account are matters conditioned only by rationality; that is a perfectly rational approach to be taken.

D The conclusion section at 2/255-256 is obviously important. That is the overarching conclusion that I am sure the court will have read in full. Then the report looks at the scope 1 and 2 emissions. That is the direct and indirect contribution to Mozambique GHG emissions from the project itself.

E LORD JUSTICE STUART-SMITH: It is really 251 to 253 at the top of the page that is primarily scope 1 and 2.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Then 253 and following is scope 3. Then the next is the statement there which you have got.

F SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Then you have a conclusion at 255A which rounds off that section of the---

SIR JAMES EADIE: Beginning the "Project scope 1 and 2 emissions"?

LORD JUSTICE STUART-SMITH: Correct. But then you get on to---

G SIR JAMES EADIE: Then you get on to scope 3.

LORD JUSTICE STUART-SMITH: It is scope 3 in the last paragraph. It seems to me that 256, the second -- no, the first paragraph is marginally different from the wording adopted at 253. Then you get back on to it big time at 267, and certainly my present understanding is that you

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are right in the thick of it when you get to questions 9 and 10, p.267, going on to 272. Then on to 277.

A SIR JAMES EADIE: Yes. My Lord, you do not need me to invite you to read it. We are all inviting you to read this in full.

LORD JUSTICE STUART-SMITH: I think that you can rest assured that we have read it in full.

SIR JAMES EADIE: Yes, I was going to characterise as “in the thick of it” questions 9, 10 and 11.

B LORD JUSTICE STUART-SMITH: Yes.

C SIR JAMES EADIE: They are the essence of it. And then, for good measure, and if I may, question 14, which asks whether the project will contribute to fossil fuel transition and expressly noted the global temperature goal in Paris and so on and, in that context, considered various bits and pieces. So question 14 as well I was going to draw attention to as at least deserving of another read.

D Then perhaps if I can just finish this section and then stop for the evening, if I may, the CCR, as you know, and I am not going to take you through it again all the way through, but the CCR then feeds into what you have described as the critical path of the decision making. It was provided to the Secretary of State and to the Chancellor. The 1 June submission you have seen. The decision by the Secretary of State was on 10 June to support the proposal, decision by the Chancellor on 12 June, all of them recognising that the ultimate decision maker was UKEF under s.13 of the 1991 Act. We do submit, therefore, in the light of all of that, in particular the fact that the Paris Agreement does not contain the sort of hard-edged obligation which my learned friend needs to make good the error of law case on any view -- where are the words that impose the sort of obligations that she has been contending for is perhaps a shorter and simpler way of looking at it. But the punchlines are that UKEF did not misinterpret the Paris Agreement. There is plainly at least a tenable view as to the meaning and effect of those provisions which permits the conclusion that supporting this project was in alignment with Paris and, moreover, when you get into the application part of that -- I did not put the headline of “application” in, but, when you get into those sorts of considerations, those sorts of judgments, you are dealing with rationality. It may not make much difference in terms of legal standard but you get there and there is no case we submit for saying that the applications and the judgments made in this particular project’s case were irrational. So no error of law and no error in terms of rationality.

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LORD JUSTICE STUART-SMITH: I think it must be time to stop because either you are your dropping your voice or I am failing to hear you. Could you just repeat that last sentence?

A SIR JAMES EADIE: Yes, no error of law and no irrationality in terms of application. I was back on that distinction between interpretation and application.

LORD JUSTICE STUART-SMITH: Thank you very much. 10 o'clock tomorrow again?

SIR JAMES EADIE: I suppose that we had better. If I say 10.30, I am going to want half an hour for lunch.

B LORD JUSTICE STUART-SMITH: I do not want anybody to be leaving thinking that they have not had the opportunity to put their case properly.

SIR JAMES EADIE: I am grateful. I think that we may be better at 10 then.

C LORD JUSTICE STUARY-SMITH: If we finish by 3 o'clock , no one will be more delighted than I am.

SIR JAMES EADIE: I think that I am due to finish by lunch time.

LORD JUSTICE STUARY-SMITH: Yes, that is fine. Thank you very much. So 10 o'clock tomorrow.

D (4.32 p.m.)

(Adjourned until the following day)

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

CO/3206/2020

Royal Courts of Justice

Thursday, 9 December 2021

Before:

THE RIGHT HONOURABLE LORD JUSTICE STUART-SMITH
THE HONOURABLE MRS JUSTICE THORNTON DBE

B E T W E E N :

THE QUEEN
on the application of
FRIENDS OF THE EARTH LIMITED

Claimant

- and -

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

First Defendant

- and -

CHANCELLOR OF THE EXCHEQUER

Second Defendant

- and -

TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA

Interested Party 1

- and -

MOZ LNGI FINANCING COMPANY LIMITED

Interested Party 2

PROCEEDINGS
(Hybrid Hearing via CVP)

A P P E A R A N C E S

MISS J. SIMOR QC, MISS K. COOK and MISS A. DAVIES (instructed by Leigh Day) appeared on behalf of the Claimant.

SIR JAMES EADIE QC, MR R. HONEY QC, MISS H. HIGGINS and MR C. FEGAN (instructed by the Government Legal Department) appeared on behalf of the Defendants.

MR A. HEPPINSTALL QC and MISS F. FOSTER (instructed by Latham & Watkins LLP) appeared on behalf of the Interested Parties.

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(10.00 a.m.)

A LORD JUSTICE STUART-SMITH: Thank you very much. On the dot. Yes.

B SIR JAMES EADIE: My Lord, my Lady, good morning. I wanted to finish, if I may, Ground 1(a) and the second part of Ground 1(a), which is, in effect, an allegation by the claimant that providing export finance to the project would be a breach of, as they put it, an obligation to support Mozambique in complying with its current and future NDCs.

C LORD JUSTICE STUART-SMITH: Yes.

D SIR JAMES EADIE: We submit there are two answers to that case. The first of them is that enquiring into the correctness of UKEF’s conclusion that the project was consistent with Mozambique’s NDCs, or, if you want to put it that way, Mozambique’s obligation to pursue domestic mitigation measures with the aim of achieving the objectives of its NDC per Article 4.1 of Paris, would contravene the third rule of the foreign act of state doctrine. The principles that govern that third rule are set out in *Belhaj v Straw*, which is the very long and detailed Supreme Court case about the allegations made by Mr Belhaj that he has been involved in rendition and so on. It was that case. It is in bundle 2, tab 31, and the passage I want, if you would, when you get behind tab 31, is on p.1498, using the page numbering on the bottom of the pages, and I want para.123 in the judgment of Lord Neuberger.

E MRS JUSTICE THORNTON: Sorry, which paragraph?

F SIR JAMES EADIE: 123, my Lady, which sets out what the principle is. Can I invite you to read that paragraph to yourselves? (After a pause): And from there can I invite you to go next to 130, on p.1500, in which the court gives – or Lord Neuberger gives – a recent example of the application of the third rule, which to some extent helps illustrate the nature of that third rule. See also, if you would, in the other judgments, Lord Sumption at para.225 on p.1534, identifying the principled underpinnings for that rule.

G LORD JUSTICE STUART-SMITH: 225?

SIR JAMES EADIE: 225.

LORD JUSTICE STUART-SMITH: Thank you.

H SIR JAMES EADIE: Perhaps, more broadly, the underpinnings for the foreign act of state doctrine more generally.

LORD JUSTICE STUART-SMITH: Is it just my form of printing, I think it must be, but in para.225----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- lines 4 and 5 in my copy look as if they are emboldened.

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: No. That is----

SIR JAMES EADIE: Well, not in mine. So I think “emphasis not added”.

LORD JUSTICE STUART-SMITH: Well, I have not done anything to it. So, all right, that is----

SIR JAMES EADIE: Mine are uniquely in one----

LORD JUSTICE STUART-SMITH: Well, it is rather alarming. Maybe if other symptoms appear, I will let you know!

SIR JAMES EADIE: Thank you.

LORD JUSTICE STUART-SMITH: 225.

SIR JAMES EADIE: 225, if you would.

LORD JUSTICE STUART-SMITH: Thank you. (After a pause): Anything else in *Belhaj*?

SIR JAMES EADIE: I think the only other passage perhaps, but it is more by way of a dotted side-line note, is the rather fuller treatment of at least some of the case law involved by Lord Mance between paras.90 and 95. Can I just summarise----

LORD JUSTICE STUART-SMITH: Do we have to?

SIR JAMES EADIE: You do not have to really. It is all really encapsulated in 123 but if you wanted a slightly fuller exposition, there it is. You have the reference. I am not going to take up time with it. There is then a helpful summary of the case law and a pulling together of the principles in the recent judgment of the President of the Family Division and Chamberlain J, who should know all about it because he was involved in the *Khan* case, as you saw reference to, in the *Al Maktoum* litigation.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And that is in authorities bundle 3, so, sorry, it is a different bundle. You can put bundle 2 away, if you would. Bundle 3 at tab 41. And their consideration of the doctrine starts at para.49 on p.2118, so para.49. I should say this was upheld on appeal so I do not think that is more relevant. And it goes forward then to para.52, if you just note – it is really just a review of the case law you have already seen, and perhaps of principal interest here, when they have done the analysis, they have pulled together their conclusions as to what the various judgments in *Belhaj* mean at para.64. So para.64. (After a pause):

LORD JUSTICE STUART-SMITH: Does subparagraph (e) link up with your submission about the absence of a body of established precedent? That is not the right way of putting it but when you were talking about----

SIR JAMES EADIE: Yes, and that article 24 point?

LORD JUSTICE STUART-SMITH: Yes.

A SIR JAMES EADIE: It does. It does, but what I wanted to emphasis was that the doctrine is not
only, or perhaps even centrally, underpinned by the usual things that underpin non-
justiciability, of which that is one. As you have seen from the earlier passages, it is
essentially a principle of judicial restraint or abstinence, as it were, in relation to particular
B issues (a) because it involves our courts being beastly about foreign governments but also
(b) because, and built into the doctrine, some issues are better dealt with on the international
plane, so there is that link into the doctrine in terms of its principled underpinnings. But
that essentially the doctrine and I hope that that is all you need out of all those long and
complicated judgments.

LORD JUSTICE STUART-SMITH: Yes.

C SIR JAMES EADIE: So the key question, we submit – the key question, we submit, is whether
or not the – at least the key question that the claimant is inviting this court to consider, is
effectively whether Mozambique is doing enough in pursuit of the Paris Agreement aims
and that is a question that involves Mozambique’s obligations as a sovereign state pursuant
D to an international treaty. It is about unilateral domestic acts viewed through the lens of
international relations, and it engages for precisely that reason all of the principal
difficulties and underpinnings of the third act of state rule. It is, to take but one example of
those principled underpinnings, evidently better addressed as a matter of foreign relations
E on the international plane as is, to pick up my Lord’s point, precisely recognised in that
primary mechanism for dispute resolution in the Paris Agreement by reference back to the
earlier UN agreement we went to yesterday.

F So what my learned friend says about this is that this is all a red herring, as she puts it,
because there is no question on the claimant’s case of Mozambique breaching their NDC,
simply whether the UK is assisting Mozambique to meet its NDC. That, we submit, at least
has a strong element of casuistry about it. If the foreign act of state doctrine would be
engaged by a direct enquiry into whether the project was inconsistent with Mozambique’s
G obligations under Paris, the claimant, we submit, cannot circumvent that rule by trying to
frame this as the UK’s obligation to support Mozambique to comply.

LORD JUSTICE STUART-SMITH: Can I just see if I can get a handle on this? There are, in
fact, two – there are two thrusts, are there not? One is Mozambique’s obligations under the
NDC----

H SIR JAMES EADIE: Yes.

A LORD JUSTICE STUART-SMITH: -- but I suppose one could see this case as involving a much wider – which is irrespective of NDC, if the court were, not to exercise the (inaudible) words, to start saying NDCs – Mozambique’s projection was not a low emissions path on a low emissions pathway or something like that, on the claimant’s case we would be at least expressing a view about compliance with international obligations.

SIR JAMES EADIE: Of Mozambique?

B LORD JUSTICE STUART-SMITH: Of Mozambique.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: So it is not – I am thinking, as you can tell, I am thinking as I go along----

SIR JAMES EADIE: Yes.

C LORD JUSTICE STUART-SMITH: -- but it is not simply limited to the NDC, is it?

SIR JAMES EADIE: No, I do not think it is. It is the NDCs and how they play into whether Mozambique is or is not complying with----

LORD JUSTICE STUART-SMITH: Yes, well, you do not get a----

SIR JAMES EADIE: -- Paris.

D LORD JUSTICE STUART-SMITH: -- you do not get a total “get out of jail card” simply by (inaudible) of your NDC. Is that----

E SIR JAMES EADIE: No, you do not. You do not but what the claimant seeks to do, in answer to third rule, foreign act of state, is to say, “No, no, no, do not worry about that. We are not actually directly asking you to do that”, query, query. “What we are asking you to do is to focus on the UK’s role in the provision of finance which amounts to assistance and that is”-

LORD JUSTICE STUART-SMITH: Well, there is – there is a logic in that.

F SIR JAMES EADIE: There is a logic to that. The difficulty is whether it can be sustained and we make three points in answer to that, if I may. The first of them is the fact, as you have seen from the case law, the fact that there is a domestic foothold for the question of international law, based in what the UK is doing, does not resolve the question of whether or not the foreign act of state doctrine applies. And that is evident from the principles that you saw in G the Supreme Court’s judgment. It is illustrated by the *Khan* case, to which you saw Lord Neuberger make reference at 130 of *Belhaj*. There, as you will recall, and as he pointed out at 130, the issue was framed, or sought to be framed, by the claimant as to whether the provision of information by the UK intelligence services to the US Government to assist H with drone strikes in Pakistan was unlawful because it involved GCHQ officers and

A encouraging or assisting murder. That was the way in which the claim was sought to be put but it was barred on this ground because it would necessarily involve, or at the very least be perceived as involving, the UK, in the form of its courts, assessing with the US acts amounted to murder because otherwise the thing did not get off the ground. So it does not depend on there being a domestic foothold pure and simple and that is because the underlying principled basis for the doctrine is essentially, as Lord Sumption noted and, indeed, as the other judges noted in *Belhaj*, to do with comity and restraint by the domestic courts.

B LORD JUSTICE STUART-SMITH: So it is necessary for the claimants to distinguish *Belhaj*, which they do by saying there are two different obligations. One is Mozambique's obligation to put its commitments in an NDC. The other is, I think, a separate obligation on the UK not to – not to finance projects which are not on the low emissions pathway.

C SIR JAMES EADIE: Quite and our answer to that, on the facts, when we get to it, is going to be, well----

LORD JUSTICE STUART-SMITH: You come back----

D SIR JAMES EADIE: -- you cannot determine one without the other because if Mozambique is, to take your description of the international obligations which they are under as slightly broader than just producing the NDC, if they are not in breach then what is the problem with assisting them? The two are directly interrelated. But just on this first answer, it does not depend on saying, "It is a UK obligation so you must go there" because the doctrinal underpinning of the foreign act of state third rule is broader and includes judicial comity. My Lady, I am sorry, yes.

E MRS JUSTICE THORNTON: Do we end up at some point in having to form a view on the Paris Agreement, i.e., some form of interpretation to decide whether actually this Paris Convention and the obligations on the developed and developing world are sufficiently different that, irrespective of how it might be classified, there is a difference in the obligations of the two countries? In other words, I am trying to marry this with the other part of your argument, which is that we should go nowhere near the (inaudible) to Paris. At some point we have to form some view on Paris and I am trying to work out what that is.

F G SIR JAMES EADIE: You do and I am not sure there is a terribly clear answer to that question. It is an entirely, if I may respectfully say so, fair and difficult question, but I suspect the answer may be to take it in sequence and, at this stage of the argument, if you are into foreign act of state you are doing, at the very least, tenable interpretations. And I fully accept the logic of the point that you put, which is if you are doing that then you have got to

work out how the obligations work, at least on the tenable basis, under Paris for that purpose. I think that is probably the way the logic flows.

A MRS JUSTICE THORNTON: So at some point we have to address the meaning of Article 2.1, that all the finance flows with the existing low pathways. We have to form some view on that to arrive at an understanding of whether your view is tenable.

B SIR JAMES EADIE: You do. Whether or not you have to go very far down that road is questionable for the purpose of this doctrine, because this doctrine, as you know, is about being beastly to foreign states and the question is whether or not that is a good idea or a bad idea in terms of comity.

C MRS JUSTICE THORNTON: Well, it would not be being beastly to a foreign state to say the UK has a tougher obligation than Mozambique because Mozambique is developing. You are not being beastly there, are you?

SIR JAMES EADIE: Well, that is true if you can get to that point.

MRS JUSTICE THORNTON: Yes.

D SIR JAMES EADIE: So, yes, for that purpose. I wanted to give you one more authority, without turning it up, on domestic foothold not being enough.

LORD JUSTICE STUART-SMITH: Hold on, hold on.

SIR JAMES EADIE: I am sorry, my Lord. (After a pause):

LORD JUSTICE STUART-SMITH: Okay.

E SIR JAMES EADIE: Yes. And, as I say, I do not want to invite you to turn it up now but if you need it on this question about whether domestic foothold is enough or not, answer “not”, we say. See the *Ukraine v The Law Debenture Trust Corporation*, authorities bundle 3, tab 36, and the two relevant paragraphs are 155 and 164. 155 which, slightly oddly for this purpose at least, which I ought to explain, it sets out the issues but you can see the way in which they set out the issues which make it perfectly clear that domestic foothold is not enough. F And then 164. And, as I say, illustrated by *Khan*.

G Secondly, we do submit that there is nothing – to come back to my Lady’s point – in the Paris Agreement to support that sort of bifurcated approach. There is nothing in the drafting of the Paris Agreement to suggest that there is any kind of bifurcation obligations in that way. Article 9, as you know, is cast in terms of an obligation – an obligation I underline – it is a “shall” provision, an obligation to provide financial assistance to developing countries, and that is then linked to their, that is the developing country’s, existing obligations. That H provides you with some context. But we submit it all does link back to Mozambique’s

A obligations and, in particular, if not exclusively, to their NDCs. And we do rhetorically ask the question, if it is acceptable for this project to happen from Mozambique's perspective, and if they are allowed to make various judgments including bringing into play lifting people out of poverty, longer term development, the creation of the grid, all of those sorts of matters, if that is judged to be acceptable by Mozambique why would Paris set its face against the provision of support from the developing countries to enable them to do that? And we respectfully submit that that is both consistent, i.e., it all linking back to those sorts of judgments by the developing country, that is consistent both with the language and with the spirit and, indeed, with the potential injustice otherwise to developing countries of Paris.

B
C In any event, it is to be noted, for the very least for the purpose of this argument, that the claimant's positive case, as we understand it (see their skeleton at para.47(b) amongst others) is that the project was not compliant with Mozambique's obligations under Paris anyway, and that is because – and I will come back to the issue about how you measure scope 3 and all of that in a second – but that is because even if you take your scope 1 and scope 2, says the claimant, you are going to end up in territory in which Mozambique is in breach.

D LORD JUSTICE STUART-SMITH: Because it is increasing.

E SIR JAMES EADIE: Because it is increasing and so on and the numbers end up being kind of half the thing they were going to save, even on scope 1 and scope 2, unless, therefore, you are allowed to take in the sort of broader balancing considerations that I identified from Paris yesterday. So that is the first answer, or set of answers, to that point.

F The second answer is an “in any event no breach” answer, and that is because, as we submit, the Paris Agreement is based on national parties determining their own voluntary contributions, that is the centrepiece of it, communicating those NDCs into the relevant bodies and then taking measures to achieve them. And in this case, therefore, the UKEF took Mozambique's own NDC as a starting point. It is not, I respectfully submit, for the UK to start assessing whether another foreign state's NDC is insufficient. And that NDC says that Mozambique's contribution will include implementing certain expressly listed policy actions and programmes, including its master plan for natural gas (that is core bundle 2, tab 2, p.13). And see, without needing to turn it up, under that heading “Mitigation contribution”. At 9 then the type of contribution, implementation of policies and programmes and actions, and then at 6 “master plan for natural gas 2014-2030”.

LORD JUSTICE STUART-SMITH: And has someone kindly drilled down to see if we have got anything lying behind the master plan for natural gas?

A SIR JAMES EADIE: I hope I have done so but Mr Heppinstall confidently tells me that he is going to deal with this issue as well, so I am just going to give you some headlines.

LORD JUSTICE STUART-SMITH: Good. Yes.

B SIR JAMES EADIE: That is the first document to go to. It refers, as the punchline, to the master plan for natural gas. And then the master plan, we submit, envisages the delivery of the project. In particular, supplemental bundle p.833.

LORD JUSTICE STUART-SMITH: Okay. Let me get down, please.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Supplemental bundle 833.

C SIR JAMES EADIE: If you would just give me a moment to get it up. (After a pause): I am sorry, start at 831, if you would, noting in the introduction the fourth paragraph starting, “Taking into consideration such vast potential ...”. And then, as I understand it, the table at 833 is a list of existing concessions – that is licences to companies interested in undertaking exploration and production activities – and this lists the project which, I think, is Area 1 –
D Offshore – Rovuma – Anadarko.

LORD JUSTICE STUART-SMITH: Because it was Anadarko at that stage.

E SIR JAMES EADIE: It was Anadarko at that stage and, as I understand it, Total subsequently purchased that interest. And then 843, referring to the core objective of fighting poverty and the role of natural gas in driving development----

LORD JUSTICE STUART-SMITH: Hold on. 843?

SIR JAMES EADIE: 843.

LORD JUSTICE STUART-SMITH: Thank you.

F SIR JAMES EADIE: And 846 to the same effect, referring to gas projects being the only opportunity for the industrialisation of the country. And then 848----

LORD JUSTICE STUART-SMITH: I know you are a bit pressed for time but I think this may be important, so on 843 I have identified the first paragraph and then you wanted to go to 848?

SIR JAMES EADIE: I wanted to go to 848.

G LORD JUSTICE STUART-SMITH: Okay.

H SIR JAMES EADIE: The penultimate paragraph and the final paragraph, if you would, particularly that reference to the natural gas master plan’s role being to ensure that the natural gas becomes a true catalyst for the sustainable development of the country. (After a pause):

LORD JUSTICE STUART-SMITH: I am not sure the claimants would agree with the last sentence of p.848 but there we are.

A SIR JAMES EADIE: I have got a reference to 869, referring to the object of a developing infrastructure in Caba Delgado for the development of LNG. I think it is about halfway down the page if I have got the right reference. If not, someone shout at me. Yes, sorry, at the top. That first item on 869, do you see the second column?

LORD JUSTICE STUART-SMITH: Implement the LNG product?

B SIR JAMES EADIE: Yes, second column, first item. (After a pause):

LORD JUSTICE STUART-SMITH: Okay. So that is 869.

SIR JAMES EADIE: That is 869. If you could just give me one moment to check a reference.

C (After a pause): Yes, and then I think there are some African Bank development – African Bank analysis of all of this but perhaps the only reference you need for that purpose is, into the CCR, which I think refers to – the Climate Change Report – which I think refers to it at p.257-258 and 270.

LORD JUSTICE STUART-SMITH: Yes.

D SIR JAMES EADIE: And two references into the witness evidence, if I may, on this point, if that is helpful. One of them is in Mr Griffin’s statement at para.76-77, essential reading bundle, tab 12, and then Dr Hawkes, who is the interested party’s expert, at para.28, essential reading bundle, tab 13, p.272. So you have got the – those are the links, I think, back into the master plan for natural gas, and so on, and you have got already the points about the broader aims that Mozambique was taking into account to balance all of that, including the need for financial resources to become climate resilient and, in effect, to develop renewal energy projects in the future, the precondition to which was the development of the grid. So you are back to all of the complex balances involved but this time in the context of Mozambique making its own judgments about what appropriate NDCs should look like, what appropriate form it wanted its compliance with the Paris Agreement to take, and it then went out and sought international financing for that. But these are fundamentally choices about Mozambique – for Mozambique about Mozambique.

G I wanted to pick up one topic, which was discussed yesterday, which was about accounting for Scope 3 fuel. I am not sure it terribly matters for this purpose, given the expected impact even in relation to Scope 1 and Scope 2, but it was asked about it and you have got Scope 3 and the question is to whose account does it go? And I just wanted to pick up our understanding of that. Others may have a different view but can I give you our

H

understanding of that? It is, of course, for each country to determine and define their own NDC. The UK's NDC is reflected in the Climate Change Act 2008 and it is a target to reduce carbon emissions "from UK sources" by reference to the 1990 baseline that it uses. That is clear from s.29 of the Act.

LORD JUSTICE STUART-SMITH: From UK sources.

SIR JAMES EADIE: From UK sources.

LORD JUSTICE STUART-SMITH: So that gives some wriggle room.

SIR JAMES EADIE: That gives a little bit of wriggle room, yes. UK – well, it is UK sources, so we are responsible for what we use effectively. That is 29 – section----

LORD JUSTICE STUART-SMITH: Oh, I see what you mean.

SIR JAMES EADIE: -- that is s.29, and really on that thing of how do you – to whose account?

Does it go to Mozambique's account if it is Scope 3 exported, if that makes sense to the idea? I am not exploring that. It does not look like that is the position. It looks like it is user. So that is s.29 of the 2008 Act, authorities bundle 1, tab 15, p.337.

The Mozambique NDC refers to the conditional target, as you saw, to reduce emissions by about 76.5 million tonnes of CO₂ equivalent in that ten year period, 2020-2030. And that NDC does not make expressly clear what that refers to, whether it refers to emissions from internal sources, but, if I am allowed to put the point this way, we consider it is likely that that is what they are doing – internal sources. And, as I say, for the purpose of this point, I have already referred you to the Scope 1 and 2 emissions and the need for balancing and all of that, so I am not going to repeat all of that.

The only final point to note in relation to this is that if that is the right approach and that the 95 per cent, or whatever it is, of Scope 3 is exported and that the effect of that, in terms of Paris accounting, is that those exports move from Mozambique's account, if I can put it that way, to the user country's account then that provides a mechanism for effective protection under Paris anyway because what that would mean would be that if, and to the extent, that LNG was used in the foreign country, leave aside displacement of coal and everything else, if it was used and the emissions went up in that foreign country, it would operate as a debit in their account and they would then be required, in order to conform to their own NDCs----

LORD JUSTICE STUART-SMITH: To compensate.

SIR JAMES EADIE: -- to compensate and take measures to deal with that. And that is quite a significant point, if I have got that right.

LORD JUSTICE STUART-SMITH: Okay. Can I just ask, is that agreed?

SIR JAMES EADIE: Yes. I do not know.

A LORD JUSTICE STUART-SMITH: Would the claimants agree with that as a proposition? That if the exported LNG goes to the importing country's account and thereby increases emissions to that extent, is it right that it was then the obligation would be on the importing country to compensate elsewhere, i.e., to make cuts elsewhere?

B MISS SIMOR: So I would like to be able to give you a yes/no answer. The first answer is, yes, but I have to make an addition to it.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Because----

LORD JUSTICE STUART-SMITH: Do you want to do that now or do you want it in reply?

C MISS SIMOR: I do. I will just do it very, very quickly----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- if you do not mind. And that is that there is an enormous gap between the NDC commitments and the temperature goal.

LORD JUSTICE STUART-SMITH: Yes.

D MISS SIMOR: And, therefore, it is not a complete answer.

LORD JUSTICE STUART-SMITH: Yes, okay.

SIR JAMES EADIE: My Lord, I am entirely prepared to accept that caveat----

LORD JUSTICE STUART-SMITH: Yes.

E SIR JAMES EADIE: -- for the purpose of peace breaking out, as it were, on this point.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: The only----

LORD JUSTICE STUART-SMITH: I am sorry to interrupt you in mid-flow----

F SIR JAMES EADIE: Not at all.

LORD JUSTICE STUART-SMITH: -- but I think that is quite helpful.

SIR JAMES EADIE: It is helpful. The caveat, however, is, of course, an overarching global problem.

LORD JUSTICE STUART-SMITH: Yes.

G SIR JAMES EADIE: So that is all I wanted to say about that issue. I was going to turn – I am going to deal with Scope 3 emissions rather more fully, as you will expect, under the next broad heading which is Ground 1(b), whether we committed errors of analysis, in effect, and obviously to some extent----

H LORD JUSTICE STUART-SMITH: Yes.

A
B
SIR JAMES EADIE: -- there is flow-over between the two ways of putting the grounds but just for the sake of convenience. If we are dealing with no an error of law because of breach of Paris Agreement but we are dealing with this, it is a pure rationality challenge. The overriding standard of review, we submit, at whichever level you choose to pitch it, whether it is in relation to the substantive decision, factors taken into account or enquiries pursued, it is for the primary decision-maker to make the primary judgment. It is that constitutionally which attracts the notion of rationality because rationality has built within it that margin, that degree of respect for the decision – for the primary decision-maker under our constitutional arrangements.

C
D
And if you wanted at least an analysis, in a slightly different context, but if you wanted an analysis of how rationality works and how broad it is, there is quite a long chunk of it but, to pick out the highlights, if I may, Hickinbottom LJ in *Spurrier* – I do not invite you to turn it up now. My Lady and his Lordship will be familiar with the passage I am sure, I think in the planning context. Authorities tab 37. I am afraid I have rather lost track of which file that is but maybe it is 4. It is 3 or 4. It does not matter. I am not inviting you to turn it up now. 148 is the paragraph number, to 152, and then 176 to 181.

LORD JUSTICE STUART-SMITH: 148 to 152?

E
SIR JAMES EADIE: 148 to 152 and then 176 to 181 are at least helpful in terms of this whole long passage and identifying all the case law and so on. So that is the legal standard. That is all I wanted to say about the legal standard and I touched on it yesterday anyway.

F
What I wanted to do, if I may, was to try and deal with the principal way in which the challenge is now put, which was centrally focused on the topic to which I am going to devote most time this morning, which is Scope 3 emissions generally, and there are various aspects to Scope 3 emissions. And then at the end I am going to make some very brief submissions, just pulling together a few short points and giving you some references in relation to three other discrete areas, two trains locked in, stranded----

G
LORD JUSTICE STUART-SMITH: And just so that we know, because there is an art to the building up of suspense, you are aiming for 12.30, are you? Or are you----

SIR JAMES EADIE: I am aiming for 12.30. I am rather hoping I will be before that. I think I have technically got until one but I am going to try very hard not to take that time.

H
LORD JUSTICE STUART-SMITH: Okay. Thank you.

A SIR JAMES EADIE: So Scope 3 emissions, see generally, if I may, Mr Griffin at para.112 and following in the witness evidence. The UKEF, if I can just summarise the points at the beginning, and then when I will come to six or seven plea grounds of challenges in the answers, but just to summarise very broadly at the beginning, our submission is that UKEF went as far in considering Scope 3 emissions as it judged was useful and appropriate in the context of the decision which it was making. And at a very, very high level – and I will come back to some of these points – in the CCR, as you know, the conclusions in essence were very difficult to do a full emission impact assessment, a clear recognition that Scope 3 emissions will be high – I think “very high” was the phrase used – will significantly exceed Scope 1 and 2, will exceed 25,000 tonnes of CO₂ equivalent per year. However, that did need to be considered, at least in terms of assessing the overarching impact, on the basis of the potential at least of LNG to displace more polluting fossil fuels. But even C acknowledging some deficit in terms of CO₂ emissions, there were a range of other factors in play relating to Mozambique which meant that the provision of finance would still be aligned. That is, in essence, the core skeletal reasoning in that document.

D I wanted then to come to the main points and the answers to the submissions made by my learned friend in relation to this and, if it is not too wearisome, six main points. The first of them is that, as you know, a qualitative assessment was made that the emissions from the plant, unsurprisingly, would be significant. The decision-makers knew and appreciated that E Scope 3 emissions in particular were very high and would have a significant impact, and that is significant – that is essentially CCR p.253. The significance of that is two-fold, it might be thought. The first of them is that the UKEF, and other decision-makers, faced up to the fact, but considered that fact in the round against the context of all the other decision – all the other aspects bearing on the decision about whether, e.g., Mozambique would be F on a pathway still. And, second, in those circumstances, given that conclusion, it was rational to decide that there was not a need to undertake some form of precise quantitative assessment. That is the first point.

G The second point is that UKEF instructed Wood Mackenzie to attempt, at least, a quantification of the Scope 3 impact and Wood Mackenzie’s view was that it was not possible – on which it was permissible and rational for us to rely – that it was not possible to quantify that impact reliably. That is recorded in the CCR at p.272. And I emphasise H that because the CCR did not conclude that it was impossible to estimate Scope 3 emissions

(see Griffin, para.59). It was using the language of impossibility in the context of Scope 3 emissions impact (see the CCR at p.253, 272 and 275-6).

A LORD JUSTICE STUART-SMITH: Just hold on a second. (After a pause): 252?

SIR JAMES EADIE: 252 – sorry, 253, I am so sorry – 253, 272 and 275-6.

LORD JUSTICE STUART-SMITH: Thank you.

B SIR JAMES EADIE: And in relation to that impact there was inevitable uncertainty given the uncertainty of off-taking. That is a judgment call in the end, not a mistake or an error. And I should say in the context of this second point that our submission is that the defendants were properly and rationally entitled to place the weight that they did on the Wood Mackenzie report in that regard. How they actually viewed it is set out by Mr Griffin, in particular, at paras.37-44 where he deals, amongst other things, with the implication behind C lots of my learned friend’s submissions in relation to this, which is, “Well, what were you doing relying on Wood Mackenzie given that they were instructed by Total?” And Mr Griffin addresses that point and we do not accept that the Wood Mackenzie conclusions were in any way undermined – and it would be very surprising if they were – by some form of lack of expertise. They considered that they were expert for the purpose of opining on D the matters they opined on and there is no reason for the decision-maker to second-guess that. That is the second point.

E Thirdly, we do submit that it is clear, from the CCR in particular, that UKEF did not conclude that the Scope 3 emissions and/or the project more generally was likely to be emissions net zero or better. The key passages, as we discussed yesterday, are at 253, 274 and 277, and the correct reading, we submit, of UKEF’s conclusions on project emissions is F that it would lead to an increase in emissions with some reduction if, and to the extent, that it is displacing more polluting fossil fuels in the importing country that would otherwise have been used. And that is the natural reading of the CCR as a whole and all of the passages, and that is how it should be read. You cannot just pick up on isolated phrases and leave out the rest of it. See, for example, and if I may, if you have the CCR to hand – it is G in the essential bundle – it might not be marked up but it is in essential tab 17 or core bundle 2, tab 21, and the first passage to draw attention to is the one about two-thirds of the way down 253 beginning, “On balance ...”. I am sure you have marked that up, but:

H “On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the project will ... result in some [and

then I have underlined or circled] some displacement of more polluting [fossil] fuels, with a consequence of some net reduction in emissions.”

A And that comes after two paragraphs that are talking entirely about the capacity of LNG to displace more polluting fossil fuels such as coal and oil rather than the overall net position of the project. That is all the clearer when one reads the summary in the context of the body of the CCR. If you go forward to 269, question 11 asks:

B “How does the Project impact on the NDC, the Paris Agreement and other related national climate strategies?”

C Notes the economic benefits that will flow from the project and then says, at the top of 270, the last sentence of the first incomplete paragraph:

“However, alongside these economic benefits, is the negative impact of the Project’s GHG emissions.”

D And then at the top of 271:

“The Project has a significant impact on the country’s emissions but is still considered in alignment to Mozambique’s stated climate policies and by extension with their Paris Agreement commitments.”

E LORD JUSTICE STUART-SMITH: That is Scope 1 and 2, is it not?

SIR JAMES EADIE: That is Scope 1 and – Scope 1 and 2.

LORD JUSTICE STUART-SMITH: If one looks at the context. “Mozambique’s climate strategies promote ...”, blah, blah, blah. Just below where you took us to on 270:

F “UKEF considers that whilst the impact on the country’s emissions is significant ...”.

And the last paragraph on that page is also talking about Scope 1 and 2 and Domestic Scope 3.

G SIR JAMES EADIE: Yes, I think that is----

LORD JUSTICE STUART-SMITH: And the summary is:

“The Project has a significant impact on the country’s emissions ...”.

H

SIR JAMES EADIE: I think that is fair in relation to question 11, not least because they then go on at question 13 to deal with Scope 3.

LORD JUSTICE STUART-SMITH: Precisely.

SIR JAMES EADIE: Yes, I take that.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And then 273, you are very well aware of the three different scenarios, and then the mid-case scenario, which is dealt with at 274, and this perhaps is the clearest of all, look about halfway down “Scenario 3” on p.274, you see a line beginning, “The likely scenario for the use of the Project’s LNG based on the SPAs”. And then:

“A combination of replacement and displacement of coal and oil power generation will lead to a net reduction in future GHG emissions when compared with fossil fuel alternatives.”

LORD JUSTICE STUART-SMITH: Hence the additional words in your skeleton argument.

SIR JAMES EADIE: Hence the additional words in the skeleton argument and, I think, hence the way in which the decision-maker puts it in the evidence. And, as I say, that is also how Mr Taylor understood and summarised the findings of the CCR in his 1 June submission to Ministers, core bundle 2, tab 17, p.153 at para.56e, where he says---

LORD JUSTICE STUART-SMITH: Just give me that again. Core bundle 2?

SIR JAMES EADIE: Core bundle 2, tab 17, p.153 and the relevant paragraph, in the summary of conclusions is at 56e where he says that he has taken into account:

“the Climate Change Report setting out the significant impact that the project will have due to increased GHG emissions ...”.

That is the key headline on overall emissions, impact being communicated to Ministers, and that is reflected in his witness evidence at para.95c.

LORD JUSTICE STUART-SMITH: Just----

SIR JAMES EADIE: Yes. Do you want the submission?

LORD JUSTICE STUART-SMITH: I am just not sure whether I got – Yes, no, I think I did get that.

SIR JAMES EADIE: The submission is all over the place but it is also behind tab 15 of the essential reading.

LORD JUSTICE STUART-SMITH: No, I have got it. Thank you.

SIR JAMES EADIE: It is 56e.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Yes? And then in the witness evidence of Mr Taylor, which is behind tab 11 in the essential reading bundle – I think I am right in saying – at 95c.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Yes. So that is how it is – that is how it is done in the CCR. That is how it is presented in the ministerial submission. Everyone saw it. There can be no suggestion that the ministers in some way were miscommunicated to about this issue, not least because of the clarity of 56e and because of the clarity of the CCR, we submit, particularly when they are actually dealing with Scope 3 emissions in that sentence I highlighted. And I made the point yesterday, by way of rhetorical question, why would the PM ask for everyone to have a look at offsetting measures unless he appreciated that offsetting measures were necessary? So that is the third point.

The fourth point is a submission that the analysis in the CCR that there would be some net reduction in GHG emissions in the manner that I have just explained, was a plainly justified and rational conclusion. It involved a series of predictive judgments where the LNG was likely to be used, for what purposes, what are the future options, and so on. And, in essence, a particular focus in the CCR, on the fact that most cargoes from the project would be likely to be – or a significant proportion would be likely to be – directed at the Asian market (p.272), and that there was particular scope for displacement of coal to occur in China and India and in Indonesia. And that was---

LORD JUSTICE STUART-SMITH: And you balance those two out by saying it is – you are not going to do a quantitative assessment and the CCR did not do a quantitative assessment about what would happen in Asia? It is qualitative at every point?

SIR JAMES EADIE: It is. It is. There is no attempt to chase everything down. You are trying to get an impression as to whether there is some scope and so the conclusions are necessarily guarded. It slightly goes back to the point I made yesterday about the UKEF not being a research institution and not conducting a trial. What it is actually trying to do is to get an impression, to get a flavour, and the overall impression was an accurate one, which was really significant emissions coming out of this project, might to some extent, in relation to Scope 3, be offset by displacements/transition from more damaging fuels, but even if you end up with net-plus, as it were, you have still got the Mozambique features to factor in.

LORD JUSTICE STUART-SMITH: I think I know the answer to this but what do you say in response to the submission, oh, well, Ben Caldecott was telling you that these things were possible and should be done in a full climate change assessment?

SIR JAMES EADIE: The answer to that, in principled terms, is that whether or not any particular step should or should not be chased down or taken was a matter for the decision-maker. To the extent that they decided not to chase down all of those strands, that was entirely justifiable, particularly for the sorts of reasons and on the sort of basis we have just been discussing; qualitative at any stage, trying to get an impression, not conducting a trial. There is nothing wrong with, indeed it is an entirely appropriate and sensible part of decision-making, for those who are engaged in making these decisions to receive challenge from a whole variety of different sources. That improves rather than denigrates decision-making and----

LORD JUSTICE STUART-SMITH: Including a couple of Secretaries of State.

SIR JAMES EADIE: Including?

LORD JUSTICE STUART-SMITH: A couple of Secretaries----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- of State.

SIR JAMES EADIE: Yes, but the fact that someone is challenging some of the statements in an earlier draft or in an approach is not an indication of irrational decision-making on any view. We certainly do not accept the impression, not least because it is an entirely unfounded one having regard to the level of expertise that was available (see Mr Griffin's statement) that in some way, shape or form everyone that my learned friend wished to rely upon was super-expert and everyone else was a duffer. It is also to be borne in mind that Mr Caldecott, and his comments that you were taken to, were, in the first instance, I think, in April, some six weeks before the CCR was finished, and the later comments some three weeks before the CCR was finished and before the Scope 3 emissions scenario analysis was added to the CCR. But I do not take my stand on that. My submission is a broader one. You are perfectly entitled to have a series of comments taken into account. So that is what we say in answer to that.

I just wanted to refer finally in relation to whether the conclusion in the CCR about that net reduction, judged in those terms, or possibility or potential net reduction judged in those terms, was justified, and just to identify the fact that it also corresponded, and was no doubt based a significant part on, a work that was done first by Wood Mackenzie, on which it was

obviously centrally based, and you have read their report. I do not need to go back to that. Secondly, the fact that US EXIM was of a similar view (supplemental bundle p.621), future coal use in China expected to trend down with gas used and so on. And it is right to point out that the US gave notice on leaving Paris on 4 November 2019, that it would withdraw, but that was always and only going to take effect from 4 November 2020, so it is not right to say that the US was already outside Paris at this point.

LORD JUSTICE STUART-SMITH: I do not know whether it does not----

SIR JAMES EADIE: It does not advance matters much.

LORD JUSTICE STUART-SMITH: It does not affect what they actually said.

SIR JAMES EADIE: It does not. I just wanted to correct that in case there was a misapprehension. And then on the same point, about noting the LNG demand in China and India being expected to grow and replace – and operate as a displacement for coal, see also the memorandum to the board of directors of African Development Bank. For that purpose, supplemental bundle 649-650. So that is the fourth point, which is justified to reach the conclusion that they did about net reduction in terms of impact.

Then the fifth point is emissions impact in quantitative terms as a topic, and the question there is whether it was irrational not to produce a bear quantitative estimate of gross Scope 3 emissions. And it is to be noted at the outset of this set of issues that the UKEF was provided with, and took into account, at the very least a rough and high-level quantitative estimate of the project Scope 3 emissions, which was sent to officials from the Department of International Trade (supplemental bundle 1586). Those figures were calculated by Robert Towers, who was the Head of International Energy Economics and Analysis at BEIS, by Helen Meekings of UKEF (see core bundle 1). Sorry, I am going to give you an essential reading reference because it is into a witness statement. I think it is Mr Griffin's witness statement at para.49 for her expertise, if you need it. And the Head of the International Energy Unit at the FCO. And Mr Taylor confirmed in his evidence that prior to his 30 June decision, he reviewed the papers before him which included the BEIS advice, containing that rough quantification of absolute Scope 3 emissions relating to the project (see his witness statement at para.103), and the underwriting minute also contained those estimates (see core bundle 2, p.338-9). So he did have a rough quantified figure before him when he made his final decision but, as he says in his witness statement, those figures only served to confirm the existing qualitative conclusion in the CCR that Scope 3 emissions would significantly exceed Scope 1 and Scope 2 (see para.104 of the statement).

LORD JUSTICE STUART-SMITH: That would not be an answer if we accepted that it was irrational to proceed without a full quantified----

A SIR JAMES EADIE: It would not.

LORD JUSTICE STUART-SMITH: -- assessment.

B SIR JAMES EADIE: It would not. I accept that. But it is at least to be noted. So, in essence, the rational decision-making, as we submit it was, was to go as far as was considered to be useful and appropriate for the purpose of the exercise that they were undertaking and the decision they had to make.

C I should just note, because there is a complete answer, as I respectfully submit, to this part of the case, but I should just note that the suggestion was repeatedly made that calculating absolute Scope 3 emissions was easy and anyone could do it. You just do a bit of multiplication. Well, if that is right, the rough and ready calculation would do (a), and (b) we do not necessarily accept that but we do submit that the calculation, even of absolute Scope 3 emissions, is an uncertain and not entirely easy or straightforward exercise (see, for that purpose, Mr Griffin's statement, paras.58, 59 and 130) and there is not, we submit, any policy or guidance requiring any such exercise, and none of the documents my learned friend took you to provided such an indication.

D MRS JUSTICE THORNTON: So the GHG protocol (inaudible) taken to, you say that does not?

SIR JAMES EADIE: I say that does not. That is supplemental bundle 2.

E MRS JUSTICE THORNTON: And do you say----

SIR JAMES EADIE: 823-5.

F MRS JUSTICE THORNTON: -- do you agree that it is for us to take a view on how difficult that exercise is? Again, we have got to form some sort of view to be able to evaluate both your competing submissions on that.

SIR JAMES EADIE: Well----

G MRS JUSTICE THORNTON: The claimant says it is very difficult. You say – the claimant says it is easy and you say it is very difficult. At some point we have to engage with that to be able to----

H SIR JAMES EADIE: Well, my primary submission would be that you do not actually have to engage in that particular issue because the short and complete answer to this is that a qualitative assessment, with the conclusions that it fed to, was enough for the rational decision-making and once you have got to that place what is the benefit of doing the absolute number? I mean, to some----

A MRS JUSTICE THORNTON: We might only get to – To get to a view on the qualitative point, we might need to look at how easy the quantitative point was, might we not? But, in any event, do you accept that we have to form some sort of view, however much we step back, however much the margin of appreciation we give your view that it is very difficult to quantify Scope 3?

B SIR JAMES EADIE: My Lady, I do not accept that that is a necessary part of the court’s analysis. Of course, it is a matter for you what you take into account in weighing whether the decision-making was rational having regard to its nature and the context in which it was done. So I am not making a positive submission that you would be precluded from doing that. My submission is the slightly lighter one, which is that it is not necessary to do that here. And if and to the extent that it were necessary to do it, you would then have an initial question anyway, which is, was it necessary to do it at a greater level of specificity and detail than was in fact done? So that is, I think, how I would answer that question.

C LORD JUSTICE STUART-SMITH: Just for my note, you were – I think you gave us quietly the reference from the GHG protocol.

D SIR JAMES EADIE: My Lord----

LORD JUSTICE STUART-SMITH: Could you just repeat it?

E SIR JAMES EADIE: -- I am sorry, I did, and I am sorry it was quiet, but – So the GHG protocol, in terms of the reporting standard, is I think at supplemental – maybe supplemental authorities bundle 2, 823, and the GHG protocol guidance, which I think was also referred to, is at authorities bundle 1, tab 11, p.297, 298 and 302. And then I think the other document that you were taken to was the UKEF’s ESHR policy, core bundle 2, tab 5, p.33, which there says the UKEF “will comply with all international agreements which apply to the operations of ECAs” and so on, and that takes you into OECD Common Approaches and into the Equator Principles and so on. It gets quite complicated at that point.

F MISS SIMOR: Sorry, the protocols are at 11, 12 of 13 – the protocols are at 11, 12 – 10, 11 and 12 of the first authorities bundle.

LORD JUSTICE STUART-SMITH: Thank you.

G SIR JAMES EADIE: Thank you. Yes, sorry, I only have a duplicative reference so, sorry, that is a convenient way of finding them. If you wanted to drill down from the EHSR into – sorry, ESHR, into the OECD Common Approaches or to the Equator Principles, you have those at authorities bundle 1, again, I think behind tabs 7 and 8. I think the key passages, at least according to my notes, are OECD, see p.46, and Equator Principles, see p.199 and 205. But our fundamental submission is that it was not irrational for them not to have

sought that quantification. It was working on the assumption that the project would have a large Scope 3 emission budget in absolute terms, which would exceed 25,000 tonnes per annum.

A LORD JUSTICE STUART-SMITH: 25,000 tonnes is peanuts in this – in the numbers we are talking about, is it not? 25,000 tonnes is the threshold but it is----

SIR JAMES EADIE: It would exceed----

LORD JUSTICE STUART-SMITH: -- a very small fraction----

B SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- of what we are actually talking about.

SIR JAMES EADIE: Yes, it is. That is why they qualified it by saying “very high”, so that was their qualitative assessment.

C LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: And what the decision-maker was then truly interested in was what – what did the impact look like, and for that purpose it was plainly of some importance and some significance not simply to look at the gross number but to look at any things that might net it, and that is what essentially was done.

D LORD JUSTICE STUART-SMITH: yes, but there is – I think there is force in the claimant’s point that the netting off, you do not know whether it is 1 per cent or 50 per cent or whatever, which may be a reason for leaving it unquantified, properly understood.

E SIR JAMES EADIE: Yes. And part, this exercise, unless you are going to conduct, as the decision-maker, a trial down, this is bound to be to some extent evaluative and broad-brush, particularly having regard to the way that even the Paris Agreement works with those other considerations playing into the decision.

F So that takes me to my sixth and final submission on this area, which is how then, in the light of points one to give, was the UKEF able to conclude that the project was consistent with Paris, despite it increasing, or probably increasing, the overall global GHG emissions? And the answer to that, I respectfully submit, is in broad brush terms that the Paris

G Agreement does not prohibit developed countries from supplying finance to any energy project that is not carbon neutral, i.e., that will by definition, therefore, add to global GHG emissions. On the contrary, Paris expressly contemplates that there is room for manoeuvre in respect of developing countries and, indeed, on the face of Paris, that in conducting those

H sorts of analyses a broader range of what I have described as mutually irreconcilable factors can properly be taken into account; lifting millions out of poverty, developing long-term

infrastructure, creating the sort of protections that might be needed for climatic change events.

A And so in terms of the answer to that question, first, Article 2.1(c) does not contain any such prohibition. I do not want to go back over the territory I covered yesterday but, in very brief summary, 2.1(c) could easily have said so. There is nothing in the language of 2.1(c), or any other part of Paris----

B LORD JUSTICE STUART-SMITH: Well, we come back to Lord Sumption. You say 2.1(c) could have said so. We are not construing the contract and, anyway, that is always about the weakest argument when you are construing the contract. But 2.1(c) is what it is as a process of negotiation between sovereign states.

C SIR JAMES EADIE: It is, but what it----

LORD JUSTICE STUART-SMITH: And the simple point surely is it does not----

SIR JAMES EADIE: Specify the obligation.

LORD JUSTICE STUART-SMITH: -- it may be a good point or a bad – or a bad point, but the point is it does not, not that it could have done.

D SIR JAMES EADIE: It does not specify the obligation.

LORD JUSTICE STUART-SMITH: It does not.

SIR JAMES EADIE: It does not. My Lord, I am happy to take that correction. And, indeed, as I made the point yesterday, it might be thought to be highly unlikely----

E LORD JUSTICE STUART-SMITH: We will never know.

SIR JAMES EADIE: -- we will never know, but it might be thought to be highly unlikely to have been agreed given that the – given the respective national interest both on the developing country side and on the----

F LORD JUSTICE STUART-SMITH: Again----

SIR JAMES EADIE: It may not be----

LORD JUSTICE STUART-SMITH: -- sitting in a court in London----

SIR JAMES EADIE: -- it may not be necessary----

LORD JUSTICE STUART-SMITH: -- it is easy to speculate.

G SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: But the fact is, it did not or the fact is they did not.

SIR JAMES EADIE: The fact is they did not and not merely did they not but, if I am allowed to make one further positive point on the interpretation, not merely did they not but they did other things which were inconsistent with that.

H

LORD JUSTICE STUART-SMITH: Yes.

A SIR JAMES EADIE: Allowing all those other factors, types of factors, to play in and making it clear that the pathway down was not necessarily a uniform negative one, and recognising that developing countries will peak at different times and so on. All of that.

LORD JUSTICE STUART-SMITH: I think I will allow you that as an admissible point!

B SIR JAMES EADIE: Thank you. I do not want to chance my arm! That might have been the last point but for that. So that is the first point.

C The second point is to some extent an adjunct to that, which is that the imposition of such an obligation through Paris would be inconsistent with the recognition which does sit throughout Paris that greater latitude is available to developing parties and that, as I have already submitted, has a consequence for how you approach the assistance provision. And to some extent that provides or needs to sit in the context of the third point, which is that providing finance to some projects that are not carbon neutral or carbon clean does not mean that the low emissions pathways that Paris is concerned about will be unattainable. I make that point in absolute terms, as it were, recognising – and it is a very, very important D recognition because it provides the global answer – recognising that the other mutually irreconcilable factors are in play, but even on its own terms it does not lead to that conclusion. Again, it depends on national choice. It depends on the NDCs that each E country puts in place, that go back into the – by way of the reporting mechanisms, back into the centre, as it were, and would then be the subject of further negotiation if, as appears is the case, you end up with a gap when you add up all the NDCs, it goes back to international negotiation at that point.

F LORD JUSTICE STUART-SMITH: I noted these submissions being providing finance to non-carbon clean projects does not mean that lower emissions pathways are unattainable.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: I think there is a *non sequitur* in there.

SIR JAMES EADIE: Is there?

G LORD JUSTICE STUART-SMITH: I think there is because – well, in a world where there is the enormous gap anyway between projections and the attaining of either plus 2 or plus 1.5, at the moment lower emissions pathways, as defined, namely a route to 1.5 or well under, are unattainable, full stop.

H SIR JAMES EADIE: Well, I think to avoid the logical inconsistency one needs to recognise that that problem, which creates that logical difficulty, is a global problem that has not yet been

solved by the international negotiation that will be necessary to solve it. The logic does not necessarily apply if you view each country's position individually as current.

A

LORD JUSTICE STUART-SMITH: I think I could possibly – I could possibly live with providing finance to non-carbon clean projects does not of itself----

SIR JAMES EADIE: Does not of itself and in relation to----

LORD JUSTICE STUART-SMITH: -- mean the lower emissions, because – but then you are going into what the claimants accept is a complete assessment of the world we live in.

B

SIR JAMES EADIE: Exactly.

LORD JUSTICE STUART-SMITH: Which----

SIR JAMES EADIE: Which has not----

LORD JUSTICE STUART-SMITH: -- with all the enthusiasm in the world, I think this court is not going to be----

C

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: -- particularly willing to undertake.

SIR JAMES EADIE: But that is why I said, and if you judge it by reference to Paris as it stands, the NDCs as they stand and the position of each individual country, or the individual countries, it is a fact, no doubt, that if you add them all up you end up with a global problem, *non sequitur* that Mozambique should not be allowed to do it or should not be allowed to have the NDC that it has.

D

LORD JUSTICE STUART-SMITH: Yes, well, that is a different point.

E

SIR JAMES EADIE: That is a different point. And it is to be noted, perhaps is the final point in relation to this, that there has been some recognition – and I think it was recognised by Wood Mackenzie and then the CCR followed the advice, and I think the recognition is in the IEA report – that gas could, and probably will, still form part of the world's energy mix in a scenario that would still be consistent with well below 2 degrees centigrade as the temperature goal. So just to give you a reference to that, in the Wood Mackenzie report, at p.69 of core bundle 2, which is then picked up and noted in the CCR at p.275, that figure of gas forming 24 per cent of the world's energy mix is noted and that there was still room, therefore, for new LNG developments within that scenario. Now, as I say, that does not necessarily provide a complete answer to all of this but it does provide some real world context to this. So that is what we say about – that is what we say about Scope 3, which was the first of the main areas I wanted to deal with.

F

G

H

A Three other short areas, which I can deal with very quickly, and then I will finish. Firstly, the defendants, we submit, were entitled to quantify the Scope 1 emissions of the project on the basis that it would be – or the emissions in the project – on the basis that it will be operating two trains and not more (see, in that respect, Mr Griffin’s statement at 101-111, so 101 to 111), and the key answer perhaps is that the current project, in relation to which support was provided, was defined as two trains. The African Development Bank’s analysis, which set out a six train scenario, was citing the ESIA analysis conducted in 2014 but that was out of date by 2020 because the project scope had been reduced. And the references to eight to ten trains and so on are references to how many trains the gas reserves could justify, not what was actually proposed. And so we do respectfully submit that in applying whichever test is used to apply, it is appropriate and, at the very least, rational to proceed on the basis that the project in question is defined by its current scope and is also defined by the financing which is to be provided, not least because if the project then does expand, and would presumably then need further international finance to take that forward, fresh decisions would need to be made. So that is the complete answer to that one.

D The second aspect is lock-in risk, which we submit the UKEF properly considered (see in that regard Mr Griffin’s statement at paras.138-143). The lock-in risk was expressly and specifically considered but it was weighed against the LNG project being important for Mozambique’s energy transition, in summary, not irrational to go – not to go any further in that analysis, and---

E LORD JUSTICE STUART-SMITH: I mean, it is referred to in – the risk of it or the possibility of it is referred to in the CCR.

SIR JAMES EADIE: It is, at p.275-277.

F LORD JUSTICE STUART-SMITH: Which might be more compelling than the statement of someone who was not actually there at the time.

G SIR JAMES EADIE: Yes. Well, you have the reference; 275-277, if you prefer that one. And then the same point can be made in relation to the stranded risk – stranded asset risk. That, again, was considered with care in the CCR, see pp.254, 256 and 283-285, and again we submit no error of the hard-edged kind that would be required to ground rationality of any description in relation to any of that.

H My Lord, my Lady, unless I can assist further, those are my submissions.

LORD JUSTICE STUART-SMITH: I think we will just take a moment to have a discussion to see whether there is anything we want to ask you.

A SIR JAMES EADIE: Of course.

LORD JUSTICE STUART-SMITH: Which will give you also a moment. Say, five minutes. Thank you.

(Short break)

B LORD JUSTICE STUART-SMITH: Thank you very much. Yes.

C MR HEPPINSTALL: My Lord, my Lady, I represent the two interested parties, the first interested party being the current operator and the second interested party being the borrower, the company that has undertaken the financing.

D I do want to go back to some of the pleas and issues that have already been traversed by the parties to the judicial review but maybe looking at some of the issues with a slightly different emphasis from the point of view of the project itself or, indeed, from the point of view, in some occasions, of the Government of Mozambique. I do want to touch upon this issue of common but differentiated responsibility, which you will have guessed from our skeleton argument is one of the central parts of our position in this case. So I do want to go back and look at some of those recitals and parts of the Convention and the Paris Agreement.

E But, first, I just want to start with looking at Professor Philippe Sands' textbook where he introduces this issue and shows where it has come from. It is at tab 58 of the last volume of the authorities bundle, volume 4.

F LORD JUSTICE STUART-SMITH: Just again, because I like to know, how long have you got or how long are you scheduled for?

G MR HEPPINSTALL: I have got an hour and a half. I do not think I will be taking it all. Tab 58, opening with the title piece of this well-known textbook, and so "Principles of International Environmental Law", and we see the well-known Professor Philippe Sands is one of its principal authors. And then if we turn to – and I think the bundle page numbers have gone missing but there are internal page numbers – so if you turn to internal 244, which is actually 3019 of the bundle for those on the PDF. There is a heading "Principle of common but differentiated responsibility"----

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: -- and he, or the authors, discuss its history here:

A

“The principle of common but differentiated responsibility has developed from the application of equity in general international law, and the recognition that the special needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law.”

B

And that should then take you to where it appeared in previous climate change treaty, the Rio Declaration. And then over the page you get a helpful discussion of the common responsibility, the shared obligation of the states towards the protection of a particular environmental resource, and then on the next page the other part, which perhaps is the part that we are more interested in, the differentiated responsibility; differentiated in the sense of the developing countries have a different responsibility based on that equity, that potential injustice. And it is mentioned in that first paragraph:

C

D

“The differentiated responsibility of states for the protection of the environment is widely accepted ... It translates into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of developing countries, and historic contributions to causing an environmental problem.”

E

The historic contribution mainly coming from the developed countries, of course, in this context. And all of that is suffused into both the United Nations Framework Convention and then into---

MISS SIMOR: Sorry, could you go there perhaps to the next page – the next page, next paragraph. The next page, middle paragraph.

F

LORD JUSTICE STUART-SMITH: “The special needs”?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Okay. (After a pause):

G

MR HEPPINSTALL: Yes, that is the financial technological assistance that obviously developing countries require. Although, as I will develop my submissions, there is a difference between myself and my learned friend as to whether that financial assistance only has to go to something that is purely designed to mitigate or reduce GHGs or whether – and we will look at it in a minutes – there are other goals, other – as I think Sir James put it – irreconcilable goals of eradication of poverty and sustainable development. So you

H

A might supply finance that leads to a later peaking of GHG, that might then eradicate poverty and be used later on down the line for green energy, for renewables. Of course, it depends where your least developed countries, such as Mozambique, is in terms of developing its economy and its green economy.

B So those principles are to be found in both the United Nations Framework Convention, which I am afraid is back in the first authorities bundle, tab 2, and we know that the Paris Agreement sits within this convention and, indeed, my learned friend has taken you to these recitals in order to say this is how you should interpret the Paris Agreement, looking at the recitals of the Convention. But just looking at those recitals, at p.8, tab 2, the third recital:

C *“Noting that the largest share of historical and current global emissions of [GHGs] have originated in developing countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.”*

D Indeed, you might say they will have to grow. And then the sixth recital, in common CBDR, you can see it in the final words of the sixth recital, “common but differentiated responsibilities”. Two recitals down, you get the sovereign right of countries to exploit their own resources pursuant to their own environmental and developmental policies.

E MRS JUSTICE THORNTON: Sorry, where are you now?

MR HEPPINSTALL: That is – I have numbered it eight. They are not numbered. It is three from the bottom----

LORD JUSTICE STUART-SMITH: Three from the bottom.

MR HEPPINSTALL: -- yes, “*Recalling ...*”.

F MRS JUSTICE THORNTON: Yes. Thank you.

MR HEPPINSTALL: Sovereign right. And the final recital:

G *“... States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”*

H And we will come to this concept a little bit further on, that one country’s climate mitigation policy, let us say of cutting off finance flows for fossil fuels, can have an

unwarranted and detrimental effect in another country that needs that finance. Another NGO, which comes to the end of my submissions, refers to this as “kicking away the ladder”, which the developed countries have already gone up. And that is the sort of thing that is being referred to here.

And then just over the page, at p.10, we get these words, which you will see again in Paris, at the top, the top recital:

“*Affirming* that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.”

And then all that you find again in Paris, if we go into the next tab, at p.52. (After a pause): It is again the point we were looking at in Philippe Sands’ book:

“... need access to resources required to achieve sustainable social and economic development ... energy consumption will need to grow taking into account the possibilities for achieving for achieving greater energy efficiency ...”.

MISS SIMOR: Sorry, we are back to the UNFC.

MR HEPPINSTALL: Yes. My learned friend asked me to read the final one, p.10 of that tab.

MRS JUSTICE THORNTON: The last section.

MR HEPPINSTALL:

“... including through the application of new technologies on terms which make such an application economically and socially beneficial.”

And then into----

MISS SIMOR: I am really sorry. You ought to read the whole of 8 as well.

MR HEPPINSTALL: Sorry?

MISS SIMOR: The whole of 8, in its entirety.

MR HEPPINSTALL: I think I----

MISS SIMOR: I do not think you read the whole thing.

MR HEPPINSTALL: -- did.

LORD JUSTICE STUART-SMITH: I am sorry, I cannot hear. Do I understand that you would like us to take into account the whole of p.8?

A

MR HEPPINSTALL: No, recital 8 I think.

MISS SIMOR: Recital 8, the entirety of recital 8. I think we just had half of it.

MR HEPPINSTALL: So I think I read out:

B

“... the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

I mean----

C

LORD JUSTICE STUART-SMITH: Well, that is just impossible.

MR HEPPINSTALL: Well, it depends what it is referring to. It is referring to something like putting----

LORD JUSTICE STUART-SMITH: If it is referring to emissions it is impossible.

D

MR HEPPINSTALL: Well, it is because they are global but I think it might be referring to putting something that is terribly polluting on the border of another country and the emissions being carried over the border or whatever. But I agree with my Lord that asking Mozambique not to put emissions into the stratosphere that then go round the world is obviously, as my Lord says, impossible.

E

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: Page 52 of tab 3, recitals to the Paris Agreement.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: The third recital down----

F

LORD JUSTICE STUART-SMITH: “In pursuit”?

MR HEPPINSTALL: “In pursuit”, we get again:

G

“*In pursuit* of the objective of the Convention, and being guided by its principles, including the principle [we have just looked at] of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

H

If you skip two recitals down, you have got “the specific needs and special circumstances of developing country Parties ...”, and then the next down one we actually get to Mozambique because Mozambique, as you may have seen from a footnote in our skeleton argument,

footnote 3, p.2, is a least developed country and has been since 1988. So you take into account its “specific needs and special situations”. And then this----

A

MISS SIMOR: Sorry, “with regard”.

MR HEPPINSTALL: “... with regard to funding and”----

MISS SIMOR: “... with regard to funding and ... technology”.

MR HEPPINSTALL: Absolutely. And then the next – the next recital:

B

“... [the] Parties may be affected not only by climate change [again the theme I mentioned earlier], but also by the impacts of the measures taken in response to it.”

And then the next recital we have, again:

C

“... the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty.”

D

The next one is “safeguarding food security and ending hunger”. The next one “just transition of the workforce and the creation of decent work and quality jobs”. And the next one again, “common concern of humankind”, and we notice within the next one there is mention of “the right to development, as well as gender equality, empowerment of women and intergenerational equity”.

E

And then all this comes out again within the treaty. You have looked at the treaty before. I do not want to go back through it in any detail but the main one is Article 2.2. So Article 2.1 is the critical pathway and Article 2.1:

F

“This Agreement will be implemented to reflect equity and the principle of [CBDR] and respective capabilities, in the light of different national circumstances.”

G

And you have got the same in 4.1, “... recognizing that peaking will take longer for developing” countries, and it is all done “on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty”.

H

Now, I just want to draw your attention to the obligation in 4.4 on developed countries to “lead by undertaking economy-wide absolute emission reduction targets”. Now, if you can

A remember that phrase “absolute emission reduction targets”, because, as I will show you through Professor Hawkes’ report, that is not what Mozambique has provided and they do not have to because they are not a developed country, and they have not provided an absolute emission reduction target. Indeed, you have to go to 4.6, over the page, to find that for an LDC and small islands they can “prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances”. Then it gets a little bit repetition, but at 4.19, again parties are reminded about CBDR. So if I could----

B MISS SIMOR: Sorry, can you read the whole? That is an important – important clause.

MR HEPPINSTALL: Well, I am sure the court can see what 19 says. I do not think I need to read it out to you.

C LORD JUSTICE STUART-SMITH: No, I think we have read it.

MR HEPPINSTALL: Thank you. I would like to just turn now to that NDC, which is CB2/2.

LORD JUSTICE STUART-SMITH: I am sorry, I was just re-reading. Reference?

D MR HEPPINSTALL: CB2/2, so tab 2, common bundle 2. At p.5 you get a thumbnail sketch of Mozambique and in the second paragraph reference is made to its many natural resources. We see there, the third line of that paragraph:

E “... mineral resources including renewable and non-renewable energy sources and a long coastline ... [It is true that] the country is extremely vulnerable to climate change occurring through alternations in the precipitation and temperatures patterns ...”.

F And there is a mention there, of course, of cyclones which devastated parts of Mozambique in 2019. But I am going to pick up the theme of cyclones and how Mozambique could have dealt with that impact had it, in fact, had had the following currency revenue that the project can give, and how that itself has been raised as an issue by Mozambique.

G So Sir James stole a little of my thunder on p.13, but it is just worth going back there. Page 13 is where all the main action happens in the NDC. It is headed “Mitigation Contributions”, and these are the policies and programmes that the state is going to put into play in order to meet the target that is in box 10. And the opening words of box 10 make that clear: “Based on the policy actions and programmes outlined above, the country estimates ...”, and then it gives its target, which I am going to come back to. But when you look at the twelve policy actions and programmes, they are a mix of dealing with biofuels, H the third one. You will have seen in the evidence that one of the principal ways of

A domestic heating and lighting in Mozambique is the use – is the burning of wood, the use of biofuels. You have got new and renewable energy development strategy at 4; more biomass at 5 – 6 we will look at in a minute – but then I will leave you to look at the other list, including at 10 “Renewable Energy Atlas for Mozambique”.

But at 6 is the master plan for natural gas, so----

B LORD JUSTICE STUART-SMITH: We were told by the claimants that there is no commitment by Mozambique to – I think this was the submission – no commitment by Mozambique to channel revenues from the LNG project into renewables. I think that is----

C MR HEPPINSTALL: Well, I think you were told that that is what the CCR says. So in terms of the evidence underpinning the decision then I think that is right. That is – or that it is right that that is what the CCR says.

LORD JUSTICE STUART-SMITH: Okay.

D MR HEPPINSTALL: So UKEF, I assume, looked for evidence that revenue might go into renewables, found none and recorded that absence of evidence when they were making their decision. But obviously you can see here that Mozambique has at least policies and programmes with “renewable” in the title. I cannot go beyond that because we have not – they are not in evidence before you. So it has ambitions. Whether they can be realised, whether they are real or not, is another matter.

E LORD JUSTICE STUART-SMITH: So is this right, that the only one that is before us is number 6?

MR HEPPINSTALL: That is right.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: As far as I am aware.

F LORD JUSTICE STUART-SMITH: And could you, while I am on this page, just give me the reference to number 6?

MR HEPPINSTALL: I am going now to number 6.

LORD JUSTICE STUART-SMITH: Good.

MR HEPPINSTALL: Yes.

G LORD JUSTICE STUART-SMITH: My apologies.

MR HEPPINSTALL: So the master plan is----

LORD JUSTICE STUART-SMITH: My quill/pen is poised!

MR HEPPINSTALL: -- is supplementary 2, p.827.

H LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: So as you can – if you are there at p.827 – you can tell immediately, looking at the title page, this is the quintessential foreign act of state. This is a policy, a plan adopted at the 16th Ordinary Session of the Council of Ministers of the Republic of Mozambique Cabinet Council on 24 June 2014. So this is one of the plans and projects it is going to deploy to meet its NDC commitments. And at p.831, and Sir James took you to this, but I do draw your attention to the third and fourth paragraphs on p.831 because this, in a nutshell, is Mozambique’s sovereign plan. In previous paragraphs it notes the situation it is in. Paragraph 3:

“Despite this reality, Mozambique is still one of the least industrialised countries in the world, a scenario that can be overturned with the sustainable use of these resources [LNG].”

It talks about “the total primary energy consumption in 2011 was” only eight million tons of oil and equivalent, “below average consumption in the world and in Africa”. “78% of the primary energy supplied comes from biofuels”, and, of course, that in and of itself is a problem because if you cut down forests the carbon sink capacity is lost.

And then really paragraph 4 is, to some extent, the answer to how does the project fit within Paris, because Mozambique’s government is saying that:

“Taking into consideration such a vast potential, it is of the utmost importance that a long-term strategy is drawn to ensure the rational and sustainable use of these non-renewable natural resources, particularly gas; that is, using these resources in such a way that they can contribute to the country socioeconomic development, while at the same time, preserving the environment and ensuring enough resources for future generations to fulfil their energy needs and develop the country. The development of the gas industry, including ... (LGN), megaprojects, gas processing, gas pipelines and other infrastructure may contribute significantly for the growth of the Gross Domestic Product.”

And when we look at the predictions for the impact on GDP, that is, in fact, something of an underestimate or an understatement given that the impact will run into three figures of billions of US dollars. But that is what Mozambique wishes to do with the latitude it is granted as an LDC under Paris, and is entirely consistent with the aim of the eradication of poverty and sustainable development.

A And then just to cover it off, but Sir James did it, you can see that the project is at 833. We are Area 1 Offshore and I think it should be Area 1 Onshore – the one is missing at p.833. You will see there are other areas, Area 4, Area 3 & 6, and some of the figures sometimes you see about production capacities are referring to the whole of what Mozambique has described as an LNG path, which at some points you might see in the papers it says there is room for twenty trains on the path, but they would be – it would not just be this project. There are other areas. There are other commercial operators in that area, operating, for B example, Area 4. There are going to be other LNG trains and other projects. In fact, if we could----

LORD JUSTICE STUART-SMITH: What page are you on?

MR HEPPINSTALL: I am sorry, my Lord?

C LORD JUSTICE STUART-SMITH: What page are you on?

MR HEPPINSTALL: Page 833. 833. It is the table of the LNG concessions----

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: -- for Mozambique. And actually the Rovuma Basin is mentioned on D p.834. under the map:

“... represent[s] an important landmark, not only due to the potential existing quantities of gas, but also the opportunities that will allow the development and implementation of various integrated projects ...”.

E And notice there “fertilizers”. You can take the nitrogen from the air, the hydrogen from the LNG, create ammonia, NH₄, which turns into fertilizer. And the production of fertilizer is very important to Mozambique for its food security.

And then at 853----

F LORD JUSTICE STUART-SMITH: Before you go there, am I right in understanding that p.837 as setting out the – or summarising a policy framework which includes at (b) their renewable energy development policy, which has obviously been approved by somebody or other----

G MR HEPPINSTALL: Yes.

LORD JUSTICE STUART-SMITH: -- with those objectives? So the policy framework includes – as I read it, includes an existing commitment to renewables.

MR HEPPINSTALL: Yes, I think that was approved by----

H LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: -- a resolution of the Mozambique Cabinet.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: Yes.

LORD JUSTICE STUART-SMITH: Thank you. You wanted us to go to where?

MR HEPPINSTALL: 853.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: Some guiding principles. Just to – not go through them in detail, just to note what they are. For example, (b) sustainable use of revenues. Over the page, education and training, regional development, promotion and inclusion of SMEs (small and medium enterprises), and I will show you how the project is having an enormous positive impact on SMEs in Northern Mozambique. Environmental sustainability and then the use of local resources, and again I will show you how that is happening.

So I do now just want to go to the report of Dr Hawkes, as he was then, now Professor Hawkes, which is in CB1, tab 10. He is now the Professor of Energy Systems, Imperial College, London, produced with the permission of Foster J, 2 September 2021. My Lord gave an invitation to review his report. I do not consider that any of it falls outside of the remit of Part 35 CPR. It is offered to the court in these sort of rare circumstances of a judicial review and its only purpose is to show the difference of opinion. It is show that there is a difference of opinion out there in the scientific community about whether any project, or this project, comes within the Paris aims. Now, there clearly is a difference of opinion between the experts put forward by the claimant, Mr Muttitt and Professor Hawkes, but that is the point; that there is no – but none of that difference of opinion reaches the level, gets anywhere near the level, in my submission, of some incontrovertible error of science that would go towards vitiating this decision. But----

LORD JUSTICE STUART-SMITH: But, anyway, on a JR, if I had to decide that point, I would want to hear from the experts concerned for days and days and days, which is just not going to happen.

MR HEPPINSTALL: Well, it is also not what happens because you would have to – you have to – in a way, if you are going to cross the standard it is obvious. You would not need the experts. It would be an incontrovertible error of thought, of rationality.

LORD JUSTICE STUART-SMITH: It is amazing how often incontrovertible things are controverted.

MR HEPPINSTALL: Well, indeed, if it was – if it truly happened, it would not be (inaudible) at all.

A LORD JUSTICE STUART-SMITH: Could I just mention, and I do not mean this in any sense to cause embarrassment or difficulty, but my eyeline is absolutely concentrated upon you and, therefore, if people who are to the side or behind you nod, shake their heads and so on, I find it very distracting, so I would be very grateful if they would, if only for my sake, retain absolute stability.

B MR HEPPINSTALL: Well----

LORD JUSTICE STUART-SMITH: You are all right.

MR HEPPINSTALL: I cannot see them?

C LORD JUSTICE STUART-SMITH: I am expecting you to duck and weave. It is that I would just like other people to stay still if they possibly can.

D MR HEPPINSTALL: The point I am on at the moment is just trying to decode Mozambique’s NDC and this target of 76.5 million tons that is put forward. It is a little bit complicated. If you turn to p.271, para.26, Professor Hawkes tries to do that decoding for us. At 26 he notes that “NDC does not commit it to a formal emissions reduction target”. 27, just reading the highlighted main conclusions:

“It is not possible to assert that the Project would breach any limit on emissions Mozambique has set in relation to the Paris Agreement.”

E And that is because, as it says at the top of 272:

“It is important to note that the reduction stated is not an absolute emissions reduction target set relative to a specified historical year.”

F So if you remember that Sir James told you that the UK had benchmarked against 1990 and there is nothing like that in the Mozambique NDC. His interpretation, and it is just that, of the stated ambition, “is that it is a preliminary estimate of emissions reduction relative to business as usual”, and if your eyesight can bear it, if you look at footnote 22, he says:

G
H “... ‘business-as-usual’ emissions means the level of national emissions that would be expected if the actions set out in their NDC do not take place. Some countries have chosen to set emissions reduction targets in their NDCs relative to a specific level of expected business-as-usual emissions, thereby creating [that] quantitative ... target. In contrast, Mozambique has not defined what they expect their future business-as-usual emissions to be, but have instead only defined a level emissions

reduction. As such, Mozambique [h]as not set any quantitative emissions target ...”.

A So the 76 million tons is an ambition but we do not know what it is against. So in that sense, even though there is a quantity, it is not quantitative because it is not relative. And, of course, when I showed you what an LDC has to do under Paris, it does not have to produce such quantitative assessment. It just has to set out its ambition, its plan, its strategy.

B

C He says at 28 that the project has been acknowledged in the NDC. I do not need to take you through that because you have seen how that works. And then at 29, he very fairly says the increase in the NDC-relevant emissions, the Scope 1 and Scope 2, “is unwelcome, but can be weighed against the benefits along[side] Paris Agreement guidelines”. So over the page, he has worked out that you are looking at a 10 per cent increase and he says that this “is of course unwelcome if considered in isolation.” But then he gives in a, b and c the counterweighing benefits that we – I have already outlined, about positive economic impact, the latitude and then something I am going to come back to, where he shows how the use of the gas is – and note the careful language – “is not inconsistent with Paris Agreement targets”.

D

E Now, I do just want to go to a very helpful document that was produced by the African Development Bank, which is back in the supplementary bundle at 632, and I just want to use that document as an aid to pointing out to you, if they are not already evident, the enormous benefits of the project.

LORD JUSTICE STUART-SMITH: Okay.

F MR HEPPINSTALL: So it is p.632 of the supplementary bundle.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: The African Development Bank, it has been around since 1963, UK joined in 1983. The twentieth board seat is shared by this country, the Netherlands and Italy, and as you have already heard, I think, the----

G LORD JUSTICE STUART-SMITH: I am very sorry, I must have misheard you.

MR HEPPINSTALL: 632.

LORD JUSTICE STUART-SMITH: 632?

MR HEPPINSTALL: Yes. It is----

H LORD JUSTICE STUART-SMITH: So this is a memorandum?

MR HEPPINSTALL: Yes, exactly.

LORD JUSTICE STUART-SMITH: Okay.

A MR HEPPINSTALL: It is a memorandum to the Board of Directors of the African Development
Bank, dated 2 July 2019. One of the board members, I think you have heard – you have
already heard the reference, it is in evidence – if you want the reference, it is CB1/184,
para.61, Mr Taylor says that the twentieth board member at that time, although it is on
rotation with the Britain, Netherlands and Italy, was with British, it was a DFID nominee.
B And reference has been made, my learned friend saying that there had been a positive vote,
but it is true to say that this is – this project is supported by the Board of Directors who
represent all the member states of the Bank, fifty-four African countries, twenty-seven non-
African.

C And then if we turn to p.640, it is a canter through some very big numbers. The first one is
at 1.5, “largest project financing in Africa to-date”, 25.4 billion. The project is then
described at 2.1 and it is important to note that we are on the 12.88 million tons, so they are
D looking at a two train project. Now, I did have a range of submissions to sort of do two
trains to death because it is very important to my client, but I think you have already heard
submissions on two trains. I just – I would like to pause just to note that Mr Anderson, in
his witness statement that was later reformatted, without any changes, into a Part 35
compliant report, or purportedly so, describes doing his emissions calculations on six trains
E as “more honest”. Now, that is precisely the sort of language which we expected to be
removed from that partisan witness statement when it became a Part 35 *Ikerian Reefer*
compliant balanced, fair, independent evidence to this court.

F Monsieur Bescond, who is my – who is my client’s witness, deals with two trains, paras.35
and 36 of his witness statement (for your note, CB1/251), and here we have the African
Development Bank dealing with two train.

LORD JUSTICE STUART-SMITH: Okay. I am looking at p.640?

G MR HEPPINSTALL: 640, at the bottom, the production capacity is this magic number 12.88,
which is the two train capacity. I think we are all agreed on that. Right at the bottom of
640.

H Over the page, 641, there is a description of the concession itself and, as my Lord noted, at
this time Anadarko, my client’s predecessor, is the owner of the concession. That is

important for a reason I will come to. At 2.8 you get the project rationale, including supplying domestic and regional markets, and if you want more on domestic supply, Monsieur Bescond gives you that at CBI/248, paras.18-24.

Then skipping forward a bit, I want to go to 2.42 at 648. It notes that the Government of Mozambique has provided a sovereign guarantee at 2.2 billion.

LORD JUSTICE STUART-SMITH: I thought you wanted us to read the last line a bit slower so where have you gone now?

MR HEPPINSTALL: 648.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: I apologise.

LORD JUSTICE STUART-SMITH: That is okay.

MR HEPPINSTALL: Bottom of 648.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: And a sovereign debt guarantee has been given but to give that sort of in-debt guarantee the Government of Mozambique had to have an IMF, and, if you look at the footnote, a World Bank waiver. Now, my learned friend – I think it is just a small point but my learned friend pointed out that our skeleton argument was inaccurate in saying that the IMF and the World Bank had provided financial support. She is absolutely right that the support that the IMF and the World Bank have provided is that recorded in para.2.42, and if our skeleton argument gave a different impression we apologise. But that is the IMF/World Bank support, which is to allow the Government of Mozambique, notwithstanding its current debt situation, to give that sort of a guarantee.

Over the page, 2.43, 649, more on domestic use, including, in the middle right-hand side of that paragraph, the Fertilizer Project. 2.45, expansion, expansion beyond the 12.88 million tons per year “may only resume after Completion and remain subject to market conditions”. Now, my Lord, my Lady, my learned friend cannot have it both ways on stranded assets. The commercial imperative is to sell the gas because there is demand for the gas. The gas from the two trains is already sold. It is subject to the SPA. If international climate change obligations, treaties and regulations meant that gas for demand – demand for gas fell, as it would if the regulations said “no more gas” or “less gas”, then there would be no more trains because the demand is falling. So my learned friend went to that vast document and sort of almost made submissions as if market demand is somehow something distasteful or

something that is inimical to climate change but they are inextricably linked. The trains will come with demand. No one is going to lend the money. My clients are not going to invest money if there is not demand for further trains, and there will not be demand for further trains if there is not the market, and the market will depend on the world's governments coordinating and negotiating on that issue. And that is why it is important to stick to the two trains, because the two trains are, by definition, not stranded. They are not locking because my learned friend took you to the SPAs. Gas is already sold.

Although I have to say that my learned friend at one stage, earlier on in submissions, very fairly made the point that the SPAs, whilst – when you look at that table she took you to – have those percentages in Europe, Centrica could buy – Centrica, a British energy player, would buy it but then the point is, and then we see throughout the CCR, it could end up being resold on the world market. It could end up being resale if it gets diverted elsewhere, to a customer – another customer, either wholesale or retail or otherwise, of Centrica.

Later on, when she was looking at those percentages, that nuance fell away but it is an important nuance and it is one that leads to the many uncertainties that makes UKEF's qualitative appreciation of Scope 3 correct. It is one of the many uncertainties that means you cannot actually just look at a mathematically – arithmetically derived figure under Scope 3.

And at 2.47 the point is made about demand at that time but actually what I am – what I do want to show you here is footnote 7, that when Anadarko was the incumbent concessionaire, Wood Mackenzie was already – and, in fact, the evidence from Mr Bescond is it had been since 2014 – the lender's market adviser. Now, Sir James has already answered the point but actually it was not pressed in oral submissions, the fact that there is something the court needs to be worried about about Wood Mac because somehow they are biased towards my clients or they are a creature of my clients or they have given an award to my clients. They were the incumbents with Anadarko before my clients – well, my client at this stage of this report was literally just coming onto the scene, was in the process of taking over the assets. But they were already long established as the lender's adviser and Bescond in his witness statement – I am sure you have already seen that disclaimer at the back of the Wood Mac report, it is also repeated at para.41, p.253 of CB1. The disclaimer

in the Wood Mac report says, “This is for the lenders. We are the lenders’ adviser. It is for the lenders to rely on.”

A Just over the page, 651, bottom of 2.53, it is just a note that it is not just Asia that we are concerned with in terms of who is going to have the gas, but I think you have already heard about the interconnector to South Africa and South Africa is very much heavily reliant on coal. And if we can move South Africa to gas and they can use Mozambique for gas, then
B that is all for the good and we hear about some of the developments in that regard at 2.53.

LORD JUSTICE STUART-SMITH: Where is the reference to South Africa in 2.53?

MR HEPPINSTALL: It is the last three lines of 2.53.

LORD JUSTICE STUART-SMITH: Thank you.

C **MR HEPPINSTALL:** 3,000 megawatt gas-fired power station. And then another very small point, 654, 3.18. Just for your note, White & Case are the lender group’s lawyers. It would be----

MISS SIMOR: I accept that. That was my error.

D **MR HEPPINSTALL:** -- it would be an odd situation, of course, if they were both lawyers to both lender and borrower, and it came as some surprise to those who instruct me.

MISS SIMOR: I am sorry, I misconstrued something on a website.

E **MR HEPPINSTALL:** Page 655, para.3.24 talks about GDP and it is helpfully summarised at the top of 656, table 2. And that graph, which comes from, as you can see in the parenthesis, from a PricewaterhouseCooper report of April 2019, actually also finds its way into the submissions of the Secretary of State for International Trade at CB2/148.

MRS JUSTICE THORNTON: Sorry, which graph?

MR HEPPINSTALL: The graph – sorry, not graph, table.

F **LORD JUSTICE STUART-SMITH:** The table.

G **MR HEPPINSTALL:** At the top of 656. Sorry, Table 2. That finds its way into the submission to the Minister and, in fact, this is why I say the gas master plan is an underestimate because you can see these are enormous figures. The total impact – direct, indirect and induced – is US \$225.9 billion. The current GDP, I think, is around 15. So it has enormous impact and the impact goes just beyond GDP, because if you read down, you have got jobs and skills, 5,000 Mozambican nationals to be – are being – are employed.

LORD JUSTICE STUART-SMITH: Quite a lot of this is in the – in the – one of the reports, is it not?

H

A MR HEPPINSTALL: It is. It is. You get household income, government revenue and, again, we are talking big figures, 60 billion direct; indirect, 50 billion, and again you have got another table, Table 4, and you have got some SME opportunities, 850 million already spent with SMEs in Mozambique and, if you want move on that, para.29 of Bescond.

B So we have looked at how it fits with the NDC. We have looked at those positive benefits. Next, now we turn to Professor Hawkes to see how he fits it with paths. CB1/263, back to Professor Hawkes, para.10, please, 263. Now, he is the expert. He has done some assessment at para.10 of all those different pathways in the IPCC. At (a) he has worked out the interquartile range of gas production consistent with the pathway, and what is important to note as we go through this is the ranges. 48 to 119 exajoules. Apparently an exajoule is C 10^{18} , a quintillion of joules. And he gives you the minimum and maximum ranges of 2050 gas production consistent with Paris. It is 15 to 199. And he fairly notes, in the next – on the top of the next page:

D “... this dataset indicates that it is not possible to conclude that gas will not be used [he is a fan of the double negative] in significant quantities over the period of the Project. While it is clear that global natural gas production does decline to 2050 in most Paris Agreement compliant scenarios, it is also a fact that in some of those scenarios its use remains approximately the same ..., and in some outlier scenarios it even increases.”

E The point is that we are looking in a crystal ball and there are lots of different scientists coming up with lots of different scenarios about how we can try and meet the critical pathway of Paris. Some see more gas, some see less gas. He goes on to talk about the IEA’s net zero scenario and how much gas that allows for. He notes at para.12 that because F this project has already begun then the IEA’s advice that there should no further oil and gas fields does not apply. And then he goes on in paras.13 and following, over the page, to a very important topic of CCS (carbon capture), and in para.14 he points out that we are all pinning our hopes on carbon capture because a lot of those compliant scenarios require G carbon capture technology. And then he goes on 15 to again show you how the production from the two trains can fit within those interquartile IPCC ranges because it is 0.55 – between 0.55 and 1.35 of what could be considered acceptable in 2050, and that is the final three lines of 265. And that is why he says this project can plausibly – so it is measured H language – plausibly be accommodated in Paris Agreement compliant futures.

A He is not too excited, in para.16, about NETs, where you try and take the carbon out of the air. He notes at para.17 that the project is economically competitive in his view, unlikely to be stranded, indeed, unlikely to be stranded for the very straightforward reasons I have given, which is the gas itself.

B At para.18 he talks about that graph you may have seen in the Wood Mackenzie that shows the gas from this project is lower carbon and will produce less Scope 1 and 2 emissions relative to other energy projects. That is the highlighted conclusion.

LORD JUSTICE STUART-SMITH: Where are you?

MR HEPPINSTALL: Paragraph 18, the bold – emboldened words at the top of para.18 on p.267.

LORD JUSTICE STUART-SMITH: Thank you.

C MR HEPPINSTALL: But then he goes on to deal with Scope 3. So if we just turn forward to 273, you get lots of information about Scope 3, although I do not think we need to go through that because I think we are all familiar now with what Scope 3 is and how it works. Perhaps turn to 275, at 33 he states something of the obvious, Scope 3 “is likely to be the combustion of the natural gas at its point of end use”. And then at para.34 he introduces you to an important topic of avoided emissions. So you report Scope 1, you report Scope 2 and 3, and then you can report what emissions you may avoid, although you tend to report them separately. He makes some comments, further comments, about how to do it at 35 and 36 and then at 277 and 278 he actually then goes on to set out his assessment of Scope 3. But, as you see at para.38, p.277, it is all back to the crystal ball. It all depends on what happens next. He thinks that it will probably all be used to generate electricity, or a lot of it will be. Therefore, he takes that as his model. You are looking at electricity generation or blue hydrogen generation and then he gives you two figures at (a) and (b), one imagining we have not cracked CCS and we have got a problem because we are at 93.5 kg, or we have and you are at 11.7. And very fairly, at the top of 278, he says:

G “... early in the project lifetime scope 3 emissions are likely to be simply the combustion emissions of the gas. Later in the project ... scope 3 emissions depend largely on whether the gas use is combined with CCS as suggested by IPCC and IEA ...”.

H And then he says you have got a seven-fold range, which he describes as very large. These are the uncertainties. You cannot just do what Professor Anderson does, which is to burn all the gas and say, especially if you are using six trains, “That is an extraordinarily large

figure. Oh, dear.” You have to take into account the imponderables, the uncertainties and reflect them in your analysis, which is precisely what the CCR does.

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And then he says, “Well, you know, let us look at avoided emissions”, but, again, very fairly, at 39, it depends. If this gas displaces coal then we have excellent news. We are displacing 215. So again those 93.5 and 11.7, we might be able to displace 215. But if it displaces solar or wind power, we are at zero. Now, these are like the worst case/best case/mid case scenarios in the CCR report. And at 40 he says it is a wide range of possible values. And then on he goes in the following paragraphs essentially to say that, given the uncertainties, the extensive caveats in the CCR report – well, let us just look at para.43:

“The alternative qualitative scenario-based method adopted by UKEF is a reasonable approach given the uncertainties. Instead of making a specific calculation of scope 3 and avoided emissions, UKEF have taken a qualitative scenario-based approach in their [CCR] ... They considered a possible best-case, a possible worst-case and possible mid-case scenario. Given the uncertainties discussed above, the scenarios considered represent a reasonable range of possibilities. In my opinion, their decision to use the mid-case scenario where ‘some’ of the LNG from the Project displaces coal or oil-fired power generation is a reasonable middle-ground ...”.

Now, Mr Muttitt mentions what you should have done is modelling. You can see that, if you want, at CB/1295 para.30. And I think my learned friend very fairly said that Mr Muttitt does not actually tell you anything about this modelling. He cites a paper, one paper, in his footnote from 2014. But I think it would be, and I think my Lord said on the first day, it would be “fiendishly complicated”, and it would be fiendishly complicated, not least because every time you make an attempt you are looking in a crystal ball. You have got so many, it is like three or four dimensional, there are so many different elements that you would need to put in play to come up with something even approaching a guesstimate, and there is no modelling before you. There is no other model that could have done any better.

Now, it is just – it literally is a difference of opinion between scientists. It certainly cannot amount to an incontrovertible error that vitiates anything.

LORD JUSTICE STUART-SMITH: Does your submission add up to this, that although you can calculate the carbon content of a given amount of production of LNG, you cannot or the

calculation of impact is dependent on variables including displacement, what is being displaced, which gives such a wide range of numbers as to be unhelpful?

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MR HEPPINSTALL: Misleading to a minister, my Lord.

LORD JUSTICE STUART-SMITH: Well, they are not misleading. They just may not be of any use. I mean, if, for example – if, for example, you decided that if you took as an assumption that X per cent was going to displace more polluting fossil fuels, someone might attack your assumption but you could do the sums.

B

MR HEPPINSTALL: You could but then you would have to provide some extensive caveats which essentially amounts to “but we do not know”.

LORD JUSTICE STUART-SMITH: Yes.

C

MR HEPPINSTALL: So I suppose the misleading nature would be presenting it as concrete certainty when it is – when it is no such thing and can be no such thing. And, therefore, the caveated, careful, qualitative approach in the CCR is the way to present it.

LORD JUSTICE STUART-SMITH: Yes, so the submission would be that it is not irrational, not unreasonable to decide to use a qualitative term such as “very high”----

D

MR HEPPINSTALL: Indeed.

LORD JUSTICE STUART-SMITH: -- and subject to some – But that is – I do not think – I do not understand your submission to be that calculations cannot be done. I think I understand your submission to be that the potential variables are such that the range of results will be unhelpful.

E

MR HEPPINSTALL: Exactly, my Lord. I cannot say the calculations cannot be done because my expert has done them. It is just that it leaves you scratching your head because, you know, you have got seven-fold differentials. You have got all the way from “the gas has displaced something green or something nuclear” all the way through to “the gas has gone to Asian countries where they want to use gas to displace coal”. And mid-case, middle ground, reasonable.

F

I do not want to take you to any authorities but you may want to note a very recent decision of *Green Peace v Advocate General* in the Inner House of the First Division, with the Lord President sitting. So it is a bit like our Court of Appeal with the Lord Chief Justice. Which is at authorities bundle 4/51 for your note. It starts at 2472. But in, I admit, a very different context, permission to exploit North Sea oil and gas. But at para.68----

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LORD JUSTICE STUART-SMITH: 68?

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MR HEPPINSTALL: 68, p.2485, you will find an interesting comment on:

A “It [is not] practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer.”

LORD JUSTICE STUART-SMITH: Well, I am sure if you want us to read it, we will read it, but what use are we meant to make of that?

B MR HEPPINSTALL: Well, it is a – it is a judicial endorsement almost of the approach, that it is, in that context – and I am not going to oversell this submission because I will be told that it is in a completely different context, which is entirely correct – but in that context, for the decision-maker to work out where all the oil and gas will end up and how it will be consumed is not practicable because it would all depend and you do not know. It is also
C said, at the end of that passage, that what we should do with all the oil and gas is essentially a political and not a legal question, which may well be----

D LORD JUSTICE STUART-SMITH: As I sit here at the moment, it does not – it does not, in the context of other things that the courts sometimes have to look at in terms of calculations, it does not look particularly complicated in principle. It is just that the variables would be subject to – could be subject to challenge and would lead to a very wide range of results, and that emerges quite clearly from the evidence on a number of fronts.

MR HEPPINSTALL: Yes. And----

E LORD JUSTICE STUART-SMITH: Well, are we going to go any further than that?

MR HEPPINSTALL: No, my Lord, and, as Sir James was saying earlier, also it depends on other sovereign nations and their NDCs. I mean, I am trying to sell gas to, let us say, Indonesia. If it changes – if it ratcheted up its NDC and said, “No. No, thank you”----

F LORD JUSTICE STUART-SMITH: My Lady and I both relish number crunching and would do it if it was going to be of any use but I think your submission is that it is really not going (inaudible)----

MR HEPPINSTALL: Well, it is no use to Professor Hawkes because he is left with such uncertainties and large ranges, so it is no use to the court.

G LORD JUSTICE STUART-SMITH: Right. I think we have probably dealt with that one.

MR HEPPINSTALL: Can I make two – just do two further things? One is p.310----

LORD JUSTICE STUART-SMITH: This is still on Professor Hawkes, is it?

MR HEPPINSTALL: No, I am just going into Mr Muttitt.

H LORD JUSTICE STUART-SMITH: Okay.

MR HEPPINSTALL: I am finished with Professor Hawkes. I just want to show you how stark this difference of opinion is but it is just difference of opinion. If you look at p.310, para.76, this is his very different view of common but differentiated responsibility.

LORD JUSTICE STUART-SMITH: Give me a moment, please. (After a pause): Yes. 310, para.76.

MR HEPPINSTALL: 310, para.76.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: He says:

“While the CCR mentions that under the Paris Agreement, developing countries may reduce GHG emissions more slowly ...”.

Again, he is not “peaking later”, “reduce more slowly”.

“... it does not follow that fossil fuel expansion in those countries is consistent with the goals of the Agreement. Indeed, as noted above, achieving the Paris goals will require a rapid *global* reduction in gas production and use. The notional of ‘[CBDR]’, at the heart of the [Convention of Paris] ... means that all countries have a common responsibility, but the way in which they meet it is differentiated between them. When it comes to fossil fuel extraction, this implies that all countries should begin a reduction, but the reduction should be fastest in wealthiest countries, and poorer countries should receive finance and support to enable their reduction.”

So a very different view of CBDR but the only point is, is that it is not really for this court to choose because it is just a matter of debate between scientists and right-thinking people as to what Paris – what action Paris requires, and that action is decided upon by states and negotiated on the international plane. But, as you can tell, we fundamentally disagree – Professor Hawkes fundamentally disagrees. But the existence of the disagreement cannot vitiate the defendant’s approach.

And then, as I promised, as my final act, I just want to show you the very different view of another NGO. It is the supplementary bundle at 1867, supplementary bundle volume 3, tab 49. I beg your pardon. Tab 51, sorry, p.1867. This is a report of the Tony Blair Institute for Global Change. It is entitled “A Just Transition for Africa: Championing a Fair and Prosperous Pathway to Net Zero.” We can skip over the foreword from our former Prime Minister, but at p.1872 you get a very different view:

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“High-income countries must become genuine partners to African nations and help them advance their economic transformation and industrialisation plans in a way that minimises damage to the planet. At present, [high-income countries] are seen to be prioritising climate mitigation over Africa’s development, restricting development choices and ‘kicking away the ladder’ that they themselves have already climbed.”

And then you get a number of different principles but actually – and you get a bit more at 1878 on “kicking away the ladder”.

LORD JUSTICE STUART-SMITH: I do not quite understand why you are taking us to this.

MR HEPPINSTALL: Well, only to show, my Lord---

LORD JUSTICE STUART-SMITH: I do not know who the authors are. Obviously I know the person who gives their name to this institute but, I mean----

MR HEPPINSTALL: I am only----

LORD JUSTICE STUART-SMITH: -- we know – we know there is a conflict----

MR HEPPINSTALL: Yes, very good.

LORD JUSTICE STUART-SMITH: -- between the self-interest of developed nations and the self-interest of developing nations.

MR HEPPINSTALL: Indeed. My Lord, my only kind of marginal interest, p.1882 and 1883, which is where this project is used as a case study.

LORD JUSTICE STUART-SMITH: Okay. 1878?

MR HEPPINSTALL: 1882, 1883.

LORD JUSTICE STUART-SMITH: 1882. Thank you.

MR HEPPINSTALL: So this project is used as an exemplar of how sustainable exploitation of liquid natural gas or naturally occurring assets can assist a developing nation, including a developing nation that in the end is on its journey to a low carbon economy but needs to get there through the destination of exploiting its natural resources. So I----

LORD JUSTICE STUART-SMITH: You have cited this in your skeleton and----

MR HEPPINSTALL: Indeed, my Lord.

LORD JUSTICE STUART-SMITH: -- we will look at it again obviously.

MR HEPPINSTALL: I am very grateful. It only goes to the difference of opinion point and how inapt that sort of territory is, of course, for a claim at this stage.

LORD JUSTICE STUART-SMITH: Sorry, how inapt?

MR HEPPINSTALL: How inapt some – how inapt it is to bring a claim saying that there is some vitiating evidence, saying that there is only one way to look at Paris and only one way to

look at how Mozambique should behave and how it should keep its natural resources in the ground when, in fact, it is just all a matter of debate. It is not a matter that can be raised---

A LORD JUSTICE STUART-SMITH: Well, it is a matter – sorry, it is not just all a matter of debate. Whether or not, on public law principles, there has been a vitiating outcome is a matter for the court to decide.

MR HEPPINSTALL: Of course, my Lord.

B LORD JUSTICE STUART-SMITH: The court is, I mean, it is probably not as aware as some of the people in – or not as well informed as some of the people in this court, or listening, but the court is fully aware of the conflict between developed nations and less developed nations and the existence of irreconcilable objectives.

MR HEPPINSTALL: Indeed.

C LORD JUSTICE STUART-SMITH: That does not of itself make this claim inappropriate.

D MR HEPPINSTALL: Of course not, my Lord, but it is very important context. One accepts my learned friend for the claimant’s submissions in its proper context, where it is not all one-sided, it is not – there is not one view of what Paris requires. There is not one view of what Mozambique has to do. And, importantly, of course, is the foreign act of state of Mozambique’s own view. But to raise Mr Muttitt, and all those arguments, to a level where you say failure to follow that line is a public law error, clearly is not sustainable.

LORD JUSTICE STUART-SMITH: I think that is a different point, if I may respectfully say so.

MR HEPPINSTALL: Those are the submissions of the interested parties.

E LORD JUSTICE STUART-SMITH: Thank you very much. They are very clear and we have your skeleton which is also extremely clear. Thank you very much.

MR HEPPINSTALL: And we are grateful for allowing the extended length of the skeleton which has hopefully led to an economy, I hope, of oral submissions.

F LORD JUSTICE STUART-SMITH: Well, there are economies and economies. Economies in judicial time possibly.

MR HEPPINSTALL: I am grateful.

LORD JUSTICE STUART-SMITH: Thank you. It is useful to have your references there. Yes.

G MISS SIMOR: Now, my Lord and my Lady, I fought very hard to obtain yesterday morning, initially I was only offered a day. It now looks like we have much more time than expected.

LORD JUSTICE STUART-SMITH: Yes.

H MISS SIMOR: If I may, I would like to just respond on the last point that was dealt with. We may come back after the adjournment on that issue. And then, if possible, perhaps we could adjourn a little bit earlier so that I can just put in order----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- the best things to deal with?

A LORD JUSTICE STUART-SMITH: As you know, it is always one of the most compelling submissions that counsel can make that, "If we just break now my submissions may be shorter later". So, speaking entirely for myself, I usually find that utterly compelling.

MISS SIMOR: So I find myself slightly----

LORD JUSTICE STUART-SMITH: So do----

B MISS SIMOR: -- having to simply promise to re-order them.

LORD JUSTICE STUART-SMITH: Yes, do by all means deal with whatever you want to now----

MISS SIMOR: Thank you.

C LORD JUSTICE STUART-SMITH: -- and then we will take a break.

MISS SIMOR: So just to deal with the final debate between my Lord and my learned friend, my Lord said that there is a conflict between the interests of developed countries and the interests of developing countries, and, of course, that is right. It is a very complex conflict because in this what we have to remember at all times is that the most vulnerable countries to climate change are the developing states generally, and Mozambique, as my learned friend correctly said, falls into a category of a least developed country and the most vulnerable, according to the 2019 Climate Watch Report that I showed you to, the most vulnerable state – one of the most vulnerable states in the world to the impact of climate change; the consequence being that this project will be built on high land to protect itself from cyclones and hurricanes. With sea-level rises there will be loss of the low areas. There are obviously coral reefs. There are diversity issues – biodiversity issues, tourist issues, there are all kinds of complicated issues going forward in terms of development.

F Put on the other side, one assumes, well, the interest of the developed world is for climate change not to happen but, in fact, a country like the United Kingdom is actually in a relatively good position. We may suffer storms and problems but in global terms it is in a relatively good position.

G LORD JUSTICE STUART-SMITH: Suffolk does not think so.

MISS SIMOR: Well, quite. But in relative terms.

LORD JUSTICE STUART-SMITH: In relative terms, yes.

H MISS SIMOR: In relative terms only, of course. And, of course, one should not assume that we are talking only about finance to Mozambique. You saw the list of concessions in the

A document in relation to these liquid natural gas projects in Mozambique, which obviously are much wider than simply the one before you, and those concessions are held by the USA, by Italy, by France and by Norway. Norway, as far as I am aware, has one of the highest per capital purchasing power GDP in the world.

LORD JUSTICE STUART-SMITH: It certainly does.

B MISS SIMOR: These are extremely wealthy countries and there is also documentation about where this revenue is going. It is not – one cannot approach this on the basis that the revenue is going directly into Mozambique. There are obviously direct and indirect benefits but it is complex in that way as well, because there are economic interests of the developed world in exploiting these resources. And insofar as it is being suggested that somehow the claimant is kicking away the ladder from Mozambique, that could not be further from the truth.

C LORD JUSTICE STUART-SMITH: Why not?

D MISS SIMOR: Because the Paris Agreement, looked at as a whole, is a commitment by countries to each other, they have made an agreement, whereby finance flows will flow from the developed world to the developing world to compensate the developing world for the causes of climate change and the consequences of climate change. So when we looked yesterday, I think my learned friend said something like – and I am going to come to this in my submissions – the court needs to look at whether the parties would really have agreed this – if this is what it means, would they really have agreed it? Well, what they agreed, if you look at the document in the round – the treaty in the round, is they agreed a complex set – a deal effectively, a deal that involves finance flows. And one part of that is climate finance, which is a specific category of finance and you will have heard of the hundred billion commitment that has been made by the developed world and not paid. That commitment has not been met but it was made. And the other thing is finance generally which is necessary, if you like, to achieve – well, it is necessary to achieve the temperature goals. It is a core part and it's a fundamental change from the UNFCC.

G So when we talk about complexity, it is complex and what one cannot do is simply say it is “kick away the ladder”. I am going to make some submissions on the Tony Blair Foundation report after the adjournment because I want to consult my juniors as to what it would be appropriate for me to say and not to say before I do it in open court. So if it is all right by you, I would be happy to take a break now and get my sort of thinking in order.

H LORD JUSTICE STUART-SMITH: And start again at two?

MISS SIMOR: Is that all right with you?

LORD JUSTICE STUART-SMITH: Does anyone object to starting again at two? Very well, we will start again at two.

MISS SIMOR: Thank you very much.

LORD JUSTICE STUART-SMITH: Thank you.

(Adjourned for a short time)

MISS SIMOR: My Lord, my Lady, I am going to reply by reference to ten points. I am going to start briefly on the two trains point, deal with lock-in and transitions, stranded assets, the Scope 3 arguments made by my learned friend this morning, the approach to rationality generality, the tenability argument, the interpretation process under international law, the question of net increase, acts of state and then poverty.

LORD JUSTICE STUART-SMITH: And then we will all go away happy. Ten points. Okay. Thank you.

MISS SIMOR: First of all, I am just going to start though with a list of things that were not addressed by the defendants or the IPs. The question of the relevance to interpretation of the Paris Act, these are – these are issues that are directly relevant to the interpretation of the Paris Act, ground 1(a), and matters to which they should have had regard, the rationality arguments under ground 1(b).

LORD JUSTICE STUART-SMITH: Forgive me. I was just getting myself aligned. What was your first thing?

MISS SIMOR: So what I am addressing is matters that have not been considered in relation to both----

LORD JUSTICE STUART-SMITH: Yes, and the first one is?

MISS SIMOR: Well, no, to both arguments. The first one is the urgency of the threat of climate change. That has been left out of all accounts. And it is, of course, in the UNFCCC of 1992, but it is the basis on which in 2011 the parties got together to agree that they should go forward to enact and to agree a further agreement to respond to that urgency, not----

LORD JUSTICE STUART-SMITH: 2011 is Durban.

MISS SIMOR: Exactly. Yes, Durban, and I handed you the decision by which they decided that they should go forward and negotiate, draft, negotiate and finally agree a legal instruction; so not a declaration but a legally binding instruction. And that was a response to the urgency and that is something that has not been raised or touched on. Indeed, I would say

A the opposite because what has been said today is, “Well, okay, it does not work. The NDCs
are not enough. We are not on track. But it is all right because the parties can come
together again and they can negotiate again, and they can at that point maybe improve the
situation slightly.” But that ignores the fundamental point, which is it was the urgency in
1992 that led to this extraordinary international agreement, the UNFCCC. It is an
extraordinary agreement. Also the Ozone Montreal Agreement. But that agreement, even
B post-Kyoto, was found not to be sufficient and the indicative NDCs were not sufficient and
the urgency was recognised in the light of AR4 and 5, the reports in relation to what – the
scientific reports as to what was necessary. And as a result of that, the parties decided to
draw up a new instrument and that was the Paris Agreement.

C The second thing that the parties have both ignored is the implications of the specific
temperature goals in Article 2(1)(a) for the implementation of the rest of the Paris
Agreement. Those temperature goals are crucial. They are central.

D The third thing that they have ignored is best available science, as set out in the IPCC and
UNEP, and you will recall that I explained to you that the IPCC had taken eighty scenarios,
including the kind of scenarios that Mr Hawkes mentions in this witness statement, where
he says in one world we do not need to do anything at all because technology will have
E developed so much that we will be able to either capture all the carbon, or some people talk
about putting mirrors up to reflect back, etc. Technology will enable us to continue to
exploit fossil fuels. Now, the IPCC 1.5 report looked at eighty scenarios, and some of those
are on that extreme spectrum, and we have to respect the conclusions that are reached in
that report. That report was then – from that report, UNEP took eighteen scenarios that the
F IPCC had considered were feasible scenarios and it was on the basis of those eighteen
scenarios that you get the UNEP production gap report.

G The fourth point that the defendants and IPs have left out is the production gap, and all its
implications for the delivery – and the implications for delivery of all NDCs. So we heard
this morning about the fact that, of course, the NDCs, even if met, even if fully met, would
come nowhere close to enabling the world to meet the well below 2 degrees.

LORD JUSTICE STUART-SMITH: Is it lawful for any sovereign state to increase its
emissions?

H MISS SIMOR: Is it lawful?

LORD JUSTICE STUART-SMITH: Hm.

A MISS SIMOR: Only on that – well – (after a pause) – it is lawful but they have all got to go for net zero ultimately. There is a different time point but, yes, so for Mozambique, the later peaking for Mozambique, not for Mozambique’s sale exports but for Mozambique itself, and I think we had an exchange on that yesterday, my Lord.

B So turning to my – those are the things that we have not heard anything about. Turning then to my first point, the two trains point, I obviously – I just want to make two points about this. First of all, the defendants say that they only took into account two trains, they accept that, but they it was a reasonable approach. And we say that is wrong for two reasons. First of all, because of the obligations on the party – on the defendants under the Paris
C Agreements to assist Mozambique in meeting commitments but, significantly, increasing and enhancing those emissions. And, in relation to another submission, I am actually going to take you to those provisions, and that is the so-called “ratchet effect”. And, therefore, it is essential for the defendants, in acting reasonably, to look reasonably at the thirty year trajectory that are concerned with. And while – well, the interested party made submissions
D this morning about the position and made it very clear that the question of whether they extend is responsive to demand. So if demand continues to expand, the IPs understandably, it is in their commercial interest, will respond to that demand and that reflects exactly what Total says on its website – and I think we may have put the materials in. I think we have
E certainly linked the hyperlink in the skeleton. They say what this project is expected to produce and that is reflected in all the documents relating to commerciality, risk, etc. So it is accepted that this is a demand issue for Total.

F It is relevant also for the defendants to look at this question of assets and extension, both in the context of Mozambique developing its own renewable resources, which is something referred to specifically in Paris and in the UNFCCC, and not getting locked in to a gas-
G dependent economy. And it is one thing in relation to the grid, we have got to build a grid, but, first of all, that grid has to be a grid that can be transferred to renewables and I think that is dealt with in Mr Muttitt’s witness evidence, but, secondly, it is not simply a grid. In
H this country we are highly dependent on gas boilers, for example. It is possible that a country dependent on liquid natural gas might move to liquid natural gas transport, which is something you can. You can have cars with liquid natural gas. So it is also about not creating an economy that becomes dependent on a fossil fuel and that was relevant to the

defendants' assessment of the number of trains and the capacity, the overall capacity and intention in relation to this project.

A The second point is the IFC standards to which the defendants were supposed to have regard, and say they did have regard, and say they complied with, and this is really a question of legal interpretation. And we find that in authorities bundle, tab 9, so authorities
B bundle 1, tab 9, p.242, and if you can read 4. So this is Standard 1 and the defendants say that Standard 1 only required them to look at two trains and, in our submission, Standard 1 required them to look at six/eight trains, and I am going to show you the terms of Standard 1:

C “This Performance Standard applies to business activities with environmental and/or social risks and/or impacts. For the purposes of this Performance Standard, the term ‘project’ refers to a defined set of business activities, including those where specific physical elements, aspects, and facilities likely to generate risks and impacts, have yet to be identified.
D Where applicable, this could include aspects from the early developmental stages through the entire life cycle (design, construction, commissioning, operation, decommissioning, closure or, where applicable, post-closure) of a physical asset. The requirements of this Performance Standard apply to all business activities unless otherwise noted in the specific limitations ...”.

E And then if we look at footnote 6, which is to as yet to be identified, you will see it says:

“For example, corporate entities which have portfolios of existing physical assets, and/or intend to develop or acquire new facilities, and investment funds or financial intermediaries with existing portfolios of assets and/or which intend to invest in new facilities.”

F LORD JUSTICE STUART-SMITH: But that is not this case.

MISS SIMOR: It is because we are talking about the project.

LORD JUSTICE STUART-SMITH: No. The project, as presently defined, is a two train project.

G This surely – well, to my reading – I have never seen this before, you obviously have – but this is saying, “If your project includes physical assets, developments which have not yet been identified, then you should take them into account.” That is not this case. This case is, “You have got a project which is a two train project. There might one day be a six train project or an eight train project which will then have to be considered as such.” But the
H present project does not have, as part of it, six, eight, ten, twelve trains.

MISS SIMOR: Well, if I can take you to the next bit----

LORD JUSTICE STUART-SMITH: I thought you might say that.

MISS SIMOR: -- and 8----

LORD JUSTICE STUART-SMITH: But that is what reading this looks like to me.

MISS SIMOR: So 8:

“Where the project involves specifically identified physical elements, aspects, and facilities that are likely to generate impacts, environmental and social risks and impacts will be identified in the context of the project’s area of influence. This area of influence encompasses, as appropriate:

- The area likely to be affected by: (i) the project and the client’s activities and facilities that are directly owned, operated or managed (including by contractors) and that are a component of the project; (ii) impacts from unplanned but predictable developments caused by the project that may occur later or at a different location; [and] (iii) indirect project impacts on biodiversity or on ecosystem ... which [are] Affected [by] Communities ...”.

And then the second bullet:

- Cumulative impacts that result from the incremental impact, on areas or resources used or directly impacted by the project ...”.

And then if you go to the actual definition of the----

LORD JUSTICE STUART-SMITH: I have to say that so far, subject to definitions, para.8 seems to me to reinforce the point I was just making. But I may be----

MISS SIMOR: So we rely on “reasonably defined developments” in the second bullet, “reasonably defined developments at the time the risks and impacts identification process is conducted.”

LORD JUSTICE STUART-SMITH: Sorry.

MISS SIMOR: And----

LORD JUSTICE STUART-SMITH: Sorry, sorry.

MISS SIMOR: Sorry.

LORD JUSTICE STUART-SMITH: Where are we?

MISS SIMOR: Page 244, second bullet, and we say----

LORD JUSTICE STUART-SMITH: “Cumulative impacts”?

A MISS SIMOR: Yes. We say that the development of this site, and I – did I take you – it is all in the skeleton but I have not taken you to the May 2020 EIA, because that identifies the larger number of trains. So it is “reasonably defined developments” that are likely for this project. Now, it may be that the UK is only investing – I should not say “only”, it is the biggest investment ever – but the UK is footing 7 per cent of the cost of the two trains. Now, we do not say – or the project so far, which is obviously the – expanding the trains is very much an incremental cost on the project, and we say----

B LORD JUSTICE STUART-SMITH: Well, it is actually, in every new sense, it is a new project because it is not catered for in this project at all.

MISS SIMOR: Well, my Lord, we disagree on that. It is----

C LORD JUSTICE STUART-SMITH: Okay. Can you give me the – can you give us the reference that you are referring to?

D MISS SIMOR: Well, it is the – I would go to the 2020 EIA and you would have to go to the Total documents, which – in fact, the submission was made this morning, that it is a question of a response to demand. It will be expanded if the demand is there. And we say that that is reasonably defined and in the documents, right back to 2014, it starts with being eight to ten, it is then scaled back. Initial development is two, to be expanded up to fourteen. And those are what the EIA documents say right up to 2020.

LORD JUSTICE STUART-SMITH: Okay. Well, I may be wrong so could you give me – give us the reference for that?

E MISS SIMOR: Apparently it is at 113 to 114 of our skeleton but where the EIA 2020 – perhaps I will – (after a pause): Yes, we will find it. I think I may actually – oh, I have got it. It is the next paragraph in my notes. Supplementary bundle 1, p.1228, para.2.3.

LORD JUSTICE STUART-SMITH: 1228?

F MISS SIMOR: 1228.

LORD JUSTICE STUART-SMITH: Thank you.

G MISS SIMOR: So it is supplementary bundle 2. So here we are, yes, p.1228. This is – so what happened was in 2014 there was an environmental impact assessment. The project starts in 2012. 2014 we have the EIA. This is an update of the EIA and then 2.3 says:

H “The Onshore Project is designed to receive, treat and convert natural gas from the Subsea Production System into a liquid. Two LNG trains will be constructed initially and additional trains are planned for future phases. Space for up to 14 trains has been allocated to include the potential for future growth.”

And that is exactly in line with how it always was and, indeed, it was confirmed this morning by my learned friend, who said, “Yes, we will expand in response to demand.”

A And we say that in the light of that, IFC Standard 1 required the United Kingdom to assess by reference to at least a larger than two train project, because a larger than two train project is planned and, yes, they are only funding 7 per cent but they do not assess 7 per cent of the two trains. They must assess the project and its reasonable expansion and that makes sense both under the IFC, and complies with its intentions, but also, of course, under the Paris B Agreement in relation to its obligations to assist Mozambique.

For your notes, there are some other references. First of all, we asked – the evidence given by the defendants was that it was only two trains initially in 2014 – Sorry, it was eight trains C in 2014 but then it was narrowed down to two trains. So the original impact assessment in 2014 – (after a pause) – the early one was for six or eight trains, the early assessment, 2014, and we said, “Well, where was it narrowed? When did the project become narrower?” And the response given by Mr Griffin, at paragraph – So, sorry, start again. Mr Griffin said in D para.101 of his statement that it had been narrowed down and that, yes, we were right, originally it was larger. So we asked him to tell us where it had been narrowed down and the document he produced was effectively the – was the 2020 one, the one I have just shown you. So if we go to the original project, it is at core bundle 2----

LORD JUSTICE STUART-SMITH: So we are going to six to eight trains in 2014?

E MISS SIMOR: We are going to go to the 2018 memorandum, which is at core bundle 2, tab – p.31. It is the mostly redacted document and it says:

F “The Project will develop the Golfinho-Atum Field by constructing and operating a two-train ... LNG plant and the necessary equipment for processing ... The initial two train Project will produce – 12 [that is what they agree] --- however, the Project Site is designed to accommodate the installation of up to 100 ... [so that is actually eight times that] of the liquefaction capacity for potential future developments.”

G And then – so I have already showed, I am not going to go back to it, in the RAD report, the risk report, they proceeded to look at eight – that is CB2, tab 180.

LORD JUSTICE STUART-SMITH: CB2?

H MISS SIMOR: Tab 1 – p.180. And in footnote 6 to our skeleton – sorry, it is footnote 6 to Mr Anderson’s second witness statement, which is at CB1, p.157, he links the Total website page.

LORD JUSTICE STUART-SMITH: Sorry, is CB2/180 a page about reserved risk?

MISS SIMOR: Yes. It says eight – I hope it says “eight trains” at the top.

LORD JUSTICE STUART-SMITH: We went to it, I think----

MISS SIMOR: Yes, I went to it already.

LORD JUSTICE STUART-SMITH: Okay. And I think you said read it later.

MISS SIMOR: Oh, probably under pressure of time. But it is----

LORD JUSTICE STUART-SMITH: All right.

MISS SIMOR: -- basically that what they did was they said – they assessed the risks to this project, the commercial risks, and the reserve risk, by reference to eight trains and they said there is a low reserve risk because it has got eight trains potential. So you cannot have it both ways. You cannot, on the one hand, decide that the commercial risk is low to British taxpayers because there is lots of capacity there and it will – there is plenty of fuel and, on the other hand, say, “We are not going to look at the environmental implications of that”.

And then the third place you can find reference is on Total’s website, and that is hyperlinked in Mr Anderson’s second witness statement at core bundle 1, p.157, footnote 6, and I do not – I will not go to it. It says on my note go to the footnote and show all the references. All the references are there. They particularly to what – I mean, it accords with what was said this morning by my learned friend.

And then I took you to the 2020 environmental impact update by RINA, who is the independent adviser on this project for Total, and there you saw that it is planned to be eight trains. And we say that is sufficient for IFC Standard 1 and not to look at it is----

LORD JUSTICE STUART-SMITH: Forgive me, could you give us the RINA reference just once more?

MISS SIMOR: Yes, sorry. It is supplementary bundle 2, p.1228, para.2.3. It is the page that is basically a black page with a line in the middle.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So that is it on trains. Second point, lock-in transition. Now, my Lord, my Lady, this is a crucial element of any assessment. There are two elements to lock-in. One is the emissions produced by the infrastructure itself and the other is the locked in emissions that result from a society that develops on the basis of LNG or gas use for electricity and generation. I just mentioned that. And both of these relate to the consequence of developing----

LORD JUSTICE STUART-SMITH: I am very sorry, I am trying to take a note. I know----

MISS SIMOR: I am sorry. Am I going----

A LORD JUSTICE STUART-SMITH: -- you are – I know you are still feeling under pressure of time but I am trying to take a note so that when you have gone we do not have to write to you and say, “What was this about?” Two elements. What was the first? Emissions?

B MISS SIMOR: There are two elements. It is all – two elements of lock-in. One is the known lock-in from the project. So we know that the project produces 6 million tons of CO₂. It is not – that does not include the methane but there is at least 6 million tons per annum that the actual generation of liquid natural gas by the project site will involve and that is locked in to Mozambique’s emissions for thirty years. So that is one element of lock-in.

C The other element of lock-in or transition - /transition is the creation of a society that becomes dependent and, therefore, does not move to renewables because the cost of transmit – the cost of – the cost benefit of transferring to renewable once you have actually invested in gas infrastructure is negative. So that is another risk that needed to be taken into account.

D And both of these, in our submission, relate to the consequence of developing this source that will endure and potentially prevent development of renewable energy sources, and I refer my Lord and my Lady to Mr Anderson’s second witness statement, para.23, core bundle 1, p.163.

E The defendants’ conclusions on lock-in and transition are in the CCR at core bundle 2, p.268, and we have been there but I would like to just go back to it briefly. Yes. Page 168 (sic).

F LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: Now, UKEF says three things. First, it says that the committed cumulative carbon emissions of this project, that is the commissions of this – the emissions of this project, could not be calculated.

G LORD JUSTICE STUART-SMITH: Where are we looking?

MISS SIMOR: It is – so the first line, sorry, in the second paragraph:

H “When considering the potential for fossil fuel lock-in for Mozambique, UKEF considered whether the Committed Cumulative Carbon Emissions for the Project could be calculated. This would involve using advanced

methodology for estimating future emissions from energy sector assets which in the UK is being developed by academic[s] ... [etc.] CCCE calculations would need to be undertaken by specialist consultants and driven by/contributed to by the Mozambique Government.”

A

Now, that arguably relates to the society, the committed cumulative emissions that might come, for example, in developing a bus network that is fuelled by liquid natural gas rather than electric vehicles. But what it does not deal with is the 6 million tons of CO₂ from the project, which can easily be calculated, and that is simply not done. And you will recall that Mr Caldecott criticised the climate change report for its failure to calculate cumulative emissions and I believe it was John Murton, or perhaps Julian Critchlow from the COP Unit, who also said you can do these calculations. But our witness evidence of experts who deal with this is that those calculations can and certainly should have been done.

B

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The second thing that UKEF says is it cannot say whether the project will replace renewables. So----

LORD JUSTICE STUART-SMITH: Are we still on p.268?

D

MISS SIMOR: Yes. Whether it says it exactly here – Oh, I should just make a point about above, the paragraph above. We gave you some papers from Mr Caldecott. When it actually talks about Oxford University, the reason it talks about Oxford University is because it is Mr Caldecott who is developing those methodologies to look at things like if you create a transport network based on LNG. So it was not really a question of it could not have been done, it was a question of it would be either too time consuming, and we know that anyway, or it could not be done at a sufficient cost. We have not got any evidence of that. We have got the time issue. Oh, yes, here we are. So in the middle of the next paragraph, about six lines down, after the brackets, it is said:

E

F

“It is not known for certain whether or not the Project will displace renewable energy potential or low carbon solutions.”

I suppose by “low carbon solutions”, we are talking about things like a bus network or a heating network based on electricity created by renewable energy rather than directly powered by gas. So they do not know.

G

H

Thirdly, they do not know whether the Government of Mozambique has a plan as to how to use the finance, i.e., whether it will be used for renewables. And that you find in the last line there:

“No further information is available from the government of Mozambique related to this, nor is there further information as to whether the government has a plan in place as to how the Project funds will be utilised.”

Now, that is relevant to transition because what they are saying is they have not got any information to suggest that – or to commit to transition, and I remind you again that this is something that Mr Caldecott called to UKEF’s attention and said, “Have you got the plans from Mozambique as to how they are going to transition?”, because the UK is supposed to be helping developing countries to transition to a net zero economy whereby they can have energy, power, sustainable development and develop sustainably, not to get locked in to greenhouse gas projects, or rather, greenhouse gas infrastructure, which then will be very costly to replace when it cannot be used anymore.

And then, fourth, UKEF says openly that it would be better for Mozambique to develop renewable energy, and that is in the summary:

“Some of the gas from the Project will be used as energy source in Mozambique. Investment in renewable energy would offer a more environmentally sustainable pathway for Mozambique’s domestic energy needs and to meet the aims of the Paris Agreement ...”.

And then it says:

“... but it should be recognised that the same financial incentives ...”.

Well, “financial incentives” goes to the finance issue.

LORD JUSTICE STUART-SMITH: No, they do not. You cannot build a renewal infrastructure without finance.

MISS SIMOR: Exactly and the finance----

LORD JUSTICE STUART-SMITH: But it is just not – it is not a game that is in town.

MISS SIMOR: The finance obligations lie on the developed countries.

LORD JUSTICE STUART-SMITH: So, on your projection, no developed country, or person who is capable of financing this, should finance liquid natural gas and no one will finance renewables because it is just not on the table.

A

MISS SIMOR: Well, it is----

LORD JUSTICE STUART-SMITH: So where – where does one go from there?

MISS SIMOR: Well, interestingly, you will see – I do not know whether I put the documents in but I believe I did, the UK Government policy, and, indeed, it is said by the Secretary of State for Development that when she – it was she, was it not – Trevelyan----

B

LORD JUSTICE STUART-SMITH: I am just – I am just dealing – I am just dealing with this point which is made in the – which is it would be preferable to be investing money in Mozambique in renewables. That, I am sure, is something that everybody in this room can subscribe to. But it is just not available.

C

MISS SIMOR: But that – that is----

LORD JUSTICE STUART-SMITH: You----

MISS SIMOR: Well, that – that – first of all, it is contestable but, secondly, it is contrary – it is – the obligation on the developed world is to take steps to assist developing countries to develop that energy. Now – and renewables are specifically referred to in the recitals of the Paris Agreement. The UK’s current policy – first of all, the UK’s objection, the ministers who objected to this said, “No, we should be developing British industry, so we should be” – and they are actually doing that now, that is their existing policy – “we should be investing in our renewable industry in the UK and persuading people to go into Mozambique and make money, just like Total”. So Total is making money in Mozambique while British companies building solar power or hydropower, or whatever, would also be making money and that is where the United Kingdom should be putting its investment assistance.

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LORD JUSTICE STUART-SMITH: Every developed country – on your submission, no developed country should be supporting this liquid natural gas project and the developed world should be supporting Mozambique to go straight to carbon neutral.

MISS SIMOR: Insofar – you will see the existing UK policy, and the reason I raise it----

G

LORD JUSTICE STUART-SMITH: Just a – sorry, I am sorry. Just – I may be missing something so just – It seems to me at the moment it is a complete, it does not matter whether you call it Hobson’s Choice or (inaudible) or any of those things, I have not – and this may be my failing and maybe I will come to it when I do more reading after you have gone – but the view taken by the decision-maker was that there was currently no prospect of

H

renewable – of investing in renewables in Mozambique. And the reasons were given, which was that it did not have the – it just was not there. Now, unless I missed something completely, although when this point has been raised you cavilled about it, you have not, I think, submitted that that was a misapprehension by the decision-maker and that, in fact, there was a – I think someone once called it an “oven-ready product” or something – an over-ready deal which would enable people to invest in Mozambique’s renewables. So at the moment the difficulty I am having is that it seems to me that the logical consequence of your submissions are that Mozambique can go and stew literally.

MISS SIMOR: Well, first of all, we have not – the United Kingdom does, and DFID has – I hope the documents are in there – does invest in renewables in Mozambique.

LORD JUSTICE STUART-SMITH: Yes, I know it does.

MISS SIMOR: Yes. So that is a fallacy. But the second point is, if you look, and I know you do not like looking at the current policy of the United Kingdom, but we do have to remember that it was in order to bring the UK in alignment with Paris, and the current policy says that the exceptional circumstances in which they will allow a natural gas development, although not projects, just power stations, is when exceptionally there is no renewable alternative, and I took you to that document. Now, if we were in a situation where we were talking about a gas-powered station in Mozambique that was necessary for Mozambique’s development and Mozambique’s energy resources, so that Mozambique people could have electricity and Mozambique’s businesses could have energy, that would be a different thing. What we are talking about here is revenue and we are talking about the United Kingdom’s obligations vis-à-vis climate change and its obligations vis-à-vis climate change are not to do something which causes global emissions to rise and undermines the temperature goals. And the flip----

LORD JUSTICE STUART-SMITH: So – so----

MISS SIMOR: So, yes.

LORD JUSTICE STUART-SMITH: -- on the facts of this----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- on the facts of this case, Mozambique stews?

MISS SIMOR: No, because, in fact, it is not – it is not actually – Well, first of all, we are going to get to this question of it being, you know, development or die. They are not – they are actually – the problem is that the increasing of climate change is also going to destroy Mozambique, so there is actually a fundamental problem here which is why Paris dealt with it as a core objective in Article 2, to make finance flows consistent with a pathway to the

temperature goal, because the temperature goal itself is fundamental to Mozambique's survival.

A LORD JUSTICE STUART-SMITH: That I readily accept.

B MISS SIMOR: So the fourth – so we say that, despite those four points that the defendants have found in that bit of the climate change report, 268, despite that, they conclude no lock-in or transition risk and we say that does not play a part of the basic rationality test. The conclusion has no basis, in fact, or evidence or even theory and, as Mr Muttitt says in his witness statement, it is perverse to say that expanded carbon infrastructure is needed to enable investment in reducing carbon – carbon intensity. And you find that at core bundle 1, p.311, para.79. We also say it was based on a fundamental error that they could not do a committed cumulative carbon emissions calculation and we also say they did not take into account the period of the project, twenty-five to thirty-two years. It is wrong, as the C defendants say, to say that the CCCE methodology has only been developed for power sector. Mr Muttitt explains that that is wrong in CB1, p.312, paras.83-84. Mr Anderson also explains that in his second statement, core bundle 1, p.163, paras.25-26. We say, D again, the defendants simply put their finger up in the air and had a guess, and they had a guess that Mozambique would have to develop this first before developing renewables and, on that basis, they said transition was more likely and carbon lock-in less likely. And we say that is manifestly inadequate and does not constitute rational decision-making.

E The third point I am going to deal with, very briefly, is stranded assets.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: I took you to the analysis on stranded assets in the RAD report and that is at core bundle 2, p.201-203.

F LORD JUSTICE STUART-SMITH: Yes.

G MISS SIMOR: In relation to stranded assets, all of the arguments that apply in relation to failures, all of the arguments that we have made in relation to Scope 3, displacement, transition, lock-in, all of those failures play into stranded assets. Those errors we say necessarily undermine the view taken that there was a low risk of the asset being stranded. H The entire assessment, as with the assessment of Scope 3 emissions, was premised on an increased need for demand for gas without any regard at all to the climate change risks. But a stranded asset assessment required consideration of the opposite scenario, namely carbon pricing and regulation, reducing significantly the use of gas. And my learned friend made that point this morning, that if, in fact, China really moves very fast, and it now says 2060

for its net zero, say it moved to 2050, say India did the same, well, those two markets, according to the SPAs, make up about 20 per cent of the already purchased gas. But the already purchased gas is only the first few years. Where are we in ten years?

A

LORD JUSTICE STUART-SMITH: But when you say “already purchased”, and I am – I may be wrong about this, there are framework agreements in place but has the gas actually been purchased as such----

MISS SIMOR: Well, I----

B

LORD JUSTICE STUART-SMITH: -- or is it that the framework is in place for the calling off of gas?

MISS SIMOR: I believe that the agreements have been entered into under supply purchase arrangements, is it?

C

LORD JUSTICE STUART-SMITH: SPAs.

MISS SIMOR: And I believe 83.9 per cent has been purchased on a take – it is not take or pay. It is the opposite, is it not? That they – they have to – they have to take it. Is that right? That they have to take it so it has been purchased.

D

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: That is my understanding but I will be corrected if I----

LORD JUSTICE STUART-SMITH: No, I think you were being confirmed. So the SPAs – the existing SPAs impose an obligation upon the purchasers to take?

MR HEPPINSTALL: I believe that is right and I will be corrected or I will correct myself.

E

LORD JUSTICE STUART-SMITH: Well, it can be confirmed at some stage.

MISS SIMOR: But that covers – well, perhaps we can be informed, but I believe it is four years, the first four years of the project. Someone will tell us from behind exactly how long.

F

LORD JUSTICE STUART-SMITH: Well, I have to say, I would be amazed, possibly delighted for Total, not for anybody else necessarily, if people had already committed themselves to buy 89 per cent of whatever production was for thirty years. I think that would be----

MISS SIMOR: Well, no doubt all these things----

LORD JUSTICE STUART-SMITH: -- very----

G

MISS SIMOR: -- underlain with all kinds of guarantees and insurance and hedging and all of that rest of it.

LORD JUSTICE STUART-SMITH: Yes, but there is----

MISS SIMOR: Yes.

H

LORD JUSTICE STUART-SMITH: -- a fundamental divide between whether people have entered into an agreement which obliges them to take the oil or whether they have entered into an agreement which gives them the possibility of calling off---

A

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- calling off suppliers as they want them.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: So I do not want a thesis but I would like two or three lines just to set out the position.

B

MISS SIMOR: Yes. Yes. So the initial gas has been purchased. That does not tell us anything about the asset going through to twenty-five years, and I believe that for the first fifteen years – we are going to give you another report – but for the first fifteen years no money goes to Mozambique. So it is a complex exercise. This is not a charity project for Mozambique.

C

And then I should note that – so we say the stranded asset consideration requires consideration of carbon pricing and regulation reducing significantly the use of gas. Again, these things are modelled. You need to model what happens if China does this, Japan does this, etc., and----

D

LORD JUSTICE STUART-SMITH: And presumably – I mean, my expect – this may not be a level that we need to go to – but my expectation is that all such agreements would be underwritten.

E

MISS SIMOR: Under?

LORD JUSTICE STUART-SMITH: All such agreements would be underwritten.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: As, indeed, would the risks.

F

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I mean, my anticipation would be that there would be something which may not be called it, but would be called “stranded asset risk” or----

MISS SIMOR: Yes. Well, there will be insurance and reinsurance and eventually----

G

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- it will be live.

LORD JUSTICE STUART-SMITH: Because there is reference to bodies----

MISS SIMOR: Yes.

H

LORD JUSTICE STUART-SMITH: -- who create----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- and provide information that inform risks.

A MISS SIMOR: Yes. I mean, if you – an insurance market like Lloyds produces vast reports about lock-in and climate change.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And----

B LORD JUSTICE STUART-SMITH: The reason why I am raising this is not to be difficult or even for my own interest in insurance, but because my suspicion is that, like quite a few of the arguments I have heard on both sides, there is a degree of oversimplification----

MISS SIMOR: Exactly.

C LORD JUSTICE STUART-SMITH: -- going on for the purpose of the argument. So it is not – I would be slow to accept without qualification that if China stops----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- then Mozambique does not get its money or something like that.

D MISS SIMOR: Exactly, but I am not making that submission. I recognise that I have not got a clue exactly where the money is going to flow in this. There are reports that Mozambique does not get any money for fifteen years. That does not – how come? We will give you the relevant report. But the reality is that we do not know or understand this. What we are looking at is the minister's decision and we are looking at what the minister had in front of her and him, because, of course, it was the Chancellor as well, and it was absolutely crucial to the Chancellor's decision because this is taxpayers' money. So a stranded asset assessment is the key question for the Chancellor in determining whether the Treasury should put at risk. But it is also crucial for the purposes of the United Kingdom's assessment of its obligations to Mozambique because what we do know is that there are various stages of danger, and we know, for example – I showed you those documents about the DSU, the debt service something, I showed you in the RAD report. We know that if – that Mozambique is guaranteeing the 2.6 billion debt of ENH, which is the Mozambique entity, and we know that Mozambique cannot afford that debt and, therefore, it will return to debt distress. So there are all kinds of risk.

LORD JUSTICE STUART-SMITH: My understanding, and I cannot my fingers on it exactly, is that Mozambique is in debt distress.

MISS SIMOR: Yes.

H

A LORD JUSTICE STUART-SMITH: Yes, it has guaranteed but also steps have been taken to protect it or which are accessible in the sense that, I cannot remember where I read this, but there is provision for monies to be kept offshore, there is provision for revenues to be used for repaying and getting out of – and one of the ideas – sorry, this is very high level – but one of the ideas is to enable Mozambique to get out of debt distress.

B MISS SIMOR: Well, yes, but in the DSU document I took you to, one of the reasons it is considered a low risk that the project will not happen is because if it did not happen Mozambique would be bankrupt again, back in serious debt distress. So the debt distress was – there was a waiver from the World Bank of its debt position in order for it to be able to borrow, because it was not allowed to borrow before.

C LORD JUSTICE STUART-SMITH: Okay. Sorry to be----

C MISS SIMOR: So it is complicated.

LORD JUSTICE STUART-SMITH: -- sorry to be difficult, could someone just give us the reference for the DSU document again?

MISS SIMOR: Yes. I can probably actually give it to you because it is Annex----

D LORD JUSTICE STUART-SMITH: We can come back to it.

D MISS SIMOR: All right. Okay. So I am saying, and actually that is a different issue from the stranded asset assessment, is you would expect a proper stranded asset assessment, and it is not there.

E LORD JUSTICE STUART-SMITH: I think your submission on this point was if you have a stranded asset problem, that may contribute to Mozambique because it is guaranteeing the debt----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- going into debt distress.

F MISS SIMOR: Yes. Well, there are – there are two issues. One is the UK taxpayer and the other is the UK's – I am trying to focus back on the----

LORD JUSTICE STUART-SMITH: I have got that.

G MISS SIMOR: -- UK and the UK's obligation vis-à-vis Mozambique. And I just want to refer you to the fact that both Mr Caldecott pointed this out and Mr Murton, and that is at CB2, p.293, and they raised all of this.

H So I am now going to turn to my fourth point, which is Scope 3. My learned friend said that the fact that Mr – Oh, this is an important point. My learned friend sought to argue that Mr Taylor's consideration of the calculation of Scope 3, done for the Prime Minister in

twenty-four hours, from 29 to 30 June, which he received one hour before signing the final document or agreement, was taken into account by him, and relied on, and I believe he gave LT103, core bundle 338. And I will have a couple of points to make on this.

A

First of all, the decisions with which this court is concerned are the decisions of the Chancellor of 12 June 2020, which is a requirement of s.1 of the Act – s.4 of the Act, and the decision of the Secretary of State of 10 June. When we saw this statement, because, of course, in the summary grounds – the summary grounds, the defendants stated that they did not quantify Scope 3, and we got permission on that basis, and the first we heard about this quantification was when we got some disclosure and the witness statement of Mr Taylor. So we sent a Part 18 request to ask what was going on because we rather predicted that this argument might be made. And if we can go to that, it is at supplementary----

B

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LORD JUSTICE STUART-SMITH: Part 18?

MISS SIMOR: Yes. Supplementary bundle 2, 1579.

LORD JUSTICE STUART-SMITH: 1579?

MISS SIMOR: Yes. And you will see the question at D:

D

“Please state whether the Defendants now contend”----

LORD JUSTICE STUART-SMITH: I will not yet. Hold on.

E

MISS SIMOR: Sorry. 1579, para.17. It is the second supplementary bundle.

LORD JUSTICE STUART-SMITH: I have it. Thank you.

MISS SIMOR: Have you found it? Yes? So it is para.17, we said:

F

“Please state whether the Defendants now contend, contrary to their previous stated position in the Summary Grounds of Defence and skeleton argument for permission ...”.

Because at that stage they were just clear that there was no Scope 3 quantification.

G

“... that a quantification of Scope 3 emissions was taken into account in the Decision ...”.

And then we have:

H

“Louis Taylor has confirmed that he was aware of a ‘highly indicative estimated range ...’ ... He stated that he had these estimates ‘in mind’. The estimates ...”.

A

And then we say:

“If such an argument is now being made:
(a) please explain why the Defendants stated that the Decision to agree funding was taken on the basis of only a ‘qualitative assessment’ and without any quantitative assessment of Scope 3 emissions in their Summary Grounds of Defence and skeleton argument at permission stage, as well as orally.”

B

And then if you look at the second paragraph below, it says:

“It remains the position that the Defendants, including UKEF, considered Scope 3 emissions in qualitative terms, and did not undertake a quantitative assessment of Scope 3 emissions, as explained in the Climate Change Report. Whilst Louis Taylor had seen the estimated figures for Scope 3 emissions before he took his decision, the Defendants do not suggest that this amounted to a quantitative assessment of Scope 3 emissions.”

C

D

Now, that rather begs the question and the question is, is it now being contended that Louis Taylor’s decision of 30 April was, in fact, the decision of the Secretary of State, not the decision of the Secretary of State of 10 June?

E

Now, my Lord, the first point to make is you could ignore all this because the Chancellor’s decision was required and the Chancellor is not Louis – Louis Taylor cannot, even under *Carltona*, be the Chancellor. But as regards the Secretary of State for Trade and Industry, and this is why I emphasised this in my opening submissions, it is clear that she had made it clear on 12 March 2020 that she would take decisions on hydrocarbon projects. You will perhaps recall that because I took you to three places in the documents where it says it. And, indeed, it may even say it in the submission to her – the submission to ministers.

F

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So it is clear also from Mr Taylor’s submission to her that she was being asked to give him delegated authority to take a decision. So she had said, “I am taking hydrocarbon project decisions”, and he wrote to her and said, “Please give me delegated authority to agree this project”, and she went and did that. But he could only exercise that delegated authority on the basis of what she had seen, for obvious reasons, and I am just going to take you to –

H

because I feared that this argument might be made – it is in AB1, tab 21. No, it is not tab 21. It is the back, 22 – tab 22. And an attempt was made to make a similar kind of argument in this case, so it is a reverse *Carltona* in a sense, and it was rejected. And if you could just read 72 to 74 of Keene LJ, at the back. (After a pause): And then if my Lord and my Lady could mark up 23-37 of Sedley LJ, and I just want to emphasise para.26.

LORD JUSTICE STUART-SMITH: So that is 72 to 74?

MISS SIMOR: Yes, of Keene LJ.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And then Sedley LJ, it is quite an extended analysis of this problem, it is 23 through to 37, but if you could just read para.26 now that will, I hope, resolve the issue. In a sense, it is a common sense issue. She had not given her delegated authority for him to go and consider something else. (After a pause):

The decision you are reviewing is the decision of 10 and 12 June. Those are the material decisions for the purposes of the statute and Mr Taylor had no delegated power to take a further decision subsequent to the Secretary of State's. So you can ignore that argument by my learned friend.

The fourth point on this is that somehow it is difficult to assess Scope 3 and the GHG protocol is not appropriate or, I do not know, difficult or something. Well, I think – I have got the words “not useful” from my learned friend but, first of all, they used it for Scopes 1 and 2. Secondly, they use it now and, crucially, if you go to our skeleton at para.76, you will see that the defendants tried to make this argument the year before to the Environmental Audit Committee in Parliament. And on 10 June 2019, the Environmental Audit Committee advised UKEF that quantification of Scope 3 emissions was not only essential to assess the climate change impacts of the project but could also be done using the protocol. And if you see the underlined bit in 148:

“UKEF claim that there is no universally accepted measure for Scope 3 emissions. However, Scope 3 emissions are already being used in many private sector companies using the GHG Protocol ...”.

And then the first – all the underlined bit:

“UKEF should report the Scope 3 emissions of all projects ... The GHG Protocol provides a methodology for calculating Scope 3 emissions, and

the TCFD recommendations provide a readily-available source of guidance for this work.”

A And, in fact, they are going to do that, they want to do that, because they are now reporting on that basis. UKEF reports on that basis and, indeed, is encouraging the private sector through the Green Finance Strategy to do it through the TCFD and Scope 3, greenhouse gas protocol.

B Also Total produces Scope 3 figures for all its projects, and it does that annually. It does it under a different standard. It does it under something called the IPIECA. We have put that in tabs 26 and 27 of the supplementary bundle. And you find the annual reporting by Total in the supplementary bundle at tabs 23 to 25. Now, why do they do this? Because, like
C most of these companies----

LORD JUSTICE STUART-SMITH: Are those references in your skeleton?

MISS SIMOR: They may not be.

LORD JUSTICE STUART-SMITH: So tabs 26 and 27 of the supplementary authorities bundle?

D MISS SIMOR: Yes, it is another standard that Total uses, because this is obviously----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- not a mandated standard.

LORD JUSTICE STUART-SMITH: Yes, I have got that much.

E MISS SIMOR: And then 23 to 25 are Total – some examples of Total reporting. They report the Scope 3 of their projects.

LORD JUSTICE STUART-SMITH: Thank you.

F MISS SIMOR: Why do they do that? Because all of these companies are now professing to aim for net zero and, therefore, they need to go beyond – they need to actually assess what is going on in order to establish and show reduction, and certainly the French law actually requires that Total report, the European standards do, the TCFD does and the UK is now doing it and is going to do it in its annual report as well. And it is going to do it for Scope 3 of its projects, so it will take responsibility for the emissions, at least in accounting terms, of third parties. My----

G LORD JUSTICE STUART-SMITH: Say that again?

MISS SIMOR: It will take responsibility, at least in emission accounting terms, for the emissions caused by the use of its products, or projects it invests in.

LORD JUSTICE STUART-SMITH: The United Kingdom?

H MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Or UKEF?

MISS SIMOR: UKEF.

A LORD JUSTICE STUART-SMITH: UKEF. So it will track----

MISS SIMOR: It will track – that is----

LORD JUSTICE STUART-SMITH: -- every – That is amazing. It will track----

MISS SIMOR: And all the banks are doing this.

LORD JUSTICE STUART-SMITH: -- every emission from projects it is----

B MISS SIMOR: Yes, and you will find that the banking stance, so the green finance strategy,

which was 2019, is trying to make banks do this. The pensions regulator is doing it. It is now across the industry and the reason is because industry itself – it is all about 2(1)(c) – it is all about getting the private sector and the public sector to move its money in a way that gets to net zero. It is an astonishing development and it is something that the United Kingdom has actually been at the forefront of. And that is also why it was so important to the Chancellor, and to the Foreign Secretary – you have seen the letter of the Foreign Secretary – because they are trying to persuade other countries to do this.

D So my fifth point is the approach to assessment generally, and my learned----

LORD JUSTICE STUART-SMITH: So have you finished Scope 3 or is this fifth point on Scope 3?

MISS SIMOR: I have finished Scope 3.

E LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: My learned friend says that it was all----

MRS JUSTICE THORNTON: So what is the heading of this submission?

F MISS SIMOR: Sorry. The head is the assessment generally, the approach to assessing the whole thing. And he said simply it was all done rationally. There was Wood Mackenzie expertise and, in response to that, I would say actually Wood Mackenzie's findings were effectively rejected because they did not conclude that you could not know; they concluded you could choose – you could proceed on the basis of a choice, so you could decide on the balance of probabilities it was going to have a net reduction or in terms of going forward, and there is an argument about what that actually means. But, in any sense, Wood Mackenzie said you cannot do it, you cannot actually make that prediction, and the CCR said, "We are going to". So they concluded, on the balance of probability, that despite their expert saying that is not possible, that it would more likely than not lead to a net – lead to a lower level of emissions than would happen if the project did not take place even though that might be –

H

A that might not be a net reduction; it might just be a smaller reduction than would happen otherwise. So not a net reduction of the global carbon emissions. An increase in global carbon emissions but not an increase that is as big as they would have expected.

So as far as I understand the submission being made now – I am really sorry but let me – I am sorry, I am not being – I am not being clear.

B LORD JUSTICE STUART-SMITH: It is not your most perfectly clear submission so far, if I can put it like that.

MISS SIMOR: Okay. I am going to start again, if I may.

LORD JUSTICE STUART-SMITH: Can we start again?

MISS SIMOR: Yes.

C LORD JUSTICE STUART-SMITH: You are talking about the issue of whether there is any form of net reduction because of displacement or are you talking about something else?

MISS SIMOR: I made a classic advocacy mistake because I got distracted into something which I should just deal with separately.

D LORD JUSTICE STUART-SMITH: You assumed that the judge knew what you were talking about!

MISS SIMOR: I want to – let me make my first point, which is that Wood Mackenzie said you cannot work out whether there will – what the impact will be.

LORD JUSTICE STUART-SMITH: Yes.

E MISS SIMOR: You can say it might be this or it might be that but what you cannot do is say, “On the balance of probabilities, it will be this”. They say you cannot do that. But the CCR nevertheless does it. That is my first point. So it does not have expertise that says that; it actually contradicts the expertise that it has been given.

F It relies then – the second thing that they rely on is the AFD. Well, AFD equally did not actually reach a conclusion but, anyway, the AFD is based on Wood Mackenzie as well. And thirdly, they say, “Well, okay, those experts from EGAC, Mr Caldecott and Mr Heath, they told us something different. Mr Murton told us something different. Mr Critchlow told us something different. But we had our own expert in-house, Mr Griffin”. And there are two answers to that. First of all, they did not have him, as far as I understand, because he was not there but, secondly, in the minutes of their meetings they say, “We do not have the expertise”, which is why they went to Wood Mackenzie.

H LORD JUSTICE STUART-SMITH: And that is the document you took us to last time out?

MISS SIMOR: Yes. “We do not have in-house expertise and, by the way, we have not got time to go and get – out – external expertise”.

A

LORD JUSTICE STUART-SMITH: Just help me, is that the 7 May meeting?

MISS SIMOR: It is, as far as I recall. And the references to the EGAC points by Mr – are at 70 and 73 of our skeleton. The reference to Mr Murton’s criticism is at core bundle 2, tab 24, p.293. Anyway, it is in the skeleton at 73, Mr Critchlow’s, but I will give you the – So that is my point on that. You cannot just----

B

LORD JUSTICE STUART-SMITH: 293 is that horrid note which makes two-thirds of sense because it is a note taken while on the telephone.

MISS SIMOR: Yes, it is that terrible, terrible note.

LORD JUSTICE STUART-SMITH: Yes, horrible.

C

MISS SIMOR: Which is a shocking note actually because it was an important person making extremely important points, who was the Africa COP26 person and a highly, highly experienced person. If you look up the CVs of these people, who I have, the ones with real profound expertise in this area have been ignored.

D

And then I am going to turn now to my sixth point, which is tenability. My learned friend relied on an article by then Philip Sales, urging the limiting of *Launder* and *Kebilene* and, in fact, with great respect to Lord Sales, now in the Supreme Court and no doubt, well, I know, a brilliant man, having worked with him, in fact, *Launder* and *Kebilene* have been upheld by Green LJ in *Heathrow* and were not questioned in *Corner House* or *ICO*, whose reasoning on tenability in both cases, by the way, in both of those cases, I say is *obiter* in *Corner House* and *ICO*. This case is closest to the *Heathrow* case because here we are concerned not with a mere taking into account of a relevant international standard – and, for example, in the *Corner House* case it was established it would not have made a difference. It was not a very important consideration in the whole thing. And that applies equally to *Dove* and *Elliott* – here – where they were not even necessarily material to the decision – here we are concerned with a case, as in the *Heathrow* case, where there was a clear finding that granting this funding was compatible with the United Kingdom’s international obligations in this case under the Paris Agreement.

E

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The defendants have been asked whether they would have taken the same decision had the financing not been compatible with the United Kingdom’s obligations under the Paris Agreement and have declined to say that they would. It was plainly material. It was plainly

H

essential. The United Kingdom was president of the COP. Indeed, it is still president of the COP. It was urging other states to align their finance flows with the Paris Agreement and it is highly doubtful, in my respectful submission, that had the Chancellor of the Exchequer and the Secretary of State for Trade been told that financing was not, or indeed may not, be in alignment with the Paris Agreement obligations, and had to respond to questions in Parliament on that issue, this financing would not have been agreed. And this – that, my Lord, my Lady, is a constitutional issue.

The Executive cannot claim compliance with UK international law, for which it answers to Parliament, with the cover that no one can question whether they are right about that. It is only courts ultimately that can determine legality and it is no answer for Sir James to say that courts should not carry out that role because the consequence of them doing so might be to dissuade the Executive in the future from considering its international obligations. The judiciary has a duty to apply the law. For it to decide whether to do so by reference to what potential effect its judgments might be on how the Executive behaves in the future would not be a judicial but a political decision. It is of no concern to you, my Lord, my Lady, how the Executive behaves provided it behaves lawfully. And despite Sir James' dulcet and persuasive tone, he is not in fact asking you to uphold a high constitutional principle but, rather, to break one.

The Executive is answerable to Parliament for how it chooses to behave. It is Parliament that holds the Executive to account. It is for Parliament to ask and demand that the Executive comply with international law. It is for you to ensure that that law is applied correctly.

Here the Executive answer to Parliament for this decision and defended its compatible with UK obligations. Lord Sumption, in *Benkharbouche* and Green LJ in *Heathrow*, where the Government made exactly the same submission as it is making in front of you today, or perhaps yesterday, those judges emphasised your duty and obligation to apply the law.

There is one further point on this----

LORD JUSTICE STUART-SMITH: Did you take us to the relevant passage of Lord Sumption in your opening submissions?

MISS SIMOR: No, but it is in the skeleton. The references are in the skeleton.

LORD JUSTICE STUART-SMITH: Okay. Thank you.

A MISS SIMOR: There is one further point on this. Ministers are entitled to know whether they are right or not on the law. They are entitled to know whether they have been properly directed on the law and they are entitled to be given the chance to retake their decision on the basis of a proper understanding of the law. If the decision is quashed, they will be able to take it again with the benefit of a correct understanding of the law.

B Now, just turning to the second stage of my submissions on tenability, for the purposes of what the obligation – so this submission relates to the question of the purposes of what the obligation entails and the reasonableness of the implementation of that obligation. So my learned friend said that there were two questions. That was, again, not clear. I am going to be clear now. My learned friend said that there were two questions. First, he said you have to ask yourself what is the obligation and did the defendants have a tenable or reasonable – he accepted that “tenable” meant “reasonable” – did the defendants----

C LORD JUSTICE STUART-SMITH: Rational. Rational.

D MISS SIMOR: Rational.

LORD JUSTICE STUART-SMITH: It is different, I think.

MISS SIMOR: Public lawyers have started to us “reasonable” rather than “rational”. It is a sort of – it has now become – but, I mean, it may----

LORD JUSTICE STUART-SMITH: Okay.

E MISS SIMOR: Generally, we have started to say----

LORD JUSTICE STUART-SMITH: So we have now got three words in play, tenable, rational and reasonable?

MISS SIMOR: Yes, but I think, my Lord, I would submit that “rational” and “reasonable”, for public law purposes, mean the same thing.

F LORD JUSTICE STUART-SMITH: Okay. Thank you.

G MISS SIMOR: So the first question was what is the obligation? Did the defendants have a tenable or reasonable view of what it entailed? This is his explanation. And the second question is, did the Executive – did the defendants implement that obligation reasonably? Now, we agree with that. However, we remain without any explanation as to what the defendants’ view is of its obligations under the Paris Agreement. In truth, having made that two-stage test, Sir James’ submissions elided the two questions. He answered the question as to what the obligation entailed, the first question, by reference to implementation, the second question. What he did was argue that overall the decision was reasonable, looked at

A in the round and having regard to development needs, and on that basis said it could not be prohibited by the Paris Agreement. That is not a defensible position and it begs the question as to whether the defendants could articulate what Paris does prohibit. One could put it like this; what is the threshold test under Article 2(1)(c) read with Article 3, that allows developed country parties to finance an increase in global emissions by a developing country party, such as to reduce the likelihood of the temperature goals in 2(1)(a) being met? Put another way, put in a more short form, in what circumstances can a developed country party undermine the temperature goals?

B So we need – we have not been given a positive statement of what the obligation is. We have been told this project is not prohibited. So I put out the question, what exactly is prohibited? What do the defendants say is prohibited? What is the threshold test that allows a developed country party to finance an increase in emissions in a developing country party which would make----

C LORD JUSTICE STUART-SMITH: I think – forgive me, I am struggling a bit here. I think the answer is nothing is prohibited.

D MISS SIMOR: That is where I am going. That is exactly where I am going.

LORD JUSTICE STUART-SMITH: So Paris – that Paris includes a number of irreconcilable objectives----

MISS SIMOR: Exactly.

E LORD JUSTICE STUART-SMITH: -- which do not impose absolute obligations. I think that is where we are.

F MISS SIMOR: Well, that is exactly where I was going. So, if we put it another way, what is the threshold test that allows a developed country party to finance an increase in emissions in a developing country party which would make it more difficult for the developing country to meet its NDC and pursue increasingly ambitious NDCs? So these questions, we say, need to be answered if the position is taken by the United Kingdom that the Paris Agreement actually allows parties to increase global emissions and so undermine the attainment of the temperature goals.

G Now, we say it is not possible to ascertain what the UK thinks its obligations are under the Paris Agreement if all we are told is that this decision is permissible; in the round, it is reasonable. Now, if the court has no interpretation before it, the court cannot decide either whether the defendants' interpretation was correct or whether it was tenable. That, we say,

is enough for you to say that the defendants did not properly address their mind to what Paris Agreement obligations entail and that too we say constitutes an error of law.

A

Well, my Lord definitely disagrees with me.

B

LORD JUSTICE STUART-SMITH: No. I am shaking my head because at the moment I do not fully understand or accept the full power of your submission. Let us leave it like that. But at the moment, I am not entirely convinced by the submission that we do not know the Secretary of State's position because I think we do. It just does not happen to coincide either with your conclusion or your approach, and we will have to make up our minds about it. But I think we do understand – well, I think we have been told what the Government's approach is (a) as to the status of Paris and (b) as to the nature of the features that appear in Paris. I am just using an entirely neutral term. So I do not – and I am not particularly thrilled by the prospect of, at half-past three on day three, entering into a completely different rationality challenge.

C

D

MISS SIMOR: Well, my Lord, if the submission is basically anything was permissible, even if it undermines the temperature goal, it is for the Secretary of State to weigh up all the things and say, "Look, it is better for Mozambique" or maybe even not. So, you know, that is why I am talking about a threshold test. What is the threshold test that makes it permissible? If the answer is there is not a threshold test, actually none of this means anything and that you can undermine the temperature objective in Article 2, you can, that is perfectly lawful, then, my Lord, my Lady, you are going to have to deal with that and you are going to have to decide whether that is right and/or tenable. I have no hesitation in saying it is wrong and untenable.

E

F

LORD JUSTICE STUART-SMITH: If we agree with you then the door is open for the rest of your case. You do not need to – Then maybe you were not starting a new hare running but---

G

MISS SIMOR: No, no, I was not asking – I was not saying – I was using this – I was using these questions to demonstrate that we did not have an explanation. I perhaps did not need to do that because you have already understood a particular explanation. I had not understood that the bold submission was being made that really – I know it was made at permission stage because the skeleton at permission literally said, "Paris does not actually mean anything", but they rowed back a bit from that. So if you are content that you understand and that is what is being said, well, it is very simple for me to say that that is not – this is an important----

H

LORD JUSTICE STUART-SMITH: We have never----

MISS SIMOR: -- legally binding international treaty.

A LORD JUSTICE STUART-SMITH: We have never met before but if we had you would know that I am never sure that I have understood, ever, but we will make up our minds in due course.

MISS SIMOR: I just----

LORD JUSTICE STUART-SMITH: But I think I – I think I understand----

B MISS SIMOR: -- I put those questions----

LORD JUSTICE STUART-SMITH: -- the submission.

C MISS SIMOR: -- to try and – I put those questions to try and open the door to what is the test, what is the question, what is – that is why I did it because I was struggling to understand, well, at what point is it not permissible to increase emissions? At what point is it not permissible to undermine the temperature objectives? Or actually----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- can you just undermine----

D LORD JUSTICE STUART-SMITH: But I think – I think this is a – I think this is a mismatch between your submissions and their submissions, which sometimes happens, because yours is much more hard lines, whereas their approach is much more balancing of things, looking at things in the round. I am not doing them justice now but I hoped that I have reasonably fairly summarised the two positions.

E MISS SIMOR: Well----

LORD JUSTICE STUART-SMITH: So when you say, at what point can you no longer do it, the answer is going to come back when the balance – the balancing of all these objectives says do not do it.

F MISS SIMOR: Yes, and I would say that that would be – that would make----

LORD JUSTICE STUART-SMITH: Well, I think----

MISS SIMOR: -- that would totally negate Paris.

LORD JUSTICE STUART-SMITH: Yes, well, I think we understand your submission on that.

G MISS SIMOR: Yes, yes. And also the duty of good faith that is in Paris itself but also in the Vienna Convention. This is a legally binding treaty with meaningful provisions and a dispute resolution procedure between States.

H So following the lack of explanation in Mr Taylor's statement, because usually in a case like this you would get an explanation as to the test that was being applied, or the meaning

A that was being given, we wrote to the defendants and asked for the legal advice on the issue. You will see that all the legal advice is redacted. So we actually do not know what they were advising themselves. And the response we received is, “We did not need to get legal advice”, so we do not know and we were not – they were certainly not going to waive any privilege on that issue.

B The summary grounds of defence and the detailed grounds of defence both proceeded on the basis that the project resulted in a net reduction in global emissions, and if that was the test being applied then all well and good. That was potentially a correct test under Article 2(1)(c) of Paris. But now we are told the position was not, in fact, as set out in the summary grounds of defence and detailed grounds of defence and, in fact, it was accepted that the project would result in a net increase in global emissions. Now, if that is correct then the case has been litigated on a fallacious basis. The defendants should never have signed off the summary grounds of defence and the detailed grounds of defence because they were not true. And since, presumably, they were signed off by Her Majesty’s Treasury, potentially the Department of Trade, FCO – well, it would have been – and also would have gone through the normal Cabinet process because there are other interested departments, including BEIS and the COP26 department, which would have wanted to see these grounds – that is the normal process when you are talking about a state, United Kingdom, obligation. Interested departments, even in the tax case, all get to look at what is being said for very obvious reasons. It is a really very serious issue that we should hear----

D LORD JUSTICE STUART-SMITH: It is but if – I am sorry to interrupt you again, but let us assume the concession had not – or the change had not taken place, and let us assume that we considered, which is not a given, that the CCR, in particular, was saying with crystal clarity there will be net increases in emissions both of Scope 1 and 2 and of Scope 3, albeit that Scope 3 may be mitigated to some extent by – if there is offsetting or if there is displacement. What should the court do then? Because----

E MISS SIMOR: My Lord, I do not know what this court should do because I have never come across this situation before, and, to be quite frank, I read the CCR as saying that it will result in a net increase in Scope 1 and 2 Mozambique emissions and a net reduction – I know it does not – of Scope 3. That was then translated through to the summary grounds and the detailed grounds. I do not know what is the position of the departments – Trevelyan Thomas is now in COP26 department – she is Trade. She was DFID. She objected to this

project on climate reasons when she was in DFID. So when she was Development Minister, she objected to this project. The Foreign Secretary objected to this project----

A LORD JUSTICE STUART-SMITH: Is this Ms Trevelyan?

MISS SIMOR: Yes. She is now in Trade.

LORD JUSTICE STUART-SMITH: All right. Who was Foreign Secretary at the time?

MISS SIMOR: Foreign Secretary would have been Raab.

LORD JUSTICE STUART-SMITH: It was Mr Raab.

B MISS SIMOR: The same Foreign Secretary, who objected for climate reasons and COP26.

BEIS also objected for the same reasons. Now, I do not know what the – it is not my – in a sense, it is not my problem, I am afraid, but it is a problem.

C LORD JUSTICE STUART-SMITH: I think we can agree about that. I think we can agree about that.

MISS SIMOR: And----

MRS JUSTICE THORNTON: And where do you say it takes us if we are looking at lawfulness?

D MISS SIMOR: Well, I am going to say – I am going to take you to the fact that, for the purposes of our case ironically, it does not actually matter. That is the irony. But it is nonetheless a problem that you have in terms of what you say the United Kingdom says. Because the United Kingdom saying to a court, and obviously I will be corrected, that it is okay to undermine the temperature goals in Article 2(1), in a judgment that will be read globally, is of significance and importance.

E Now, crucially, in either situation our submission is that we succeed on ground 1(a). If it is said that Article 2(1)(c) prohibits finance that leads to an increase in global emissions, so preventing the attainment of the temperature goals, the claimant succeeds because that is what this project will do. So if – we say that 2(1)(c) prohibits finance that leads to an increase in global emissions, and we say that that is what this project will do for the reasons set out by our experts and, as we understood from the pleadings, was accepted – No, as we understood from yesterday, is now – is now said. So it is now accepted. The defendants now accept that this will lead to an increase in global emissions and we say that is in breach of 2(1)(c) because it means that this project, and the financing of this project, undermines the temperature goals. The finance flows are necessarily not consistent with a low emissions pathway in 2(1)(c) and will lead to an increase in global temperatures.

A If it is said that the Paris Agreement allows developed countries parties to finance an increase in global emissions to prevent the attainment of temperature goals – so if it is said, in fact, that the Paris Agreement allows the United Kingdom to finance an increase in global emissions to prevent an attainment of the temperature goals in 2(1)(a), i.e., undermining the Paris Agreement and the UNFC objectives, we say that that is a misdirection in law. So if that is the defendants’ position, that in fact it was perfectly lawful for the UK to undermine the temperature goals by granting this financing, we say that is a misdirection of law.

B LORD JUSTICE STUART-SMITH: Have you not just made the same point twice? I mean, in both of those limbs you are saying 2(1)(a) prohibits investment in a project that leads to an increase in global emissions so, whatever they are saying, given that they are now saying that it does lead to gross and net increases, they are scuppered?

C MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I am using very technical terms.

D MISS SIMOR: Yes, one of our arguments is factual, based on the expert evidence, so they were wrong to say it would reduce emissions – global emissions. But – so the----

LORD JUSTICE STUART-SMITH: But that is now – but that is now accepted.

MISS SIMOR: Well----

LORD JUSTICE STUART-SMITH: It is now accepted in qualitative terms----

MISS SIMOR: Yes.

E LORD JUSTICE STUART-SMITH: -- that this project will increase global emissions under Scope 1 and 2 and domestic Scope 3, and that it will lead to an in aggregate increase in Scope 3 emissions.

MISS SIMOR: Yes.

F LORD JUSTICE STUART-SMITH: Even if it is reduced to somewhat – even if that aggregate increase is lessened to some extent.

MISS SIMOR: Exactly. And we say that undermines the Paris Agreement temperature goals.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And therefore it is inconsistent with 2(1)(c). So seven, the interpretative process.

G We agree about the *Al-Malki* case, paras.10-12. However, 2(1)(c), the normal words do accord, we say, with the object and purpose read in context. So what do the defendants argue? How do they argue that our interpretation is wrong? All they can say is that the court has to assume there was some compromise and that the parties to this agreement cannot have meant what is said, despite the 2(1)(c) being in accordance with the object and

A purpose of the agreement read in context. So their submission is simply, “Look, you, the court – it cannot be the case that parties to this agreement agreed to forego this funding and, therefore, you have to interpret it on the basis that they cannot have meant it.” And we say this is a novel and unworkable approach. It is contrary to the Vienna Convention on Treaties, and that you should follow Lord Sumption in *Al-Malki*. And the standing committee on finance was clear as to what 2(1)(c) means, and it is set out in our skeleton. It is a Paris Agreement institution. The UK Government practice prior to the decision in relation to overseas development aid funding, and post decision on 1 July in relation to CDC and now all UK financing, was that this kind of project was not being financed in order to align the United Kingdom with the Paris Agreement, and the UK, as I have said, is trying to persuade other countries to adopt that approach. It is somewhat surprising then for the United Kingdom, which is still president of the COP, to make the opposite argument in this court.

D So the standing committee on finance reference is at para.26 of our skeleton, and it says – it makes it clear – you do not have to finance always to improve climate, of course not, but you must not undermine the Paris Agreement objectives.

My eighth point----

E LORD JUSTICE STUART-SMITH: Just as a matter of interest, would you submit that a project which reduced a country’s emissions but was not consistent with either well below 2 degrees or 1.5, was prohibited?

MISS SIMOR: No. No.

LORD JUSTICE STUART-SMITH: Why not?

F MISS SIMOR: It is difficult to think of an example. As long as you were helping a – as long as emissions are going down, you are moving towards down, as long as you are going down that is the right trajectory. So----

G LORD JUSTICE STUART-SMITH: So if, say – all right. Well, let us assume for the purposes of this case that because Mozambique has a very messy economy – and I make it clear that I am just talking entirely hypothetically – this project would have reduced Mozambique’s overall emissions. Say it had been producing filthy, dirty oil and this project was intended to displace, this very same project, would this project then have been investable?

MISS SIMOR: Yes. And, in fact, that is the UK’s policy.

H LORD JUSTICE STUART-SMITH: Because it is not an absolute.

A
MISS SIMOR: No, the UK's policy – well, you will see, it says – I mean, subject to things like transition, so you are still heading to net zero. So you do not want to lock a country into fossil fuels but subject to an analysis of that, the current UKEF policy, which I took you to, is exactly that, is to say – I do not actually think it would be – well, it would not be fundable by UKEF now because they are not funding any opening up of new projects. But say you were talking about a power station, a gas power station or something like that, under UKEF's policy, that you could do. But we do not anyway say that you could not do it if it was national and reduced emissions.

B
LORD JUSTICE STUART-SMITH: Okay. And let me give you one different example. I know you do not accept this but I want to accept for the purposes of the question that this project is necessary and is the only way that Mozambique can make its way to a carbon free economy. I know that your expert, who has done really well recently, does not agree with that but I want you to ask – I want you to take it on that basis. So it is the only way that Mozambique can get to a carbon free or carbon zero economy. If that were right, would this project be acceptable for investment? (After a pause):

C
D
MISS SIMOR: You see, the difficulty – and I really appreciate that you want me to accept a premise and I know it is very irritating when people do not accept the premise of the question – but the problem is that what we are essentially saying in that question is that the money from the 95 per cent exports is what will enable Mozambique to get to renewables and Paris deals with that, is supposed to deal with that. What Paris is not supposed to do is enable developing countries to go into – because there are vast reserves out there still, so Angola, Mozambique----

E
LORD JUSTICE STUART-SMITH: So, okay, fine. So----

F
MISS SIMOR: So should all of these incredibly poor countries, who really need the money, be allowed to open up all these projects?

LORD JUSTICE STUART-SMITH: So on your view, Paris mandates that a country – a developing country, with these reserves, shall not be supported under any circumstances because the developed world should turn round and say, “We will only support you directly into carbon neutral or carbon reducing projects”?

G
MISS SIMOR: Paris mandates, obliges developed countries to assist developing countries. It obliges them to do so.

LORD JUSTICE STUART-SMITH: That is----

MISS SIMOR: Yes. So, yes----

H
LORD JUSTICE STUART-SMITH: -- I think that is what I was----

MISS SIMOR: -- the answer is----

A LORD JUSTICE STUART-SMITH: The answer is that the developed world has to go to Mozambique and say, “We will not support you but we will invest in a carbon free economy or a carbon reducing economy”?

B MISS SIMOR: Yes. And that is a consequence of two things. First, the – well, it is essentially a consequence of the production gap, because online already, in train already is – and I hope I am going to have time to take you to the production gap before – is – so it was 120 per cent more fossil fuels on train than can be used within the available remaining carbon budget, if we are going to hit----

LORD JUSTICE STUART-SMITH: I understand.

C MISS SIMOR: -- that. So it is a scientific physical chemical problem. We have too much fossil fuels in train to meet----

LORD JUSTICE STUART-SMITH: And the commitments still lead us----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- horribly awry.

D MISS SIMOR: Yes, and the same with the NDCs. The NDCs do not meet it. So we have this problem. We have poor countries with vast reserves. They obviously want to take them up. How does Paris deal with that? It should be dealing with that by the obligations that the developed world is under to finance development and renewables in those countries. And it does take us – I am going to get to the sort of poverty problem but it does go back to this issue of – it has been put as a sort of charity project that this is being done for Mozambique. It does get back to that as well but there is also a vast economic interest in companies like the interested parties also in opening up those reserves.

E LORD JUSTICE STUART-SMITH: Investors will always have an economic interest.

F MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: It does not matter what----

MISS SIMOR: Yes.

G LORD JUSTICE STUART-SMITH: -- what framework you put them in. Investors are always going to look to their economic interests and, for example, as you said yourself about twenty minutes ago, the Chancellor has to look at the----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- economic interests of the----

MISS SIMOR: Exactly.

H LORD JUSTICE STUART-SMITH: -- British people.

A MISS SIMOR: And one of the purposes in making finance flows consistent with that low emissions pathway is also to alter the global market for renewables because that itself creates new investments and new markets that would not otherwise exist. And if you invest in fossil fuels you effectively subsidise the development of climate change. If you say, “No, I am not going to do that”, and the public money moves towards renewables, the private money follows. And that is the entire idea behind it.

B LORD JUSTICE STUART-SMITH: I understand the concept of it and that is why there are subsidies for electric cars and there are subsidies for----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- heat source pumps and everything else. Of course, I would like to think I have sort of understood it.

C MISS SIMOR: Yes, and there is the urgency which is behind it. I think we should not forget the urgency because----

LORD JUSTICE STUART-SMITH: We understand.

D MISS SIMOR: -- it was said, “Well, the NDCs do not meet it, but parties can agree again to something else”. No, they cannot. There is not any time. I mean, we are talking 2030. If you look at the IPCC, we are talking 2030 and actually the report the court may wish to look at, is the EIA net zero report, because that is the standard one.

Okay, I have only got a couple more points, you will be glad to know.

E LORD JUSTICE STUART-SMITH: Oh, I do not know, it is just getting interesting!

F MISS SIMOR: So I think I have dealt with it but I will just quickly – I was going to say my learned friend – So we say that the position taken by the defendants effectively negates the Paris Agreement and it means the United Kingdom undermining the temperature goals. And it is obviously a matter for the defendants to clarify as to what it wants recorded in the judgment, but we do remind the court that the United Kingdom is still today president of the COP. And if the United Kingdom is saying that states can do things – developed country parties can do things that they know will result in increased global emissions, we say that that is an astonishing submission. And I want just to take you to the UNEP report. First, if G I can refer perhaps most easily actually in my skeleton, para.31.

LORD JUSTICE STUART-SMITH: Forgive me, I was just trying to get a note of----

MISS SIMOR: Sorry.

H LORD JUSTICE STUART-SMITH: -- just trying to give myself a note for the last five minutes or so. Where have you gone?

MISS SIMOR: I am now in my skeleton at para.31.

LORD JUSTICE STUART-SMITH: Thank you.

A

MRS JUSTICE THORNTON: Just before you get there, how do you say we use the UNEP report if we are forming some sort of interpretation of the Paris Agreement?

MISS SIMOR: So we say----

MRS JUSTICE THORNTON: Can we use it?

B

MISS SIMOR: Yes, you can use it because everything in Paris – I hope that when I went through Paris – has to be informed by the best available science and the current science, and there is a line between the IPCC and the UNEP report. The UNEP report is based on the IPCC report, which it says at the beginning of it. So it is – everything has to be informed by the science and this is part of it.

C

MRS JUSTICE THORNTON: So that means the interpretation of Paris may change over the years?

MISS SIMOR: Yes, and----

D

MRS JUSTICE THORNTON: So the same wording in Article 2(1)(c) at 2010 may have different meaning to 2022 and the development of (inaudible).

E

MISS SIMOR: Exactly, and it is – yes, and it did change because before IPCC 1.5 it was believed that there was a bigger carbon budget remaining and that we could move more slowly, and it was IPCC 1.5 that said we have got to hit net zero by 2050 or we can overshoot but these are consequences and these are the costs. So it is a dynamic process and the treaty, both the UNFCCC and the Paris Agreement, say that.

So if we just go to where it is quoted, p.4 in the fourth paragraph now. Well, maybe the third and fourth paragraphs:

F

“Oil and gas are also on track to exceed carbon budgets, as countries continue to invest in fossil fuel infrastructure that ‘locks in’ oil and gas use. The effects of this lock-in widen the production gap over time, until countries are producing 43% ... more oil [per day] ... 47% ... more gas by 2040 than would be consistent with a 2°C pathway.

G

This global production gap is even larger than the already significant global emissions gap, due to minimal policy attention on curbing fossil fuel production. Collectively, countries’ planned fossil fuel production not only exceeds 1.5°C and 2°C pathways, it also surpasses production levels consistent with the implementation of the national climate policies and ambitions in ... NDCs.”

H

So even – if surpasses even the commitments by countries.

A

“As a consequence, the production gap is wider than the emissions gap ...”.

The emissions gap governs the gap between the commitments and the needed reductions and it is also in your bundle. And just so you know where it is, I hope it is in the authorities bundle – I do not think I took you to it – in tab----

B

LORD JUSTICE STUART-SMITH: 5.

MISS SIMOR: -- tabs 5 and 6, and you will see under – so you see the reference to the IPCC report and then you have this analysis on p.174. We have not given you the whole report. Of course, like everything, you can actually access all of this on the internet if you find yourself very interested in the numbers.

C

“In aggregate, countries’ planned fossil fuel production by 2030 will lead to the emission of 39 billion tonnes ... of carbon dioxide. This is 13 GtCO₂, or 53%, more than would be consistent with a 2°C pathway, and ... 120% more than would be consistent with a 1.5°C pathway. This gap widens significantly by 2040.”

D

And then the next – the following bullet on the following side:

E

“Oil and gas are also on track to exceed carbon budgets ...”.

I think we have set this out. It is the one I read to you. And then on the next page, well, you will probably want to read this whole little insert we have put. And then on page – just the final page, it has got a (i), second paragraph:

F

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

G

And that is the 2019 report. The current report – so the two further reports, 2020 and 2021, look just as bad if not worse – I think worse, if I remember rightly. We did not want to trouble you with that. This was the one that we said that the defendants should have looked

H

at and which they say was of no relevance to their consideration, and we say that that was wholly irrational.

A Turning to my ninth point, act of state. This court is not examining the legality of anything that Mozambique is doing, or may do or will do. It is examining compliance by the United Kingdom with the United Kingdom's obligations under – and I am going to now take you through those obligations in the Paris Agreement. If we go to authorities bundle 1, tab 3,
B and then if we go straight to the agreement which starts at p.53. If we start at Article 3:

C “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. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.”

D And that is they **are** to undertake. It is a directive provision. It is a mandator provision. If we then move to Article 4(5), and let us start – 4(5) is where I want to go next:

E “Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.”

And then if we go back to 4(3):

F “Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

G 4. Developed country Parties should continue taking the led by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time toward economy-wide emission reduction or limitation targets in the light of different national circumstances.”

H

But what we rely on, my Lord, my Lady, is Article 4(5). It is an obligation on developed country parties to assist developing country parties to meet the obligation under this Article, and those obligations, if I could just take you to two of them, if you go also to 9(1):

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

And then 2:

“Other Parties are encouraged to provide or continue to provide such support ...

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

4. The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation [so all climate], taking into account country-driven strategies”----

LORD JUSTICE STUART-SMITH: What does that – excuse me, what does that mean “adaptation and mitigation”?

MISS SIMOR: So mitigation is reduction.

LORD JUSTICE STUART-SMITH: And adaptation?

MISS SIMOR: And adaptation means dealing with the consequences of climate change. So, as we have already discussed, it is the developing world that is going to suffer most from climate change and so the funds should go both to help them reduce emissions and develop and to adapt to the consequences of climate change that is already happening, “and have significant capacity” – so:

“... especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints [Mozambique], such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation.”

That is Mozambique. And then if we go to 9(5):

A “Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis.”

B Now, it is – so this case is concerned entirely with whether the UK is doing, has done and will do that. It has nothing to do with Mozambique. And I note that the United Kingdom has communicated its efforts under Article 9(5). I believe I took you to that document. It is the supplementary authorities bundle, tab 11, and in that communication you find the United Kingdom claiming for reductions in emissions that it has done. So you will see, C “We reduced X million tonnes of carbon dioxide in Tanzania by solar panels”, or whatever. So they claim the reduction. What they do not report is the increases. Now, the increases in this project dwarf the efforts to reduce and assist countries to reduce emissions. And it cannot be the case that the obligation to report on 9(5) is only an obligation to report the good stuff, but that it can be completely wiped out by the bad stuff. And we note, in that D regard, that the climate change report states that renewables will be a better way to achieve Mozambique’s Paris Agreement – or achieve Paris Agreement obligations.

LORD JUSTICE STUART-SMITH: Would BE?

E MISS SIMOR: Would be, yes. So it would be better, if you like, to do it that way, both for Mozambique and for the world, and I do not think I need to go to that. So no one is saying----

LORD JUSTICE STUART-SMITH: I think we are conscious of that and we are also conscious of what comes after.

F MISS SIMOR: We are not at all concerned with what is going on in Mozambique, and if we just go to the authority relied on – it has all the quotes in it – the easiest one, AB3, tab 41, para.52. Now, my learned friend said that we are in the third rule.

LORD JUSTICE STUART-SMITH: 72?

MISS SIMOR: 52. 52, p.2119.

G LORD JUSTICE STUART-SMITH: Got it.

MISS SIMOR: We are certainly not in the first and second rule and he does not attempt to rely on those. Those are set out in para.51. But he says we are in the third rule, so let us see what the third rule says. It says:

A

“The third rule had more than one component, but each involved ‘issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it’. Thus, ‘the courts of this country will not interpret or question dealings between sovereign states’ ...”.

There is no dealing here with any sovereign state.

B

“... of which obvious examples were ‘making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory’. Similarly, they would not ‘determine the legality of acts of a foreign government in the conduct of foreign affairs’.”

C

Not us.

D

“Another aspect of the third rule was that ‘international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts’, since domestic courts ‘should not normally determine issues which are only really appropriate for diplomatic or similar channels’.”

Well, we are in *Kebilene* and *Launder* territory here and it is accepted that this issue is justiciable. So that is not us either.

E

And then if you go to the examples at 64, again none, we say, apply to us. And insofar as we are concerned with (e), we are concerned with whether there was an error of law and the defendants have accepted that that is a justiciable issue.

F

SIR JAMES EADIE: My Lord, I am sorry, I do not want unduly to shorten my learned friend’s reply, but I would not mind ten minutes at the end to re-join on at least two cases that have been cited for the first time in her reply----

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: -- if that could possibly be borne in mind?

G

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: I am coming to the end, I really am.

LORD JUSTICE STUART-SMITH: You said a few minutes ago.

H

MISS SIMOR: So, we say that there is no illegality by Mozambique in any event, because the NDC is conditional and that is perfectly permissible under Article 4(6) of the Paris Agreement. There is no question of any breach and there is no question of you even having

to consider that. You need to consider whether the United Kingdom is complying with 4(5), 3, 4(5).

A LORD JUSTICE STUART-SMITH: It is a mad world, is it not, if people – I do not mean this – I am sorry, it is too late and I have used inexact words – but it is a strange world if a country like Mozambique can act entirely lawfully in wanting to develop its resources but the developed world cannot invest in it.

B MISS SIMOR: Well, that is the – that is the position under the NDC system. It is a very – it is a kind of revolutionary system that does not really work but you could not get any better because you do not have to make any commitment at all really. You should, you should make some commitment, but there is no – You could commit too little and actually countries have committed too little.

C LORD JUSTICE STUART-SMITH: Yes. Well, you may be right.

D MISS SIMOR: And, of course, Mozambique is – So it is a very – there are two different – they are coming at it from two different points. The question is whether the UK is doing its best and it cannot, and it admits in the CCR, it is not. And I should finally say that the relationship here is not between Mozambique and the United Kingdom; it is between the United Kingdom and Total Energies.

E The loan is not to Mozambique. Mozambique – the EMH, which is the Mozambique company, has – (after a pause) – we think it is – I am told it is 15 per cent, but most of this is nothing to do with Mozambique in terms of the investment. The investment is an international corporate investment and a very small part of it is even a Mozambique company. So it is not an act of state issue.

F Now, leading to my final point about poverty, it is not true that this is about an irreconcilable conflict, and I am afraid I am going to hand you up, because of what was put before you – raised this afternoon by the interested parties, I am going to put these papers for you to read. I am not going to make – (after a pause): So we agree with---

G LORD JUSTICE STUART-SMITH: What is this?

H MISS SIMOR: This is E3G, which is a highly reputable organisation. It is – we were taken to the Tony Blair. This is an organisation that is involved also in the UNEP reports, you will see. It is a highly reputable organisation and it puts a different perspective. I am only giving it to you because an argument is being made that we are somehow kicking the ladder from under Mozambique's feet.

LORD JUSTICE STUART-SMITH: And you want us to read this entire document?

MISS SIMOR: Well, I – I read – it is very----

A

LORD JUSTICE STUART-SMITH: My enthusiasm is inexhaustible – almost!

MISS SIMOR: I have to say, it came to our attention very late in the day. I read it on the bus yesterday on my phone.

LORD JUSTICE STUART-SMITH: Never mind that. Never mind when you read it. Never mind where I am going to read it. You would like us to read the document?

B

MISS SIMOR: If you are going to take this argument that somehow this is all about development, and I am going to make submissions as to why it is not, I think it is something that it is best you look at it.

LORD JUSTICE STUART-SMITH: Okay. Let us hear your submissions.

C

MISS SIMOR: The Blair report has problems with it in terms of independence, which I am not going to raise here. So----

LORD JUSTICE STUART-SMITH: So you are going to bash Tony Blair?

MISS SIMOR: No, I am not going to say anything about that report but I am not----

D

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: -- I am saying it is not something that you can rely on as independent. That is as far as I am going to go.

LORD JUSTICE STUART-SMITH: Okay.

E

MISS SIMOR: So a new case seems to have been made yesterday that this decision was about alleviating poverty, that one had to rob Peter to pay Paul, i.e., that emissions would have to increase and temperatures to go up correspondingly – you will recall that I showed you that scientifically they are directly related – in order to alleviate poverty and that this was what was happening in Mozambique and the reason the UK considered its financing in alignment with 2(1)(c), it was said that 2(1)(c) contains two competing and contradictory demands. And there is a lot wrong with that submission.

F

First, it has nothing to do with the decision here. The decision here was taken on the basis (i) that the project would go ahead anyway. So had this financing been material to whether the project would or would not go ahead, a different decision might well have been taken. Secondly, that the UK therefore might as well fund it because it will get some jobs. It is going to happen anyway, let us fund it because we will get some jobs. And then the third reason given was that the UK would then potentially be able to influence Mozambique more in persuading it to move to renewables. So those were the three reasons.

H

A It is that decision that has to be defended and you will see, if you look at the submission to, for example, the Chancellor, you will see those points. Not some fictional decision made up here in court. The submission to the Chancellor is at core bundle 2, p.29, and it suggests that funding might have been refused if, in fact, this finance itself would have been material in the decision as to whether or not it happened at all.

B Secondly, it plainly was not a decision taken for the purposes of assisting Mozambique to achieve its development ends, including increasing its wealth. DFID, which is the development department and charged with development, was against the project. And that is at core bundle 2, p.62, the letter of April 2020.

C The UK had decided in 2019 that overseas development funding should not be used to fund fossil fuel development, so as to align that funding with Paris. So there is no contradiction in 2(1)(c). On the contrary, to fund fossil fuels would undermine the temperature goals and undermine sustainable development. And the UK communicated that position to the UN
D under Article 9(5) of the Convention in the document I mentioned just a moment ago. In light of that policy, UKEF argues that it could nevertheless fund this project precisely because it was not development funding. So the Government has said – the defendants have said, “We can fund this. It is not against the policy, which says no development funding for
E fossil fuels, because it is not development funding”, whilst at the same time trying to argue that it was allowed to do so under 2(1)(c) because it was for development. And it is incoherent. It cannot have it both ways.

F Thirdly, another reason why we know it is not actually true is that there was no analysis of the development risks and benefits, save by DFID which was against the funding. Any analysis would have shown that the finance put Mozambique at serious debt risk, ENH debt service undertaking, and the fact that Mozambique will not obtain revenue for fifteen years. And you will find all that in the report that I have handed up to you, which is actually about
G Mozambique.

H Finally, and most – so effectively DFID was right. Finally, and most importantly, such an approach, had it been taken, would have involved a fundamental misunderstanding of Paris and 2(1)(c). If correct, it would be impossible for the temperature goals in Article 2 and the

overriding objective in Article 2 of the UNFCCC to be reached, and the consequence of that is to cause vast increases in poverty and debt. The states would be able to exploit and invest fossil fuel reserves if that was to create wealth for poor countries. Now, we know from the UNEP production gap report that if this happens the temperature goals will not be met and we know the consequences of that. As I am sure the court is aware, these are the wholesale disappearance of the small island states and low coastal areas, including low-lying areas in Mozambique, food shortages, extreme weather events, droughts, mass migration and all that goes with it. As I showed you in the IPCC report, there is a direct relationship between every gram or kilogram of carbon dioxide that enters the atmosphere and temperature rising, and each semi-degree of temperature change affects global outcomes, most importantly for the very poor. And the IPCC has specifically set out in its report the difference in terms of consequences between 1.5 degrees and 2 degrees, and it says:

“... limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050 (*medium confidence*) ...

...
Exposure to multiple and compound climate-related risks increases between 1.5°C and 2°C ..., with greater proportions of people both so exposed and susceptible to poverty in Africa and Asia (*high confidence*) ...”.

And you will find all that in the IPCC report.

As Alok Sharma made clear, the consequences of missing 1.5 degrees are vast in terms of environmental cost and human cost, and he said every fraction of a degree makes a difference. At 1.5 degrees warming 700 million people would be at risk of extreme heatwaves.

LORD JUSTICE STUART-SMITH: I am not entirely sure this is the best use of a reply.

MISS SIMOR: I have finished nearly. If I can literally----

LORD JUSTICE STUART-SMITH: Well, you may have finished.

MISS SIMOR: I----

LORD JUSTICE STUART-SMITH: I have to say that since you got to the point about the submission to the Chancellor, I have been struggling to keep up and to follow the argument, and I would appreciate, as I know you are going from a speaking note, if you could strip down your speaking note to bullet points and references only from the moment where you

said, “Not taken to enable Mozambique to achieve”, whatever it was. You then went CB2/62, April 2020, and you drew the distinction between development and non-development and said it was all irreconcilable. And I am – it is my fault entirely----

A

MISS SIMOR: Not at all.

LORD JUSTICE STUART-SMITH: -- but I was not taking that in and I would not be able to do the argument justice in the future.

B

MISS SIMOR: Did you – did you – I am just trying to work out where I am – did you take my points about----

LORD JUSTICE STUART-SMITH: I got your----

MISS SIMOR: -- DFID having been – having----

C

LORD JUSTICE STUART-SMITH: I got your submission that the decision was taken on three grounds.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: And then you talked about the submission to the Chancellor, which I know about and I can go to. You then said something along the lines of this was not a decision taken to enable development or because the developmental----

D

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- agencies were against it or something like that.

MISS SIMOR: Yes. Okay. I will----

E

LORD JUSTICE STUART-SMITH: Do not – do not give it to me again now because I will not get it but I would value, if tomorrow or the next day, someone could strip it down and just send me the references and I will check the references.

MISS SIMOR: Fine, fine. I can – I have basically finished. My submission is essentially that this was not a development funding decision.

F

LORD JUSTICE STUART-SMITH: I understand.

MISS SIMOR: And the second, more important, point is that there is not a contradiction. That is really the key point.

LORD JUSTICE STUART-SMITH: That is what I am struggling with and it is just because of information overload.

G

MISS SIMOR: Yes, well, I understand. This is a very, very heavy case in terms of information and, I mean, I appreciate that. I have been doing this case for two years.

LORD JUSTICE STUART-SMITH: Unless anyone objects, I am asking the claimants to do that. Right. So have you essentially finished?

H

MISS SIMOR: I have finished.

LORD JUSTICE STUART-SMITH: Good. Thank you very much. It is a heroic effort and, for the most part, your submissions have been extremely clear. I just began to suffer a few minutes ago.

MISS SIMOR: Thank you.

LORD JUSTICE STUART-SMITH: Sir James, you wanted to come back?

SIR JAMES EADIE: My Lord, I want to come back, if I may, on – on the----

LORD JUSTICE STUART-SMITH: Do you want to come back now or do you want to put in a note?

SIR JAMES EADIE: I can do it now. It will be very short.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: If I may?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And then you can----

LORD JUSTICE STUART-SMITH: Any objections? No. Right, go ahead.

SIR JAMES EADIE: Authorities bundle 1, tab 22, the *National Association of Health Stores* case.

LORD JUSTICE STUART-SMITH: Yes. Do you want us to open it?

SIR JAMES EADIE: Can I ask you to do that?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: I just invite you to side line some passages. My learned friend effectively suggested that this was authoritative of a proposition that if information comes to the decision-maker or to the Secretary of State who is a prior decision-maker, after the Secretary of State has viewed it, it can be ignored. This authority sits in a context of legislation, namely s.13 of the 1991 Act, which makes the decision-maker UKEF. You know the sequence of decision-making in terms of the Secretary of State and the Chancellor's involvement but the decision-maker is UKEF here. So anything that UKEF sees is relevant. The question that is thrown up is, if – to take the example that was used – rough and ready quantification information was produced between the Secretary of State seeing it and the final decision-maker seeing it, do you just ignore that? The answer to that is you do not because the decision-maker is UKEF under the statute. But you also do not, even if you treat UKEF as the decision-maker and the Secretary of State as a decision-maker also, because this authority was considering essentially a submission, as you see from para.26 and indeed the final sentence of para.27 – if you just cast an eye down those two – that, in effect, whatever the civil servant knows is imputed to the minister, and they

rejected that submission. What they did instead was to identify, as the relevant principle, a test of whether something is in public law terms legally relevant. So if and to the extent that it is legally relevant, the minister ought to have a summary or have sight of it or whatever.

And I take that concept----

LORD JUSTICE STUART-SMITH: The decision-maker should see it?

SIR JAMES EADIE: The decision-maker should see it and obviously here we have got a slightly strange decision-making set-up, but if you were just dealing with civil service to minister, to make the principle easier. And you see why I emphasise “legally relevant” because they specifically confronted what “relevance” means for this purpose, and they applied the very well-established approach, initially from President Cooke in *CREEDNZ*, as you see from para.63. That was an authority which you will recall was then cited in all of those later cases, including *Plantagenet Alliance*, and it effectively draws a distinction between something which is relevant in the sense that the minister or the decision-maker could take it into account and another matter, which is so relevant that the actual decision could not be taken without it. You see the distinction but the distinction is described by reference to *CREEDNZ* in para.63. And what they ultimately decide is that it is the latter which is the relevant test for present purposes, in other words, the matter is so relevant that no rationally minded minister could take the decision without sight of it.

And ultimately, therefore, when they come to dispose of and to deal with the facts, the question is not a binary one. The question is one of degree, judged against that legal standard. And so it is, we say, that if you get to a place, as Mr Taylor did, where having done the back of the envelope rough and ready calculation of quantification, he concludes that it does not actually materially add to whatever has gone before in terms of the CCR and the qualitative assessments that have been made, then that would plainly fail that *CREEDNZ* test. That is all I wanted to say about that case.

I wanted to alert you to----

LORD JUSTICE STUART-SMITH: Would you just give me that last sentence? If you get to the position of Taylor, that he gets the information----

SIR JAMES EADIE: He gets the information.

LORD JUSTICE STUART-SMITH: -- and decides it does not make a difference?

A SIR JAMES EADIE: He decides it does not effectively make a difference between it really confirms the qualitative reasoning that is already appearing in the CCR, then you do not need to reinform, and that is assuming that Mr Taylor is to be treated like a civil servant---

LORD JUSTICE STUART-SMITH: Yes.

B SIR JAMES EADIE: -- for this purpose, where the decision-maker is a Secretary of State, which he is not because of s.13, but assume that just for the sake of argument. So that is the submission on that.

C I wanted to simply refer you to one other case, which was the *Benkharbouche* case, which my learned friend referred to, did not open and then referred to, and said it was in her skeleton, in reply. The relevant paragraph – I do not invite you to turn it up now, it is behind tab 33 of bundle 3 – but the relevant paragraph is 35/

MRS JUSTICE THORNTON: What tab is it?

SIR JAMES EADIE: 33.

LORD JUSTICE STUART-SMITH: Paragraph?

D SIR JAMES EADIE: 35, on p.1618.

LORD JUSTICE STUART-SMITH: Thank you.

E SIR JAMES EADIE: And you will see, in a nutshell, that what Lord Sumption does is to acknowledge precisely the run of case law that I took you through; *Corner House*, the Sales article and all of that. The critical feature that you need to bear in mind in relation to this paragraph and the analysis of Lord Sumption is that what he was considering, and what he was dealing with, were principles of customary international law and, as you are probably well aware, the transposition or reliance upon principles of customary international law, in other words those principles of international law that are so well-established that almost all the states sign up to them and recognise they have to as a matter of law – torture, cannot
F torture, that sort of thing – that those principles have a very different set of rules attaching to them when the court is considering whether they are part of domestic law. So he was not dealing here with treaty obligations. He was dealing here with rules of customary
G international law in this context to do with immunities and so on, for the purpose of the State Immunity Act. And that is a critical distinction.

H So two points really; (1) bear that in mind when you come to the latter part of para.35. The second point, first part of para.35 is essentially reciting the cases I took you to.

MISS SIMOR: Yes, and it is the end of 35, on p.1619, just above 36, that we rely on. Indeed, having considered those cases, he rejects the concept that that means tenability applies.

A SIR JAMES EADIE: Well, I am not going to engage in ping-pong with my learned friend---

LORD JUSTICE STUART-SMITH: No.

SIR JAMES EADIE: -- but you will see the two references which are critical to the analysis, to customary international law, in that second half.

LORD JUSTICE STUART-SMITH: Yes. Thank you.

B SIR JAMES EADIE: I am grateful.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: My Lord asked the question about the SPAs and the off-taker arrangements. If I could give you, burden you, with one reference?

C LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: CB2/189.

LORD JUSTICE STUART-SMITH: CB2/189.

D MR HEPPINSTALL: Yes. It is the RAD report. It is, as my learned friend for the claimant said, take or pay. You either take the gas away and pay for it or you leave it but you still pay for it over the lifetime of the lending. So thirteen and a half years. You will see over the page, at 190, that there are some buyer-friendly clauses, so you can reduce the amount sometimes that you can take away in any one year, but it still is take or pay and no termination rights.

LORD JUSTICE STUART-SMITH: Which paragraph is this take or pay?

E MR HEPPINSTALL: So 189, the first – you see that there is a sub-heading “Offtake Contract/Terms”.

LORD JUSTICE STUART-SMITH: I have it.

F MR HEPPINSTALL: 172 gives you the “take or pay”. 173 gives you the length of those obligations and then over the page, at 176, there is some flexibility and, crucially, four lines down, middle of that line, “cargo diversion rights”, which are the very rights that cause the uncertainties because you can divert the gas.

G LORD JUSTICE STUART-SMITH: Okay. Thank you very much. Well, it will come as no surprise to you to know that we are going to reserve our judgment. You have given us a lot of work to do and, although provision has been made for both of us to have some time to write judgments, I would not wish to give an undertaking about how soon you are going to get a judgment but it will be as soon as we can reasonably manage without endangering life or limb on our part. May I – then you will get a draft in the normal way.

A

I think it is possible that while we are writing the judgment questions may arise which we either cannot immediately identify where the references are, in which case we would send an email copied to all parties requesting further assistance, which will not be an invitation for further argument. It will be, I hope, totally confined.

B

But can I just say thank you not only to the people in the front row, but it is quite clear that the assistance you have been getting is not limited to the people in the second row either, but to all people who have been concerned with the presentation of this, and we will do our best to do it justice. Thank you very much.

(4.41 p.m.)

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