Neutral Citation Number: [2022] EWHC 568 (Admin)

Case No: CO/3206/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2022

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE THORNTON

- -

Between:

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

Claimant

- and –

(1) THE SECRETARY OF STATE FOR INTERNATIONAL TRADE / EXPORT CREDITS GUARANTEE DEPARTMENT (UK EXPORT FINANCE) ("UKEF")

(2) CHANCELLOR OF THE EXCHEQUER

Defendants

- and –

(1) TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA

(2) MOZ LNG1 FINANCING COMPANY LIMITED

Interested Parties

- -
- -

Jessica Simor QC, Kate Cook and **Anita Davies** (instructed by **Leigh Day**) for the **Claimant**

Sir James Eadie QC, Richard Honey QC, Hollie Higgins and **Conor Fegan** (instructed by **Government Legal Department**) for the **Defendants**

Adam Heppinstall QC and **Freya Foster (**instructed by **Latham and Watkins)** for the **Interested Parties**

Hearing dates: 7-9 December 2021

Remote hand-down: This judgment was handed down remotely at 10.30am on 15 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

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Approved Judgment

Stuart-Smith LJ:

Introduction

1. The Claimant, Friends of the Earth ("FoE"), is a not-for-profit organisation that undertakes campaigning and other work in furtherance of environmental protection objectives for and in the public interest. FoE challenges the decision of the First Defendant Secretary of State to provide up to USD 1.15 billion in export finance and support in relation to a liquefied natural gas ("LNG") project in Mozambique ("the Project"). The decision was in fact made by Mr Louis Taylor, the Chief Executive Officer of United Kingdom Export Finance ("UKEF"), formally exercising his delegated power under section 1 of the Export and Investment Guarantees Act 1991.

2. The Project comprises the development of offshore deepwater gas production facilities, 50km from the coast of Northern Mozambique connected to an onshore gas receiving and liquefaction facility. It is to be operated by the First Interested Party and funded via the Second Interested Party. The decision is said to be one of the largest single financing packages ever offered by UKEF to a foreign fossil fuel project. It forms part of a much larger financing and support package in the region of USD 14.4 billion provided by multiple developed countries.

3. The decision involved at least three stages:

    i) The decision of the First Defendant of 10 June 2020 that UKEF would provide the support;

    ii) The consent of HM Treasury/the Chancellor of the Exchequer ("the second Defendant") of 12 June 2020 to UKEF providing the support; and

    iii) The decision of 30 June 2020 by the Accounting Officer and Chief Executive of UKEF to approve the underwriting minute and the decision of 1 July 2020 of the Chief Executive of UKEF to approve the clearance of documents memorandum.

4. FoE seeks to quash UKEF's decision, along with the decisions to provide prior approval to the same by the Secretary of State for International Trade and HM Treasury on 10 and 12 June 2020.

5. In bringing this challenge, FoE contends that:

    i) The decision was based on an error of law or fact, namely that the Project and its funding was compatible with the United Kingdom's commitments under the Paris Climate Change Agreement ("the Paris Agreement") and/or assisted Mozambique to achieve its commitments under the Paris Agreement (Ground 1(a)) and/or

    ii) UKEF's decision was otherwise unlawful in so far as it was reached without regard to essential relevant considerations in reaching the view that funding the Project aligned with the UK and Mozambique's obligations under the Paris Agreement (Ground 1(b)).

6. The climate change implications of the Project were controversial at the time of the decision, not only amongst NGOs like FoE, but also within Government. The Foreign Secretary, the Secretary of State for International Development and the Secretary of State for Business all opposed funding the Project on climate change grounds. The merits of the decision are not however, a matter for this Court. We are concerned only with the lawfulness of the decision.

The statutory basis for the decision and the decision-making structure

7. The relevant domestic statutory power engaged by the decision is under section 1 of the Export and Investment Guarantees Act 1991 ("the 1991 Act") which affords the Secretary of State a broad discretion. By section 1(1) the Secretary of State may make arrangements which she or he considers are conducive to supporting or developing supplies or potential supplies by persons carrying on business in the United Kingdom of goods, services or intangible assets (including intellectual property) to persons carrying on business outside the United Kingdom. By section 1(4) the arrangements that may be made are arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business; and the facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans. By section 4(2) the powers of the Secretary of State under section 1 are exercisable only with the consent of the Treasury. Section 13 provides that the functions of the Secretary of State shall be exercised and performed through what is now UKEF, which is a Department of the Secretary of State; and there is established an Export Guarantees Advisory Council ("EGAC"), the function of which is to give advice to the Secretary of State, at his or her request, in respect of any matter relating to the exercise of her or his functions under the 1991 Act.

8. UKEF's mission is to ensure that no viable UK export fails for lack of finance or insurance from the private sector, while operating at no net cost to the taxpayer. Broadly speaking, UKEF operates like a financial institution which carries out banking and insurance business in support of UK exports and investments. UKEF does not allocate public funds to or invest in projects, but provides export credits (through guarantees, insurance, grants or loans) in relation to the supply of UK goods and/or services to overseas buyers, including in relation to projects. UKEF's support is therefore conditional on the overseas buyers procuring British goods and/or services, sometimes referred to as "UK Content". It is known as an export credit agency ("ECA"), as are similar organisations from other sovereign states.

9. As part of its decision-making process, UKEF routinely assesses the statutory basis for support, the export case, the credit risk and environmental, social and human rights ("ESHR") impact considerations. In addition, in the present case officials from the Department for International Development undertook an assessment for the Treasury of the proposed transaction against the OECD Principles and Guidelines to Promote Sustainable Lending Practices in the Provision of Official Expert Credits to Low-Income Countries (the "Sustainable Lending Principles"). That assessment reported on (a) Mozambique's debt sustainability, (b) the Government of Mozambique's efforts in relation to governance and transparency and (c) the Project's positive economic returns.

10. UKEF's Enterprise Risk and Credit Committee ("ERiCC") was responsible for advising Mr Taylor, as UKEF's Accounting Officer and CEO, on the effective

management of UKEF's credit risk exposures. Initial approval was given by ERiCC on 30 April 2020 and final approval on 29 May 2020.

11. Consent from the Treasury was required because the proposed support for the Project would exceed £200 million and because the funding of the Project was recognised to be contentious. A submission was also made to the Prime Minister. I deal with the submissions to the Secretary of State, the Treasury and the Prime Minister in more detail later.

12. On the conclusion of these steps, Mr Taylor approved the underwriting minute on 30 June 2020 and the clearance of the necessary legal documents on 1 July 2020.

UKEF's environmental policy

13. UKEF's statement of policy and practice on Environmental, Social and Human Rights, due diligence and monitoring (2018), the policy in force at the material time, provides that before providing funding, UKEF will conduct due diligence in accordance with "international agreements which apply to the operation of ECAs". UKEF assesses the environmental, social and human rights (ESHR) risks and impacts by way of an ESHR review "to be satisfied that these are identified, managed and mitigated in line with local and international ESHR standards". UKEF will not normally provide funding where its "review identifies that the project is unlikely to align with international standards". This is on the basis that to do so would be contrary to the OECD Common Approaches (Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (Organisation for Economic Co-operation and Development)) and the Equator Principles ("EPs" - a risk management framework adopted by financial institutions for assessing environmental risks in project finance), to which it has committed to comply.

14. The OECD Common Approaches and Equator Principles in turn required UKEF to assess whether a project it was proposing to finance complied with host country laws and a list of certain expressly designated "international standards" (§§13 and 21-26 of the OECD Common Approaches and Principle 3 of EP3). That list of designated international standards includes the International Finance Corporation of the World Bank Group's Performance Standards on Social and Environmental Sustainability and the World Bank Group Environmental, Health and Safety Guidelines. The former set of performance standards includes Performance Standard 1 Assessment and Management of Environmental and Social Risks and Impacts.

The United Nations climate framework

15. The Paris Agreement is the third treaty in the UN climate regime. It builds upon a complex body of rules and procedures that have developed over 25 years, which together make up the UN climate regime. Its founding Treaty is the United Nations Framework Convention on Climate Change ("UNFCCC"), which was adopted in 1992 and in force from 21 March 1994, the ultimate objective of which is to stabilize greenhouse gas concentrations "at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system": see Article 2. Actions to implement this objective are based on the principle of common but differentiated responsibilities and capabilities. In particular, developed countries (including the UK) are to take the lead in cutting emissions on the basis that they were largely responsible

for climate change: see Articles 3(1) and 4(2). Developed countries are required to finance and provide technology transfer to assist developing countries to mitigate and adapt to climate change: Article 4(3)-(5).

16. The Paris Agreement was adopted at the 21st Conference of the Parties to the UNFCCC in 2015. It was initiated by the COP17 (2011) in response to the "significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels" (Recital 2 of Decision 1 CP. 17 (UNFCCC Doc. FCCC/CP/2011/9/Add.1).

17. The submissions of the parties concentrated largely upon Articles 2, 3, 4, 9 and 11. Regard should be had to the whole terms of the Paris Agreement, but I set out the provisions that commanded most attention below.

18. Article 2 of the Paris Agreement provides

> "1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> > (a) holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change
> >
> > (b) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production
> >
> > (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.
>
> 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

19. Article 3 provides:

> "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."

20. Article 4 provides:

"1. 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.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. 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.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

5. 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.

6. The least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstance.

…

19. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

21. Article 9 provides:

> "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.
>
> 2. Other Parties are encouraged to provide or continue to provide such support voluntarily.
>
> 3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts.
>
> 4. The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation.
>
> 5. 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.
>
> …"

22. Article 11 provides:

> "1. Capacity-building under this Agreement should enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action, including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information.

> 2. Capacity-building should be country-driven, based on and responsive to national needs, and foster country ownership of Parties, in particular, for developing country Parties, including at the national, subnational and local levels. Capacity-building should be guided by lessons learned, including those from capacity-building activities under the Convention, and should be an effective, iterative process that is participatory, cross-cutting and gender-responsive.
>
> 3. All parties should cooperate to enhance the capacity of developing country Parties to implement this Agreement. Developed country Parties should enhance support for capacity-building actions in developing country Parties.
>
> …"

23. Articles 14 and 15 make provision for monitoring progress and a mechanism to facilitate implementation of and promote compliance with the provisions of the Agreement which includes an expert-based and facilitative committee that will function in a transparent, non-adversarial and non-punitive manner. The Committee is to pay particular attention to the respective national capabilities and circumstances of Parties.

24. Article 24 provides that Article 14 of the UNFCCC on settlement of disputes should apply mutatis mutandis to the Paris Agreement. Applied in this way, Article 14 of the UNFCCC provides that, in the event of a dispute between any two or more Parties concerning the interpretation or application of the Paris Agreement, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice. In the event that settlement is not achieved Article 14 provides for other methods of dispute resolution.

The developing science

25. Recital 6 to the UNFCCC recognises the role of science in the climate regime:

> "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."

26. In its Decision 1/CP.21 of 12 December 2015 adopting the Paris Agreement, the COP requested the Intergovernmental Panel on Climate Change (IPCC) to provide a special report in 2018 "on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways" (para. 21). The IPCC was created in 1988 under the auspices of the United Nations by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). The IPCC's objective is to obtain insight into all aspects of climate change through scientific research. The IPCC does not conduct research itself, but studies and assesses, inter alia, the most recent scientific and technological information that becomes available around

the world. The IPCC is not just a scientific organisation, but an intergovernmental organisation as well. It has 195 member countries. Since its inception, the IPCC has published five Assessment Reports and accompanying sub-reports about the state of climate science and climatological developments.

27. The IPCC's 2018 report, produced in response to the COP Decision, is a key reference for the Paris Agreement and was the culmination of years of work by many notable authors worldwide. The report was significant in identifying for the first time the need to limit GHG emissions substantially and soon if global warming is to be limited to 1.5°C. The IPCC concluded that on current trajectories global warming is likely to reach 1.5°C between 2030 and 2052 and the detrimental impacts of global warming are less (but still significant) if warming reaches 1.5°C than if it reaches 2°C.

28. In November 2019 the United Nations Environment Programme ("UNEP") published a report entitled "The Production Gap. The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C". The report addressed the necessary winding down of the world's production of fossil fuels in order to meet climate goals. In particular, UNEP noted the implications of the 2018 IPCC Report, referred to above, and that "Governments are planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C pathway and 120% more than would be consistent with a 1.5°C pathway." CO_2 emissions from fossil fuels would need to decline rapidly, by approximately 6% per year to remain on a 1.5°C-compatible pathway, and by roughly 2% per year to remain on a 2°C-compatible one. The report warned that "[b]arring dramatic, unexpected advances in carbon capture and storage (CCS) technology, these declines mean that most of the world's proven fossil fuel reserves must be left unburned."

Finance flows and the temperature goals in the Paris Agreement

29. The Standing Committee on Finance ("SCF") serves the Paris Agreement. In 2018, the COP requested the SCF to map, every four years, the available information relevant to Article 2(1)(c) of the Paris Agreement. In the executive summary of its 2018 assessment the SCF noted that climate finance accounted for a small proportion of overall finance flows and was "considerably below what one would expect given the investment opportunities and needs that have been identified." It continued:

> "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 [Development Financial Institutions] 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.*"*

UK domestic climate framework and relevant policy developments

30. The Climate Change Act 2008 sets a mandatory target for the reduction of UK carbon emissions by 2050 (100% lower than the 1990 baseline) and establishes an independent public body to advise the UK and devolved Governments on tackling climate change.

31. The UK signed the Paris Agreement on 22 April 2016. Pursuant to s. 20 of the Constitutional Reform and Governance Act 2010 it was placed before Parliament for 21 days. Parliament raised no issues and accordingly, it was ratified and bound the UK from 18 December 2016.

32. In October 2017 the Government issued "The Clean Growth Strategy" in which it asserted that the UK remained strongly committed to the Paris Agreement and that the UK would satisfy its international obligations under the agreement.

33. In June 2019, the House of Commons Environmental Audit Committee ("EAC") published a report that was highly critical of UKEF's support for fossil fuel energy projects. The summary called it "unacceptably high" and said that it did not "respect the Paris Agreement, which commits signatories to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development." It recorded the evidence of witnesses that UKEF was risking stranded assets and "locking in" reliance on fossil fuel energy production for decades to come in areas where energy demand is set to increase. It called for UKEF's mandate to be changed by the end of the year to ensure that UKEF's support was aligned with the UK's climate leadership and climate commitments, and to ensure that it was supporting a transition to net zero emissions by 2050; and it called for the Government to introduce a strategy to end support to new fossil fuel energy projects by 2021.

34. The Committee's recommendations included:

> "148. Scope 3 emissions are essential for calculating the full emissions impact of a product, asset or portfolio. Scope 3 emissions are particularly high for fossil fuel-related projects. UKEF claim that there is no universally accepted measure for Scope 3 emissions. However, Scope 3 emissions are already being used in many private sector companies using the GHG Protocol, and the Canadian Export Credit Agency has already expressed its ambition to work towards the G20 Taskforce on Climate-related Financial Disclosure (TCFD) standards (which would include Scope 3 emissions).
>
> 149. UKEF should report the Scope 3 emissions of all projects, and in particular of all fossil fuel-related projects where Scope 3 emissions are particularly high. The GHG Protocol provides a methodology for calculating Scope 3 emissions, and the TCFD recommendations provide a readily available source of guidance for this work. If Government considers that existing methodologies for modelling Scope 3 emissions are inadequate, it should support research to develop an agreed model, and should promote this model amongst its ECA peers."

35. In July 2019 the Government published its "Green Finance Strategy". The Government stated:

> "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. In practical terms this will include:
>
> •…;
> • Ensuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans;
>
> •…; and
>
> • Ensuring that relevant programmes do not undermine the ambition in countries' Nationally Determined Contributions (NDC) and adaptation plans"

36. In its response to the EAC in October 2019, the Government stated that UKEF was "laying the framework to assess how it can best respond to climate related risks and opportunities" and that it would develop its climate strategy as it does so. UKEF was said to be working with other government departments "to ensure that UKEF appropriately takes into account the UK's international climate commitments, including the Paris Agreement, in its activities".

Accounting for Greenhouse Gas emissions – the Greenhouse Gas Protocol

37. In its report, the House of Commons EAC referred to the Greenhouse Gas Protocol as providing a methodology for calculating emissions. The Protocol is part of a framework developed by the World Resources Institute for companies and organisations, which is aimed at developing and promoting the adoption of internationally accepted accounting and reporting standards for GHG emissions. The opinion of the expert for the Interested Parties, which appears to be borne out by the contemporaneous documents and was not materially challenged, is that the GHG Protocol is widely recognised and applied.

38. GHG emissions are typically divided into three "Scopes" or categories. The direct emissions associated with an activity (in the present case the extraction of LNG) fall within Scope 1. Scope 2 includes the indirect emissions from the generation of purchased electricity. Scope 3 are all indirect emissions not included in Scope 2, including the use of sold products. In the present case, the concentration on Scope 3 emissions has focussed on the emissions associated with the use of Mozambique's LNG from the Project (frequently referred to as "MZLNG"), of which 5% would be retained and used in Mozambique and 95% would be exported around the world.

The factual background

Mozambique's nationally determined contribution (Articles 2 and 3 of the Paris Agreement)

39. Mozambique is a poor and under-developed sovereign state that is extremely vulnerable to climate change impacts. UKEF's climate change report ("CCR") explains the reasons for its vulnerability as being its geographic location, long shoreline and the existence of extensive lowlands below sea level.

40. In accordance with its obligations under Articles 2 and 3 of the Paris Agreement, Mozambique has provided its Intended Nationally Determined Contribution ("INDC") to the UNFCCC secretariat. For present purposes it is sufficient to note that the INDC recorded the country's mission to be "to increase resilience in the communities and the national economy including the reduction of climate risks, and promote a low-carbon development and the green economy through the integration of adaptation and mitigation in sectorial and local planning." Elsewhere the mission was said to be to "reduce climate change vulnerability and improve the wellbeing of Mozambicans through the implementation of concrete measures for adaptation and climate risk reduction, promoting mitigation and low-carbon development, aiming at sustainable development, with the active participation of all stakeholders in the social, environmental and economic sectors."

41. The INDC listed implementation of 12 policies, programmes and actions, including a Master Plan for Natural Gas, set out in more detail below, as its method and type of contribution to GHG reductions. It established Mozambique's target to be a total reduction of about 76,5 $MtCO_2eq$ in the period from 2020 to 2030, with 23,0 $MtCO_2eq$ by 2024 and 53,4 $MtCO_2eq$ from 2025 to 2030. It said that the implementation of any proposed reduction was conditional on the provision of financial, technological and capacity building from the international community. It said that Mozambique is willing "to participate in the market mechanisms to be established which would allow access to clean technologies in order to mitigate the emissions arising from exploiting, managing and using the natural capital that is available"; and that "considering Mozambique's historical GHG emissions, which are insignificant in the global total, the effort that the country is willing to make to create adaptive capacity and face the national challenges of reducing poverty, including those of the most vulnerable, this contribution is fair and adequate considering the ultimate objective of the UNFCCC."

The Natural Gas Master Plan

42. In June 2014 Mozambique produced a "Natural Gas Master Plan", the introduction to which identified the country's "enormous energy potential, which provides the country with favourable means to fulfil its domestic and regional energy needs for Southern Africa and beyond." That energy potential was based on discoveries of coal and natural gas as well as abundant water resources, which put Mozambique in a very privileged position both in the region and in the world. It also had "vast potential in the field of renewable energy, particularly biomass, solar and wind energy". The introduction provided a succinct summary of Mozambique's position. In 2011 Mozambique's total primary energy consumption was 8 million tons of oil equivalent (TOE), which put the country below the average consumption in the world and Africa. Furthermore, 78% of the primary energy supplied came from biofuels (wood, hay, manure, food waste etc). The introduction continued:

> "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 way that they can contribute to the country's 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 Natural Gas Master Plan is an integral part of the strategy of the Government of Mozambique regarding the exploitation of mineral resources and the improvement of infrastructures and human capital development in Mozambique."

43. The Master Plan referred to the Government's Five-year Programme for 2010-2014, which outlined as its main goal "the fight against poverty with a view to improving the living standards of the Mozambican people in an environment of peace, harmony and tranquillity". It identified the Project as an important source of the country's LNG reserves which, with other mineral resources "must be conducted in a sustainable manner." It referred to an Energy Policy which included the development of energy resources (hydropower, forests, charcoal and natural gas) and promoting the development of conversion technologies and environmentally beneficial energy uses, and to a Renewable Energy Development Policy, the objectives of which included promoting the delivery of new and renewable energy services at affordable prices, strengthening local and national energy security, reducing local and global negative environmental impacts, and advancing the technological development of the subsector for new and renewable energy. The Master Plan envisaged that much of Mozambique's LNG would be exported but that some would be retained for internal development. The present hearing proceeded on the basis that 5% was likely to be retained for use in Mozambique with the balance of 95% being exported and therefore affecting recipient countries' carbon budgets. Recognising the potential environmental damage associated with the production and use of LNG, the Master Plan said that the Government of Mozambique "will ensure that the exploitation of natural gas, its processing, and its use will be conducted in a sustainable manner, reducing to a minimum the negative impacts on both land and sea."

The LNG Project

44. The Project site itself is located in northern Mozambique in the offshore Rovuma Basin. A project information memorandum (2018) provides the following description of the Rovuma Basin and the Project:

> "The Rovuma Basin … is home to one of the largest gas discoveries worldwide in the last 15 years, totalling over one hundred fifty (150) TCF of gas in place resources. The region known as Area 1 has established a world-class resource, which will initially be monetized through the development of a two-train onshore LNG project and associated infrastructure. …As such the resource represents a 'game changer' for the LNG market and has the potential to propel Mozambique to one of the top five global suppliers and allow it to meet a growing global demand. The Project's geographical location provides easy access to the key growth markets of Asia Pacific and Europe ….
>
> The Area 1 Mozambique LNG project ("Project") is a world-scale, integrated LNG development that will initially comprise two (2)

> LNG liquefaction trains (with the nameplate design capacity of 6.44 MTPA each) utilizing established technology. The initial development is expected to produce more than sixteen (16) TCF of gas and ninety-three (93) million barrels of condensate over the 30-year development and production period. The site, located in northern Mozambique, is capable of housing up to ten (10) LNG trains. The Project will also consist of an offshore pipeline, as well as upstream development and associated infrastructure, as further described below in this Section 1.1 (together with the LNG trains and associated facilities, the "Project Facilities"). With the gas resource located forty (40) km off the coast of Mozambique, the Project is well positioned to serve growing demand in the Asia-Pacific gas markets. The Project is set to enjoy a competitive cost advantage relative to other LNG developments due to the sheer size of the resource and potential for multiple additional developments and associated economies of scale. The all-in cost of the initial two-train Project is ~USD 24 bn (nominal, including financing costs) from inception through to final Completion. The Sponsors have already spent over USD 5 bn in exploration, appraisal and development that has allowed a partial de-risking of the schedule. The overall magnitude of investment will represent the largest FDI in Africa which will transform the economy of Mozambique and confer significant benefits on the wider SADC region."

Chronology of UKEF's involvement with the Project

45. UKEF was first approached about funding for the project in 2014 but at that stage considered that there was insufficient UK Content for UKEF to participate.

46. In 2019 the Project sponsors invited UKEF to participate in the Project as a member of the senior lending group, additional UK Content for the Project having been identified. By the time that UKEF became involved, the other lenders in the group had already been involved in structuring the Project, with a view to supporting it, for over three years. The other lenders included ECAs from South Africa, Japan, Italy, Thailand and the United States (whose ECA was known as US EXIM, or EXIM for short). In February 2019, UKEF's involvement commenced and it began its usual environmental screening for projects, focussing on environmental and human rights with some general climate change considerations. The Project was classified, according to UKEF policy, as Category A given its potential for significant adverse environmental and social impacts.

47. As a matter of fact, despite the recommendation of the House of Commons EAC in June 2019, UKEF's mandate had not changed by the date of the decisions that are the subject of these proceedings; nor was any free-standing public law obligation imposed on UKEF (by government policy or otherwise) that required it to calculate or report on Scope 3 emissions or to ensure that any investment support for fossil fuels affecting emissions was in line with the Paris Agreement temperature goals and transition plans. However, in light of the scale of the Project, the Government's response to the recommendations of the Environmental Audit Committee as well as the then recent Heathrow Third Runway decision of the Court of Appeal ([2020] EWCA Civ 214), UKEF decided that climate change impacts and consideration of the Paris Agreement

were considerations that ought to be taken into account alongside other factors in making its decision for the Project.

48. In his evidence to the Court Mr Taylor is at pains to make clear that (a) UKEF was a pioneer in taking account of climate change as part of its decision-making process, (b) there was no established methodology setting out how a decision-maker such as UKEF should evaluate projects with regard to their climate change impact or consistency with the Paris Agreement, (c) while UKEF took steps to be informed on matters relating to climate change and the Paris Agreement, consistency with the Paris Agreement was not a requirement or pre-requisite for a decision by UKEF to support the Project, (d) UKEF was not bound either by policy or for any other reason only to act in a manner that was consistent with the Paris Agreement, and (e) UKEF's decision was "multi-faceted, based on promoting significant UK economic benefits in line with UKEF's statutory purpose and mission". He characterises the decision as requiring "a range of judgments to be made across a wide spectrum of policy areas, involving questions of political policy, economic and scientific judgment." The evidence of Mr Griffin, the Head of Environmental and Social Division at UKEF is that it was desirable to go beyond UKEF's published ESHR Policy and usual practice by undertaking a dedicated assessment of the potential climate change impacts of the of the Project and that, given the nature of the Project it was considered appropriate to consider climate change more than they normally would.

49. These elements of the evidence of Mr Taylor and Mr Griffin require scrutiny in the light of the contemporaneous documents, not with a view to reassessing the merits of the decision (which is forbidden territory for the court) but with a view to understanding the nature of the process that was being undertaken and the proper place of climate change and the Paris Agreement in that process.

The Wood Mackenzie report

50. Wood Mackenzie ("WM") provided advice to the ECAs and the African Development Bank ("AfDB") from 2015 in its capacity as "Gas Marketing Consultant" to the Lender Group. In addition, WM had provided advice to AfDB on climate change considerations. In recognition of the need for additional analysis of the potential climate change impact of the project, the Lender Group to the Project discussed the prospect of seeking climate change analysis from WM.

51. The Lender Group and Total (as Project sponsor) agreed in January 2020 that WM should be instructed initially to assess the impact of CO_2 emissions associated with the use of the fuel from the emissions, i.e. Scope 3 emissions. The scope of WM's work was limited in February 2020 to analysis of possible CO_2 emissions *reductions* associated with MZLNG. The objective of their work was stated to be that "[t]he ECAs are trying to inform their Boards and stakeholders as to the potential reduction in CO_2 emissions associated with the use of LNG from MZLNG." In setting out their scope of work, WM included the caveat that it was impossible to accurately quantify the impact for many reasons, but particularly given that (a) volumes of MZLNG could be delivered to multiple markets in any given year with the combination of markets and uses and associated volumes varying every year, (b) WM could not know what the LNG would be used for in any given year, (c) WM could not know whether the MZLNG would replace other more carbon intensive fuels in existing facilities and so lower emissions or whether it would be meeting incremental gas demand (and so increase them), and

(d) there were potentially other less carbon intensive sources of gas/LNG that could be used instead of MZLNG which would reduce emissions by more than using MZLNG. WM's suggested approach was therefore that they should consider how much CO_2 emissions would be reduced if it were to be assumed that MZLNG were to be 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.

52. WM produced a draft report which was provided to UKEF on 27 February 2020. It concluded that "[u]se of Mozambique LNG in the power sector compared to other fuels could lower carbon emissions in the consuming country". The results of their (draft) analysis and report were said to be "indicative" and not to be definitive for a number of reasons. An internal UKEF email apparently referring to this draft, indicates that the writer considered that the WM analysis was simplistic. Another said: "The Woodmac report is very light and makes high level assumptions". However, it is apparent from a comparison of their draft and final reports that the scope of WM's work remained essentially unchanged.

53. The final WM report is dated March 2020 and entitled "Mozambique LNG - carbon emission benchmarking". Although it is longer than the February draft, the analysis is substantially the same. The first page states that "Gas and LNG are fundamental to the Energy Transition". The next page states that "[t]here are a wide range of energy transition scenarios with different global warming outcomes. The 2-degree scenario is widely seen as the global community's accepted limitation of temperature growth to avoid significant and potentially catastrophic changes to the planet". The next two slides address demand: they project declining demand for coal and oil and rapid growth in renewables. The next slide states that LNG's share of demand will increase significantly. There then follows a section "Considering the <u>indicative</u> emissions impact of MZLNG"[1], which considers multiple countries where the MZLNG might be used and the uses to which it may be put over time and concludes that:

> "[t]his makes it impossible for us to say with any degree of certainty where the volumes will be used, for what purpose and when. As a result, we are unable to model the emissions impact with any degree of certainty. … Even for those offtakers where gas is used only for power generation, it isn't clear to what extent the MZLNG volumes will be meeting incremental demand for gas-fired power generation, or replacing other gas volumes, or replacing nuclear and/or coal-fired generation. The emissions impact of each is quite different."

54. The following slide continues with:

> "That said there appears to be particular scope for MZ LNG volumes to displace coal in power generation in China India and Indonesia. We therefore focus on this in order to give ECAs some <u>*indicative* guidance</u> as to how MZLNG could potentially reduce emissions"

55. There follows a summary analysis seeking to quantify the potential 'avoided' carbon associated with MZLNG as compared to other fuels, which indicates that the use of

[1] Underlining as in the WM report

MZLNG rather than more carbon intensive fuels will lead to reductions in life cycle carbon emissions. The analysis is summarised in the headline statements that (a) "carbon emissions associated with MZLNG into power are less than half that of a modern coal fired project"; and (b) "using MZLNG could avoid over half a million tonnes of carbon emissions per TWh of electric power generated". Having caveated its work with "this analysis is only intended to provide some guidance about the potential avoided carbon emissions associated with Mozambique LNG volumes as we cannot forecast where and for what purpose the volumes will actually be used", WM states the following conclusions[2]:

> "…we can't predict with certainty what the volumes [of gas] will be used for but given the importance of Asian markets we see scope for some of the volumes to be used in power generation to replace coal and oil which could lower carbon emissions
>
> The results of our analysis are indicative, and we cannot provide a definitive assessment of the emission reduction associated with MZ LNG for a number of reasons including …
>
> - we cannot know exactly what the LNG will be used for in any given market in any given year
> - we cannot know whether the LNG is
>   - replacing other (more carbon intensive) fuels in existing facilities (and so lowering emissions) or
>   - replacing other less carbon intensive facilities (like nuclear plants) and so increasing emissions
>   - meeting incremental demand or replacing indigenous gas supplies (and so increasing emissions)"

56. An appendix to the WM report compared carbon intensities of selected LNG projects delivering LNG to China and concluded that "from a Scope 1 and 2 carbon emissions perspective, Mozambique LNG will likely be well placed relative to competitor projects, largely due to low CO_2 content of feed gas, relatively low methane losses and an efficient modern liquefaction plant."

Other advice

57. In April 2020 UKEF received advice from the Department of International Trade Oil and Gas Team, which reviewed the role of LNG, renewables and other fuels. The advice noted that "Mozambique LNG fits The World Bank's justification for continuing to support upstream gas projects in exceptional circumstances (this being that gas is a flexible energy source that can help countries make the transition more quickly to renewables, to expand energy access and energy security for the poor and displace carbon-intensive coal)." Under the heading "Support for UK Supply Chain" it said that "the nature of the project fits in very well with UK oil and gas supply chain

[2] Underlining as in the original as before

capability and there are massive post pandemic export opportunities for the UK supply chain", giving estimates of potential goods, services and jobs that would be involved; and that "The project will go ahead anyway. If the UK does not participate the opportunity for economic benefit to the UK plus embedding improved environmental/ethical/social standards will be lost. There are other enormous gas projects globally that will also offer significant opportunities for the UK supply chain in a post-pandemic world."[3] Under the heading "Mozambique Renewables" it said:

> "Renewables cannot yet provide an alternative for an energy project of this scale and Mozambique LNG provides a solid platform to influence clean energy developments in Mozambique. Mozambique's biggest challenge is enhancing grid resilience to manage their own network and serving the needs of other networks. This can be done with renewables as well as with gas. The UK has a strong offer on grid enhancement and expansion. The revenue streams from LNG will allow Mozambique to invest in infrastructure and sustainably realise its clean energy potential including reinforcement and development of its electricity grid."

"Key messages" included that much of the gas would be exported and was viewed as a transition fuel, the Project would be "nation-changing" for Mozambique, and that:

> "Mozambique has a very strong potential to become a key regional producer of renewable energy. The enabler of such industry would be the investment in key transmission and grid infrastructure through the revenues of the LNG exports. Therefore the LNG projects in the country have the potential to become the energy transition bridge that will help the country transition away from coal, build a strong grid infrastructure and enable the economic and social development of the country."

58. The role of LNG as a transition fuel was endorsed by the AfDB on 25 February 2020. After referring to the relatively lower levels of GHG generated by the use of LNG as opposed to coal or gasoline, the AfDB continued: "As such, most governments identify natural gas as a transition fuel and thus part of the solution to the current GHG emissions challenge, as substituting coal and oil by natural gas can in fact help to curb absolute GHG emissions globally." After referring to Mozambique's NDC commitment to invest in renewables in parallel to investment in natural gas, the AfDB continued: "As NDC commitments become more ambitious with each subsequent iteration (expected every 5 years) it is envisaged in the Government electrification strategy that renewables (excluding hydro) will increasingly make up a larger share of the energy mix. The large investment needed for hydropower will be made viable, in the long term, by the tax revenues generated by natural gas."

59. UKEF also took advice from others, including US EXIM on the approach it had adopted, to which it is not necessary to refer in further detail here.

Development of the CCR

[3] Underlining as in the original

60. Also in or about February 2020, UKEF officials decided to prepare a document that ultimately became known as the CCR. The earliest iteration of the document available to the Court is dated April 2020 and designated "V2". Internal UKEF emails refer to it under the heading "UKEF Climate Change Assessment Framework discussion." V2 did not mention the Paris Agreement. V2 was sent to Dr Ben Caldecott, a member of EGAC and climate change expert who specialises in sustainable finance and holds an associate professorship at the University of Oxford. His general response to V2 was that it didn't seem to him to be like a "framework", which should have more clarity on what was and was not acceptable (and why), how outcomes of the analysis would influence a decision, and more details about the process of assessment (who does the assessment and who reviews it etc). He suggested there should be a clearer structure with climate risks and impacts followed by mitigation measures (if applicable); then broader nonclimate risks and impacts also followed by mitigation measures; peer analysis and comparison with what others have done should also be included. His specific comments on V2 typically challenged the provenance of assertions made in the document. For example, against a statement in the draft that "natural gas and LNG are the least polluting fossil fuels, producing lower levels of GHG emissions than the heavier hydrocarbons fuels like coal and oil", Dr Caldecott commented as follows:

> "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 industry but also by usage and remaining carbon budgets"

61. It appears that Dr Caldecott's comments were provided to UKEF on or shortly before 14 April 2020. On that day there was a UKEF Climate Change Assessment discussion attended by Mr Taylor and other members of UKEF, the purpose of which was to receive feedback on the draft Climate Change Assessment Framework from Dr Alistair Clark (the chair of EGAC) and to consider Dr Caldecott's written feedback. The minutes of the meeting record as general feedback that the "draft framework" required further refining and clearer structuring but that it was broadly agreed that it was not missing anything significant. Dr Clark expressed his view that it was too light on climate change and too focussed on other considerations. In relation to Scope 3 emissions Dr Clark "posited" that the current information on MZLNG's Scope 3 emissions was insufficient and asked if UKEF could capture (i) what markets the gas would be exported to and (ii) what energy sources it would replace. Without hard data, he suggested that UKEF pursue a "what if" modelling approach based on rational assumptions. He was told that this would be difficult as WM was unable to answer these questions. Later in the meeting, Dr Clark noted that there were specialist climate change assessment companies that could model lots of different climate change considerations to understand the impacts of a project. However, it was "accepted that there [was] not enough time left to engage consultants for this project." Mr Taylor raised the importance of benchmarks against which to reach decisions but was told this was difficult because of the absence of clear internal or external guidance or an acceptable threshold for fossil fuel emissions. On decision making, Dr Clark suggested that they should not discuss weightings at present but that what was important at this stage was that UKEF should show it had fully acknowledged the climate change risk of this project: once that had been evidenced, it could then be coherently presented to

the ultimate decision makers alongside the other project considerations. Mr Taylor emphasised that a project having negative climate implications does not necessarily prevent UKEF support, but that it was important that they had fully considered the implications before reaching a "holistic" decision based on all the relevant factors.

62. On 24 April 2020, Dr Caldecott was asked to review a later version ("V6) of what was at this stage referred to internally by UKEF as "UKEF's climate assessment framework". The document itself was entitled as a draft "UKEF Climate Change Assessment Framework." The structure of the document had changed significantly since V2. It introduced itself as follows:

> "This framework has been designed to enable decision makers to understand and assess the climate change implication of a project in the context of international agreements … Much of HMG thinking is still in the early stages of development…"

63. On 30 April 2020 there was a meeting of ERiCC at which the project team sought a commitment approval from ERiCC for the Project. The working papers and minutes are extensive and what follows is a small selection of the most relevant items from the minutes. The timing of the meeting was driven by the need to get ministerial approvals following ERiCC approval and the project timeline: at that stage the Sponsor's deadline for signing documents was the end of May 2020. The minutes record that the lender group had taken their Final Investment Decision in June 2019 and that work was now well advanced. After referring to the view of the project team that the Project would be transformative to the economy of Mozambique and that support would increase the level of UK Content, the minutes refer to the ESHR report that was in final draft and that "in addition to its usual ESHR procedure UKEF will consider climate change impacts as part of its decision on the Project.[4]" The minutes also referred to the draft Climate Change Assessment ("CCA") and the favourable views of legal advisers, WM, AfDB and US EXIM. Turning specifically to emissions, the minutes recorded that the Project would have a significant impact on Mozambique's GHG emissions, that Scope 1 and 2 emissions were expected to account for 10% of the country's total emissions; and that "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." While rejecting quantification, the minutes recorded that there was scope for the Project's LNG to reduce reliance on coal and oil in some Asian markets "which could help their transition to a lower carbon economy." The minutes recorded the unanimous decision that ERiCC "after an extensive discussion, which was the third such formal discussion around this transaction" agreed to the $1.15bn transaction.

64. Dr Caldecott replied about V6 of the CCR on 2 May 2020. In his covering email and in his comments on the document he repeated his concerns about the absence of an apparent framework as he understood that term.

> "I sense that the LNG project is driving the creation of this UKEF CC assessment framework. Ideally the framework would be developed first through an appropriately robust and

[4] This reflected a statement in the working papers that "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."

> comprehensive process and then we'd apply it to this project (and other projects) systematically."

He regarded the document as "really just some questions" and was not sure that the right questions were being asked. He regarded WM's conclusion that it was impossible to state with any certainty what the Scope 3 emissions would be "a big gap in the analysis".

65. On 5 May 2020, timed at 18.44, Ms Miana Capuano of UKEF sent an email to Mr Taylor and others enclosing an updated version of what she described as the Climate Change Assessment Framework for Moz LNG. She said that she had added additional text to make the complexities in accurately calculating Scope 3 emissions clearer, repeating the argument that Scope 3 calculations are dependent upon a number of variables which could not be determined, so that any emissions calculations would be subject to "much error". She had considered displacement (i.e. whether the MZLNG would "displace" other fuels, thereby causing aggregate emissions to increase or decrease) under the transition fuel section because displacement would not change the Project's Scope 3 emissions.

66. On 7 May 2020, shortly before a scheduled call with Dr Caldecott, Ms Helen Meekings, the Head of Policy and Climate Change at UKEF, sent an email to those who were going to participate in the call. In it she summarised Dr Caldecott's responses to V6. She drew specific attention to his observation about the normal structure of framework documents and to his observation that the lack of a Scope 3 calculation was a big gap in the analysis. She proposed that the meeting should be used to discuss these topics, adding that it was a fair point from Dr Caldecott that the current document did not "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." It is apparent from the email that this has been the topic of discussion previously.

67. After her discussion with Dr Caldecott (in which Dr Clark also participated), Ms Meekings sent another email, timed at 18.49, to Ms Capuano, Mr Taylor and others, including those who had been in on the discussion. She attached a further revised version of the document and now gave it the new title "Climate Change Considerations" to reflect an earlier conversation.[5] Comparison shows that the document underwent substantial further revision before becoming finalised as the CCR. It is perhaps only material to note that the document at this stage introduced itself in the following terms: "The below sets out a number of climate change related matters to assist decision makers to gain an understanding of and consider the possible climate change implications of a project."

68. A further meeting was held on 20 May 2020 at which the Climate Change Report was discussed. An undated note of short-form minutes indicates that the meeting discussed Cumulative Committed Carbon Emissions and how to address them. It would include assessing compatibility of emissions with carbon budgets, which was described as "complex". Apparently Dr Caldecott said that he could not do the work for the MZLNG Project, though he was sure that people could do it. Under the heading "How to assess projects against the Paris Agreement?", Dr Clark is recorded as saying that there was

[5] It appears from the minutes of the ERiCC meeting on 29 May 2020 that the document was also referred to at some point as a Climate Change Assessment, before finally becoming and being known as the CCR.

no precedent of people who had tried to undertake the necessary analysis. He said that there were pilot studies to test methodologies, but no precedent as "we're right at the beginning of the curve on this." Dr Caldecott agreed. The note ends with:

> "Us failing to do CCCE for Mozambique LNG is not a terrible thing! We've considered it, but it is not applicable because methodology isn't available as yet. But going forward, for future transactions, it may be and it is something we should consider."

According to Further Information provided by the Defendants, "the understanding from the meeting was that there was no clear or comprehensive methodology that could be followed to assess Scope 3 emissions impacts." This appears to be consistent with the notes of the meeting.

69. In May 2020 UKEF produced a document entitled "UKEF Climate Change Report Background Information". When Ms Meekings sent her revised document on 7 May 2020, the precursor to this document formed Annex A to the revised document. In its final form, its stated purpose was to provide non-exhaustive background information "as a guidance note and a reminder of certain relevant agreements, guidelines and documents that may aid the review of the Climate Change Report." The paper set out Article 3 of UNFCCC and Articles 2(1)(a)-(c) and 4(1) of the Paris Agreement and other international and domestic materials that were said to provide "policy context". It also provided examples of the position being adopted by various financial institutions to investment in fossil fuels; and it provided a summary of the approach being adopted by various different government departments to climate change in decision making, which demonstrated a lack of uniformity and that different departments were at different stages of development of their approaches.

70. During May 2020 the ESHR report and the CCR were finalised.

The ESHR report

71. The ESHR report treated the Project as being the construction of two trains (liquefaction and purification facilities) each having a capacity of 5.99 MTPA for the treatment and conversion of natural gas to liquid and associated infrastructure. It noted that space for up to 10 trains had been allocated, but based itself and its calculations on two. Its purpose was to record the due diligence that had been carried out in respect of the potential ESHR impacts of the project by reference to established international standards and guidelines. The summary section included that "[t]he Project is estimated to produce approximately 6 million tonnes CO_2 equiv/annum in the operations phase (Scope 1 and 2), …". Subject to various steps to be taken (which are not material to these proceedings) the summary recorded the authors' satisfaction that "the processes in place for the assessment, management and mitigation of potential adverse environmental and social impacts associated with the Project should be in alignment with the relevant international standards." This assessment is not challenged.

72. A section of the ESHR report entitled "Climate Change and Greenhouse Gases" included the following:

> "83 Studies to determine the Project's direct and indirect (Scope 1 and Scope 2) contribution to Mozambique's carbon emissions

> baseline (historically low) have been undertaken which indicate these could account for approximately 5-10% of Mozambique's national GHG emissions (per its 2015 Nationally Determined Contribution under the Paris Agreement).
>
> 84 Direct emissions of GHGs (Scope 1) for the operational phase are predicted to be 6 million tonnes of carbon dioxide equivalent ($MtCO_2e$) per year. …
>
> 85 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.
>
> …
>
> 89 A supplementary UKEF assessment has been prepared, providing broader considerations of climate change risks associated with the Project."

The CCR

73. I have recounted some of the discussions and steps that contributed to the formulation of the CCR above. The exact process by which the CCR reached its final form is not known. Its purpose was to summarise the climate change matters considered by UKEF. Because of its length, its importance as an element in the decision-making process and the attention devoted to it by the parties, I annex it in full. It will be necessary to address aspects of the CCR in more detail when considering the Grounds on which these proceedings are brought and the parties' submissions. For present purposes, I merely introduce the structure of the CCR to assist anyone who has to read it or this judgment to find their way around more easily.

74. The CCR is divided into four main sections, of which the first ("Mozambique LNG - Summary": see page 5ff) is intended to provide a summary of the sections that follow. The second main section ("Mozambique LNG – Impacts and Emissions": see page 12ff) is sub-divided into three sections, namely (A) Host Country (page 12 ff), (B) The Project (page 15ff) and (C) International Impact (page 27ff). The section on The Project is itself sub-divided into subsections on (i) Alternative Analyses, (ii) GHG Emissions, (iii) Planning, Management and Mitigation, and (iv) Resource Efficiency and Pollution Prevention. The third main section is "Mozambique LNG – Climate-Related Factors Affecting Credit Risk" (see page 33ff); and the fourth is "Mozambique LNG – Other Financial Entities" (see page 41ff).

75. Each main section, section and subsection includes one or more headings in the form of questions. Thus, for example, question 1 under "Mozambique LNG – Impacts and Emissions/Host Country" is "What are the host country's strategies, commitments and plans on climate change?" Question 10 under "The Project/Resource Efficiency and Pollution Prevention" is "Does the Project contribute to fossil fuel transition/GHG

emissions reduction at a country level? If so how? In the process of answering this question consider whether the project *displaces renewable energy potential or low carbon solutions *adversely affects the country's transition to lower emissions *contributes to fossil fuel lock-in/increasing reliance on fossil fuel." Questions 13 and 14 under "International Impact" are "13. What are the estimated Scope 3 GHG emissions of this project?" and "14. Does the Project contribute to fossil fuel transition/GHG emissions reduction at an international level? If so how? In the process of answering this question consider whether the project: *displaces renewable energy potential or low carbon solutions *adversely affects the country's transition to lower emissions *it is compatible with the Paris Agreement i.e. to reduce emissions well below 2 °C with effort to limit to 1.5 °C *contributes to fossil fuel lock in/increasing reliance on fossil fuel."

76. The most important sections for the purposes of these proceedings are the Summary and the section on "International Impact", which includes the main references to and discussion of Scope 3 emissions. Those (and all other) sections should, of course, be read in the context provided by the CCR as a whole.

77. At this stage, I paraphrase or set out aspects of the Summary, as follows:

i) The CCR proceeds on the basis that the Project comprises two trains, that being the scope of the development for which UKEF was contemplating providing support;

ii) Summarising the "Host Country" section, it refers to Mozambique's particular vulnerability to climate change and to its NDC (to which I have referred at [39]-[40] above);

iii) Summarising the "GHG Emissions" subsection, it says that the Scope 1 and 2 emissions could account for approximately 6-10% of Mozambique's national GHG emissions and that analysis by WM notes that, from a Scope 1 and 2 emissions perspective, the Project compares favourably with a representative selection of other LNG projects in terms of carbon intensity;

iv) Summarising the "Resource Efficiency and Pollution Prevention" subsection, it says:

> "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, but it should be recognised that the same financial incentives do not exist to attract such investment into the renewables sector, and it is unlikely that Mozambique will attract significant international investment into the renewables sector without first being in receipt of financial resources from investment into sectors such as natural gas. Mozambique needs investment from the international community to develop its energy resources, including renewable sources and its currently limited electricity distribution network. 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."

and

> "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."

v) Summarising the section on "International Impact", it says:

> "The majority of Scope 3 GHG emissions relate to international emissions. A high-level qualitative assessment indicates that the potential Scope 3 emissions from the use of the Project's exported LNG will be very high and will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities, as well as exceeding 25,000 tonnes CO_{2e} per year (the threshold set by the IFC for determining whether GHG emissions are considered 'significant'). However, whether the Project leads to a net reduction or increase in global GHG emissions[6], 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).
>
> It cannot be stated with certainty whether or not the Project will contribute to fossil fuel transition 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 an unavoidable consequence of the Project's offtaking arrangements and could not be resolved with further analysis or due diligence. 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.

[6] Net Reference 1

> 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.[7]"

vi) The Conclusion of the Summary states:

> "The Project's Scope 1 and Scope 2 emissions (from the Project Facility) will significantly increase Mozambique's GHG emissions i.e. account for up to 10% of Mozambique's national GHG emissions but will on the other hand provide the country with increased financial resources with which to invest in renewable technology and improve climate resilience. …
>
> The Project's Scope 3 emissions are caused by the end use of the LNG. Scope 3 emissions will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities and will also exceed 25,000 tonnes CO_{2e} a year (the threshold set by the IFC for determining whether emissions are considered 'significant'). However, as per IEA projections, UKEF agrees with the view that gas is a transition fuel, which will remain part of the global energy mix over the life of the proposed tenor of UKEF support and beyond, and that LNG will therefore remain commercially viable. … Globally, long-term gas demand is predicted by Wood Mackenzie to more than double from 2017 to 2040. It is therefore UKEF's view that although the Project's Scope 3 (along with its Scope 1 and 2) emissions will contribute to global GHG emissions the net effect may be a decrease in future GHG emissions provided that the Project LNG is used to replace and/or displace the use of more polluting fossil fuels.[8]
>
> Gas from the Project is also considered by the Government of Mozambique to be an important contributor to the energy transition of Mozambique in line with its NDC and its Paris Agreement commitments. 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. The Paris Agreement also recognises that the global peaking of greenhouse gases will take longer for developing countries such as Mozambique (Article 4.1) and the Project sits within Mozambique's longer-term climate change plans to establish strong social and economic stability.
>
> In addition to the role of gas as a transition fuel generally, the Project will produce lower emissions ($kgCO_{2e}$/mmbtu) than

[7] Net Reduction 2
[8] Net Reference 3

> other LNG projects, and is also well placed on the cost curve compared to other sources of LNG. For these reasons UKEF does not anticipate that the Project will become a stranded asset. …"

78. ERiCC met again on 29 May 2020, at which meeting both the ESHR report and the CCR were presented with a request for final approval of those reports and all other project information previously presented to ERiCC. The minutes of the meeting include:

> "5. BG stated that the climate change analysis identified that although this 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 the international standards (i.e. the IFC Environmental and Social Performance Standards and relevant World Bank Group / IFC Environmental, Health, and Safety sector guidelines).
>
> …
>
> 13. ERiCC stated that based on previous detailed presentations and discussions on project structure, credit metrics, demand & supply, stress testing, and today's comprehensive discussions on the ESG and Climate Change factors, this deal is now formally approved."

79. On 1 June 2020 Mr Taylor provided UKEF's submission on the Project to the First Defendant and to the Minister of State for Exports recommending that he, as UKEF's Chief Executive, should use his delegated authority to underwrite the transaction, allowing UKEF to support the Project Facility. The submission was accompanied by information papers including the ESHR report, the CCR and the papers that had previously been submitted to ERiCC. Given concerns raised by (ministerial) colleagues, the submission recommended that the ministers "may wish to pay particular attention to the [CCR]." The timing was said to be urgent and the submission recorded that, as of 29 May 2020, the ECAs of the USA, Italy, South Africa, Japan and Thailand as well as the AfDB had received final approvals for their total debt commitment to the Project of over USD12 billion.

80. The Submission set out the range of considerations taken into account by UKEF. In briefest outline, these included:

i) Export wins for the UK and contracts to be secured: the submission referred to USD360m with an additional USD370m of UK Content in further contracts to be awarded. The businesses behind these contracts were in Scotland and Northern England with some 2,000 jobs supported by UKEF's participation;

ii) The impact on Mozambique's economy: the Project is said to be transformational for Mozambique, a country progressively emerging from debt

distress, and would substantially increase Mozambique's GDP. The Project was supported by (a) AfDB, (b) the World Bank, which had provided an exemption for the Project from the country's Non-Concessional Borrowing Limit stating that LNG is "expected to be a transformational catalyst for Mozambique's economic growth and fiscal revenues", (c) the IMF, which expressed the view that the LNG sector including the Project "could lift millions of people out of poverty" and that it would "also help reduce green-house gases, although zero-emission fuels will ultimately be needed in the fight against climate change", (d) HM High Commissioner in Maputo, who regarded the Project as of "transformational importance" to the Government of Mozambique and pointed to the significant diminishing of UK leverage and influence if UKEF pulled out at this late stage. The submission pointed to the potential for Project funds to be used for other development priorities including developing the nation's renewable energy potential and as set out in its energy planning policy commitments;

iii) Wider Department of International Trade/HM Trade Commissioner for Africa views: the DIT sector team regarded the Project as "nation-changing" for Mozambique. The gas used for Mozambique would provide capital for investment into growing other sectors including renewables projects and the development of other industries and infrastructure that would be enabled by the revenues of the LNG exports. HM Trade Commissioner was strongly in favour of the project, regarding it as "hugely important to the future economic growth of Mozambique. "If we withdraw, the project will anyway proceed, we shall just lose the opportunity for the UK export and supply chain." LNG could be regarded as a transition fuel and "this is a major part of our strategy to wean South Africa off coal consumption.";

iv) World Bank support: it was said that the Project "fits the World Bank's rationale for continuing to support upstream gas projects in exceptional circumstances";

v) Climate change: see below;

vi) Financial benefits to the Exchequer: including but not limited to a £185m support fee;

vii) Export Credit Agency (ECA) approval of the Project: with details of the proposed structure and US EXIM involvement;

viii) Risks and impacts of the decision: if UKEF supported the Project there would be a substantial positive impact on the UK export and supply chain. Many contracts remained to be awarded. There would however be significant attention and scrutiny from the NGO community. If UKEF did not support the Project, a significant amount of UK contracting, and potentially associated jobs would be lost. There would be reputational damage in international export financing circles which may be expected to extend beyond the hydrocarbons sector. And a decision not to support would in essence be setting government policy in relation to its support to the sector, a decision that should be made by ministers and not civil servants.

81. Under the heading "Climate Change and Environmental and Social Due Diligence", after referring to the ESHR report, the submission said:

> "37. 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.
>
> 38. 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.
>
> 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 (BEIS, 2019) 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 (BEIS, 2019).
>
> 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."

82. Drawing the submission together, Mr Taylor summarised his decision to support the Project as follows:

> "56. In reaching my decision that I recommend the use of my delegated authority to underwrite this transaction, I have taken into account the following key considerations:
>
> a. the strong export case for maintaining and securing further UK contracts through the existence of a UKEF facility in fulfilment of UKEF's statutory purpose.
>
> b. the positive risk advice I have received from UKEF's Enterprise Risk and Credit Committee (ERiCC), following extensive due diligence into a highly complex project financing in a developing market;
>
> c. [redacted]
>
> 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;
>
> 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;
>
> f. government policy in the round relating to support for overseas upstream oil and gas projects;
>
> g. the overwhelming support of the IMF and the Multilateral Development Banks (MDBs), such as the World Bank, and AfDB who are lending into the Project for its strong developmental potential in Mozambique; and
>
> h. the substantial developmental benefits to Mozambique of this project in providing future economic, security and social development including providing the potential to lift millions out of poverty."

83. On 4 June 2020, HM Treasury provided advice to the Chancellor, noting that it was highly contentious because of being a fossil fuel project. The emphasis of the submission was different from the submission to the Secretary of State, reflecting the different priorities and interests of the Treasury. It therefore highlighted the potential for increasing or reducing UK Content and income in the event of proceeding or not. It also included a section on the implications for wider policy positions, noting the work that was being done in this policy area and that "a decision not to offer support for this project could pre-emptively change the Government's policy without consideration of the wider impacts of doing so." It also noted that "as the project will proceed with or without UK involvement, a decision not to offer support would have no impact on global emissions."

84. Climate change considerations were specifically mentioned as follows:

> "6. UKEF has assessed the climate change risks of this project and prepared a climate change report as part of its consideration of the project, in line with post-Heathrow judgement requirements. UKEF notes that:
>
> a. Government policy is currently to provide support for fossil fuel projects, except for new support for thermal coal projects as announced by the PM at the Africa Investment Summit in January.
>
> b. Gas is a transition fuel and the International Energy Agency (IEA) suggests that gas will remain part of the global energy mix beyond 2040.
>
> c. The DIT sector team notes that the transformation of Mozambique's economy through this project will provide capital for investment into other sectors such as renewables, where DIT assesses Mozambique has strong potential.
>
> d. There is potential for LNG generated through the project to displace heavier carbon fuels, particularly in China, India and Indonesia based on signed Sales Purchase Agreements to date.
>
> e. The project is expected to proceed regardless of UK involvement, with confirmed support from the African Development Bank and the Export Credit Agencies (ECAs) of the USA, Italy, South Africa, Japan and Thailand. The Dutch ECA is also involved and has submitted a request for decision to its Ministers."

85. The last section of the submission is entitled "Legal Risk" and is heavily redacted. But the following remains visible:

> "13. The Government announced that it would cease support for thermal coal at the Africa Investment Summit in January, but no such announcement has been made in relation to LNG. 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.
>
> b. The project fits the World Bank's rationale for continuing to support upstream gas projects in exceptional circumstances,

> c. The project would have a substantial positive impact on the UK export and supply chain,
>
> d. DFID SoS has written to you confirming the project meets the OECD Sustainable Lending Principles,
>
> e. The project is consistent with HMG policy relating to support for overseas upstream oil and gas projects,
>
> f. The substantial developmental benefits to Mozambique."

86. It may immediately be noted that paragraph 13(a) appears to muddle the ESHR report and the CCR, since it was the ESHR report which addressed the question of compliance with relevant international standards.

Ministerial Discussions and decisions

87. On 5 June 2020, the then Foreign Secretary, the Rt Hon Dominic Raab MP, declined to support the Project on climate change grounds. While recognising that there would be economic benefits, he agreed with concerns raised by the Secretary of State for International Development about the Project's climate change impacts and said that "[t]he reputational risk to the UK ahead of hosting COP26 next year are considerable, not least the risk that we are seen as supporting the increased use of fossil fuels while encouraging others to move away from such investment." The Secretary of State for International Development, the Rt Hon Anne-Marie Trevelyan MP, had written on 1 April 2020 expressing strong reservations about the Project's climate impact and expressing the view that, in the light of the UK's very high domestic ambitions around achieving net-zero, 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.

88. On 10 June 2020 the Secretary of State confirmed that she was happy to approve UKEF supporting the Project and that UKEF could proceed. On 12 June 2020 the Chancellor confirmed that he was content to provide Treasury consent for the transaction to proceed.

89. The evidence of Mr Taylor, which appears to be supported by the contemporaneous documents, is that there were discussions between UKEF and No. 10 because of the opposing ministerial views on the Project. The opposition of the Secretary of State for Business, the Rt Hon Alok Sharma MP, was indicated via an email on 18 June 2020, which said that his view "is that it does not seem credible to support this proposal, given the UK's COP26 Presidency, and the Prime Minister's announcement at last year's UK-Africa Investment Summit to end UK support for thermal coal mining or coal power plants overseas, which would end direct Official Development Assistance, investment and export credit. Overall [his] view is that it is necessary to review UKEF's policy on fossil fuel investments." The email requested that it should be communicated to No. 10 colleagues involved in the decision, as appropriate.

90. In the light of these continuing discussions and disagreements, Mr Taylor provided a formal submission to the Prime Minister on 18 June 2020. In it he identified that agreeing support would represent a "status quo" policy decision, whereas declining

would effectively set a new policy for domestic and international oil and gas support, with implications across government ahead of a full understanding of those implications; whereas agreeing support risked NGO backlash and reputational issues in the run up to COP26. The submission included the following passage:

> "17. 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. 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 (some at UKEF's requirement). 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. 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 the project. "

91. By an email on 26 June 2020, the Private Secretary (Foreign Affairs) to the Prime Minister confirmed that the Prime Minister had reviewed the details of UKEF support for the LNG project in Mozambique and was content for it to proceed. The email continued by saying that, "as part of this he would like DFID and BEIS to pull together a proposal on CCUS[9] to offset the emissions generated through this project." By a later email sent on 29 June 2020 the Private Secretary confirmed that approval to proceed had been given and that the request for a proposal on CCUS was a separate request: in other words, that the approval was not contingent or dependent upon the provision of the proposal on CCUS.

92. There followed a period of intense activity which had two related strands. The first led to an advice to the Prime Minister on CCUS on 30 June 2020, in the course of which Scope 1 and 2 emissions were estimated and it was said that Scope 3 emissions "are not known but would be significantly higher." The advice concluded that the range of options to reduce/offset the full Scope 1 and 2 emissions for the project would cost USD1.5bn-11bn and to reduce/offset the full Scope 3 emissions would cost between USD3.22bn-24.18bn. The second was that, in the course of preparation of the advice to the Prime Minister, the absence of any quantification of Scope 3 emissions was raised. Mr Julian Critchlow, who was then Director General, Energy Transformation and Clean Growth at BEIS said in an email on 29 June 2020 that, in his opinion, the absence of estimates of Scope 3 emissions in the CCR undermined its credibility. This seems to have provoked an exercise to obtain production figures for MZLNG and apply the appropriate conversion factor (based on the carbon content of LNG) so as to obtain the maximum Scope 3 emissions. With maximum effort by those concerned and a high degree of simplification, a figure of 322mt was arrived at as the overall production range figure and a figure of 805.75 $MtCO_2$ over 25 years was arrived at as an overall emissions figure "range" for Scope 3 emissions. The exercise and resulting figures

[9] Carbon Capture, Utilisation and Storage

were expressly recognised to be "a very simplified approach and should only be considered a very rough estimate of the potential Scope 3 emissions."[10] The figures were then used, albeit heavily caveated and described as "indicative", for the purposes of the advice to the Prime Minister, where they formed the basis for the costing of reducing/offsetting Scope 3 emissions to which I have referred above. They were also incorporated in the underwriting documents that were approved and signed by Mr Taylor in making his formal decision under challenge.

93. Mr Taylor's evidence is that he was cautious about placing any reliance upon the last minute Scope 3 emissions figures and that they only substantiated the existing qualitative conclusion of the CCR that the Project's Scope 3 emissions would significantly exceed the Project's Scope 1 and Scope 2 emissions. Consideration of the estimates therefore did not change his views from those set out in the submissions of 1 June 2020 and 18 June 2020, which were based on the CCR.

Outline of applicable principles

The correct approach to judicial review

94. The starting point is axiomatic. As Green LJ said in *Heathrow Airport Limited v HM Treasury* [2021] EWCA Civ 783, [2021] STC 1203 at [135]:

> "The default position in an ordinary public law case is that if in the exercise of a power or discretion a decision maker commits an error of law which is material then the court has power to set aside the decision and remit the issue to be retaken, this time applying the law correctly."

95. The correct approach to judicial review has been stated and re-stated in many authorities in terms that may vary though the substance does not. One such statement was provided by the Court of Appeal in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, [2019] 1 WLR 5765 as follows:

> "53 The essential principles of law which govern the approach which the court should take to a claim for judicial review of this kind are not in dispute. In view of the importance of the issues, however, it is appropriate that we should state some fundamental principles at this stage.
>
> 54. The first point which deserves emphasis is that this is a claim for judicial review. As the Divisional Court (comprising Singh LJ and Carr J) put it in *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 Admin, at paragraph [326]:

[10] A spreadsheet of emissions compiled on 30 June 2020 included an entry in the line "Volume to offset ($MtCO_2$)" under the heading "Scope 1, 2 and 3 emissions" of 322-806. The relationship (if any) between those figures and the figures of 322mt for production and 805.75 $MtCO_2$ for Scope 3 emissions was not explored during the hearing.

> "…judicial review is an important mechanism for the maintenance of the rule of law. It serves to correct unlawful conduct on the part of public authorities. However, judicial review is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and, in a democratic society, must be a matter for the elected government alone. … Judicial review is not, and should not be regarded as, politics by another means."

55. Secondly, and equally importantly, "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself": see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, at paragraph [42] (Lord Bingham of Cornhill).

56. In this appeal, therefore, we are not concerned with the merits of the position taken by the Secretary of State in applying criterion 2c. Different people in society may or may not approve of the sale of arms to Saudi Arabia. They may nor may not share the Secretary of State's view about the assessment of risk required by criterion 2c. It is simply not the function of the court to adjudicate on those underlying merits. If, however, the Secretary of State has erred as a matter of law in the approach taken to the assessment of those merits, it is the role of the court to say so.

57. Thirdly, the principal error of law which it is alleged was committed by the Secretary of State in the present case is that he acted irrationally in the process which he adopted in order to make the assessment required by criterion 2c. … . What is important for present purposes, and in particular in addressing Ground 1 in the appeal, is that the only legal error which is alleged to have been committed is founded on the public law doctrine of irrationality. This sets a deliberately high threshold. The court is not entitled to interfere with the process adopted by the Secretary of State merely because it may consider that a different process would have been preferable. What must be shown by CAAT is that the process which was adopted by the Secretary of State was one which was not reasonably open to him."

96. Three principles have been the subject of more detailed submissions before us. First, what is the appropriate scope of enquiry when a decision maker decides to take something into account in the course of the decision-making process? Second, should the Court entertain submissions and decide questions of interpretation of the Paris Agreement? Third, and related to the second, is the Foreign Act of State doctrine relevant or applicable to the facts of this case?

The duty to carry out sufficient enquiry

97. A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the *Tameside* duty since the principle derives from Lord Diplock's speech in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 at 696, [1977] AC 1014 at 1065, where he said: "[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?".

98. In *R (Balajigari) v Home Secretary* [2019] EWCA Civ 673, [2019] 1 WLR 4647, at [70] the Court of Appeal endorsed the following summary of principles derived from the judgment of the Divisional Court in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261

> "First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it. "

99. Subject only to the irrationality test, and in the absence of any statutory requirements, the question of which considerations should be taken into account and what enquiries should be made in relation to them is for the decision-maker and is context specific: see *R (Refugee Action) v SSHD* [2014] EWHC 1033 at [121] per Popplewell J. As the Divisional Court made clear at [139] of *Plantagenet Alliance*:

> "The test for a Tameside duty is one of rationality, not of process. The Tameside test can be formulated as follows: Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same? … In short, the

> Tameside information must be of such importance, or centrality, that its absence renders the decision irrational."

100. The standard of review that the court may be willing to carry out, and the scope of any possible margin of appreciation that should be afforded to a decision-maker has recently been the subject of review by another division of this court in *R (Spurrier) v Transport Secretary* [2019] EWHC 1070 (Admin), [2020] PTSR 240 [141] ff. Of particular relevance to the present proceedings are [149]-[156], [176]-[179] and [434] which I respectfully endorse and adopt. Without derogating from the statements of principle that are there set out, I highlight the following points:

    i) There is a spectrum of levels of review that the court will consider it appropriate to employ, with cases involving issues that depend essentially on political judgment being at the end that calls for a lower intensity of review: see *Spurrier* at [149]-[150];

    ii) A given decision may involve balancing a number of different public interests, all of which contribute to the overall public interest. Inevitably, policy-making or policy application in such areas involves striking a balance in which all factors are assessed and weighed: see *Spurrier* at [152];

    iii) Where a decision involves "scientific, technical and predictive assessments" an enhanced margin of appreciation should be afforded to the decision maker: see *Spurrier* at [176]-[179] citing *R (Mott) v Environment Agency* [2016] EWCA Civ 564, [2016] 1 WLR 4338;

    iv) Where there is no explicit legal or policy requirement to give consideration to a matter, decisions on the inclusion or non-inclusion of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the decision-making authority which can only be challenged on grounds of irrationality: see *Spurrier* at [434].

101. I did not understand FoE to dispute these principles; but it submitted that any margin of appreciation must be assessed in the context of the Defendants' *Tameside* duty. I am not persuaded that these two aspects can be hermetically sealed in the way that FoE suggests. To my mind, the nature of the decision that must ultimately be taken will affect the implementation of a decision-maker's *Tameside* duty and the level of scrutiny that the court will consider appropriate; and the factors that tend to suggest a lower degree of scrutiny by the court will also be relevant to any assessment of the decision-maker's *Tameside* duty. Thus, for example, where a decision involves a high degree of policy judgment, it may be permissible for the decision maker to adopt a less rigorously technical approach to an individual feature that bears consideration as one feature amongst many than would be the case if that feature were to be the only material feature or the sole determinant for the decision. In the same way, where a decision maker decides that a particular feature or consideration is not to be determinative (which decision may only be vitiated on irrationality grounds), it may be permissible to adopt a less technically rigorous approach to that feature than would be the case if it were necessarily or potentially determinative of the outcome of the decision.

102. The Defendants contend that UKEF should be afforded an enhanced margin of appreciation in its decision making in the present case. They submit that their decision was taken within the context of a statutory framework which accorded them significant discretion; that it involved balancing a number of public interest factors at a high, strategic level; and that UKEF's assessment of climate change impact, which was but one of those public interest factors, was inherently predictive, requiring an exercise of judgment as to what might happen having regard to scientific and technical material including the advice of independent consultants.

103. In my judgment UKEF was entitled to a significant margin of appreciation on the facts of the present case. It was conducting an exercise of assessing climate change in the context of a long-term foreign project. It was the first UK Government Department to do so. At the time there was no established or internationally recognised methodology for evaluating the climate change impacts of a project like the one under scrutiny as one amongst many policy-laden public interest features contributing to a governmental decision. Consideration of climate change required an evaluation as to what might happen in the future made by reference to scientific or technical material. It is undoubtedly a highly complex technical area. It required expertise that UKEF did not have inhouse and on which it sought external assistance and advice. It required predictive assessments that are made more complicated by the ratchet mechanism of the Paris Agreement since, by definition, current understanding, commitments and assumptions are expected to change. There is no single prescribed or recognised way in which climate change and consistency with the Paris Agreement should be assessed by governmental decision-makers in such circumstances. As a result, UKEF was engaged in a novel exercise of governmental assessment for decision-making. Furthermore, it is plain that UKEF was operating in an area where there is room for reasonable experts to disagree: it is not the role of a court in judicial review proceedings to resolve conflicts in expert evidence.

104. In a complex predictive and multi-factorial exercise UKEF must be allowed a margin of appreciation in the inquiries it chooses to make and the materials it chooses to commission. Nonetheless there are obviously limits. In his witness evidence Mr Taylor explained that there were practical limitations on how far UKEF could drive the climate change assessment. UKEF's statutory purpose is to support trade. It is not a research organisation with commensurate resources to create the pedagogy of possible approaches to considering climate change impacts or to develop cutting edge analysis which had not previously existed for use in these circumstances. Whilst that may all be so, the Court in *Balajigari* recognised that the duty on a decision maker to inform himself so as to arrive at a rational conclusion may in practice require him to consult outside bodies with a particular knowledge or involvement in the case.

105. Although not addressed in *Balajigari*, it is implicit that there will be occasions when decisions are made on less than full or perfect information, either by choice or necessity. Where that is so, the fundamental question will be whether the deficiencies in available information mean that no rational decision can be made at all or, alternatively, whether the decision maker was justified in going ahead on the information that was available. The present case is a case in point. FoE submits that it was irrational to take the decision to support the Project because of the information that the decision-makers did not have (e.g. a quantified assessment of the Project's Scope 3 emissions and their likely impact on international and global carbon budgets). It is therefore necessary to consider not

merely whether the decision taken was rational on the information that was available but, as a prior question, whether application of the principles summarised in *Balajigari* and the Defendants' *Tameside* duty meant that they could not properly take a decision at all. Here again, in my judgment, the court should exercise both appreciation and restraint when assessing whether governmental decision-makers were justified in proceeding on the basis of the information that was, for whatever reasons, available to them, since the decision to proceed is likely (as in the present case) to be driven by factors involving the balancing of multiple public interests in assessment of the overall public interest. In doing so the Court should once again remind itself that it is no part of its function to assess the merits of the decision to proceed: the court is concerned only with questions of legality.

Interpreting the Paris Agreement

106. The question whether and, if so, how the Court should go about interpreting an international treaty such as the Paris Agreement flows from and reflects the principle of dualism, which holds that international law and domestic law are regarded as separate legal systems, operating on different planes. In the present case, FoE submits that the Decision was incompatible with the terms of the Paris Agreement. The Defendants accept that the question of incompatibility is justiciable; but they say that the test to be applied is whether the view they took is "tenable". It is necessary to re-trace the emergence of the "tenability test" to put the arguments into context. This has recently been done by the Court of Appeal in the *Heathrow v HM Treasury Case* at [138]-[182], which makes it possible to shorten the present exercise.

107. The starting point was identified by Green LJ in the *Heathrow v HM Treasury Case* at [138]:

> "The case law, …, describes two principles or propositions which delineate (a) the area where the royal prerogative to conclude international treaties and agreements operates and, as a general rule, is non-justiciable and (b) the limits of that non-justiciability. The first principle is that the exercise of the royal prerogative to conclude international treaties and agreements is non-justiciable, as a general rule, whilst it operates in the international law sphere only. The second principle (which is a corollary of the first) is that if the international law measure descends from the international plane and becomes embedded or assumes a foothold into domestic law then the Courts acquire the right and duty of supervision."

108. In *R (Corner House Research and another) v Director of the SFO* [2008] UKHL 60, [2009] 1 AC 756 at [65]-[69] Lord Brown (with whom Lord Rodger agreed), acknowledged that there are occasions when the court will decide questions as to the state's obligations under unincorporated international law (of which *R (Launder) v SSHD* [1997] 1 WLR 839 and *R (Kebilene) v DPP* [2000] 2 AC 326 are two) but described this as "generally undesirable." He identified features that may make it undesirable for the court to decide such questions. They included where the contracting parties to a convention or treaty have chosen not to provide for the resolution of disputed questions of construction by an international court but by a mechanism designed to achieve consensus, where a national court assuming the role of determining

the question may have damaging consequences for the state in its own attempts to influence the emerging consensus: see [65]. He identified "a marked distinction between seeking to apply established Convention jurisprudence to the particular case before the court … and determining, in the absence of any jurisprudence whatever on the point, a deep and difficult question of construction of profound importance to the whole working of the Convention.": see [66]. And he expressed the opinion that "[i]t simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue.": see [67]. He then cited with approval a passage from an article by Philip Sales QC and Joanne Clement (124 LQR 388, July 2008) where they said

> "Adoption of a "tenable view" approach would be a way - under circumstances where the proper interpretation of international law is uncertain, the domestic courts have no authority under international law to resolve the issue and the executive has responsibility within the domestic legal order for management of the United Kingdom's international affairs (including the adoption of positions to promote particular outcomes on doubtful points of international law) - to allow space to the executive to seek to press for legal interpretations on the international plane to favour the United Kingdom's national interest, while also providing a degree of judicial control to ensure that the positions adopted are not beyond what is reasonable."

On the facts of *Corner House*, Lord Brown said that the "tenable view" approach was the furthest the court should go.

109. The "tenable view" approach was adopted by Lloyd Jones J in *R (ICO Satellite Limited) v The Office of Communications* [2010] EWHC 2010 (Admin), which concerned the scope and effect of the regime established by the International Telecommunications Union ("the ITU"). Widely different views were held and there was a live dispute "as to the rights and duties of the 191 national administrations which participate in the ITU regime." Moreover, there was provision in the ITU regime for dispute resolution. The Judge said at [94]:

> "However, that apart, it would not be appropriate for this court to embark on such an undertaking for the policy reasons given by Lord Bingham and Lord Brown in *Corner House*. This court is not in an appropriate position to determine the issue for all those subject to the ITU scheme. Given the dispute between the parties as to the effect of the ITU regime, it would not be appropriate for this court to go beyond the "tenable view" approach in examining the point of international law in question."

110. A different emphasis was introduced by the judgment of Lord Sumption (with whom the other members of the Supreme Court agreed) at [35]-[36] of *Benkharbouche v Embassy of Sudan* [2017] UKSC 62, [2019] AC 777. While recognising that there are circumstances in which a "tenable" view of international obligations is the correct test, Lord Sumption declined to endorse any general rule to that effect because "if it is

necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer." The circumstances in which Lord Sumption recognised that a "tenable view" approach may be appropriate included where the court may in principle be reluctant to decide contentious issues of international law if that would impede the executive conduct of foreign relations; or where the issue was the rationality of a public authority's view on a difficult question of international law: see [35].

111. In the *Heathrow Airport v HM Treasury* case, which concerned the scope and effect of the General Agreement on Tariffs and Trade 1994, the Court of Appeal reviewed these authorities (with the exception of *Benkharbouche*). At [180] Green LJ identified features that pointed to the applicability of the "tenable view" test in *Corner House* and *ICO Satellite*:

> "Measures of international law will range from the broad and largely political or aspirational through to the rigidly prescriptive. A court must take account of these differences and adjust its approach accordingly. In the domestic cases where tenability has been in issue the international law rule or measure in dispute has been towards the softer end of the spectrum. In *Corner House* the articles of the unincorporated treaty were vague and broad brush. They were expressions of high principle not detailed rules. They had a distinctly political ring about them. It is hard to see how any court asked to rule upon whether the decision maker had acted in compliance with such principles could have construed and applied them with save a broad reasonableness brush. The Court (Lloyd Jones J, as he then was) applied the tenability test in ICO: … . The Judge focused upon the measures in issue and because of their nature was unable to express a concluded view; he limited himself to applying a test of reasonable tenability. On the facts it is, once again, hard to see how the Judge could have done otherwise."

112. At [181] Green LJ distinguished C*orner House* and *ICO Satellite* from the *Heathrow Airport Case*:

> "[Counsel for HMRC] supported her argument by saying that there was no case law exactly on point, this being a factor which was considered relevant in *Corner House* and which goes to the intrinsic ability of a court to adjudicate upon the rule or measure. This is true only to the very limited extent that there is no directly comparable case on VAT exemption schemes. But there is multiple case law on the application of the GATT to indirect taxation and on every argument that was raised before the court and the court bundles were awash with copies of authorities and literature on such issues, including: what is meant by a 'charge' or 'rules' in art I:1; what is meant by 'matters' in art III:2 and whether it applies to internal taxes; what is meant by a 'like' product; what is meant by 'discrimination' or 'advantage, favour, privilege or immunity', etc. In truth this case turns upon the application of some fairly basic principles to essentially agreed facts. This is far removed from the situation envisaged by Lord Brown in para [66] of *Corner House* …

> where the court was being asked to swim in a jurisprudential void and answer '… in the absence of any jurisprudence whatever on the point, a deep and difficult question of construction of profound importance …'."

On the facts of the *Heathrow Airport* case, the Court held that it was both possible and appropriate to rule on what was "a clear-cut question of law upon which there is extensive jurisprudence."

113. In *Elliott-Smith v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (Admin) the Claimant contended that the Defendant had failed to have regard to the imperatives of the Paris Agreement:

> "The claimant contends that the Paris Agreement requires, by virtue of articles 2 and 4, that alongside limiting global temperature increases to 1.5℃ above pre-industrial levels the participating states should reach global peak emissions and start to reduce them as soon as possible. Thus, it is contended that the Paris Agreement includes as an important component of its provisions a requirement to take urgent action, and that in the present case the defendant focused simply upon the longer term and achieving net zero, not the need for short term urgency in limiting greenhouse gas emissions."

114. Having referred to *Corner House* and *ICO Satellite* and having recorded that it was common ground that the Paris Agreement was a material consideration and that it was taken into account, Dove J said at [55]:

> "In my view it is not for this court to resolve definitively any questions of construction in relation to an unincorporated international treaty for the reasons set out in the earlier authorities. The Paris Agreement is an international instrument to which 197 states are parties. It contains a mechanism for enforcing the implementation of the Agreement within article 14 of its text, along with other mechanisms for dispute resolution. There are, therefore, strong policy reasons as well as practical considerations which clearly militate against the court embarking on an exercise of construing the terms of the Paris Agreement. At most, in accordance with the approach set out in the authorities set out above, the court should assess whether or not the defendants' view of the Paris Agreement was one which was tenable in examining the question posed by the claimant."

115. In *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) at [215]-[216], Holgate J adopted a similar approach. After referring to *Corner House* he continued:

> "The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable." This approach allows for the possibility that, so far as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable."

> The issue is simply whether the decision-maker has adopted an interpretation falling within that range."

116. None of this derogates from the primary rule of interpretation that applies once an international treaty is given effect by an English Statute. Where that happens, the position is as summarised by Lord Sumption in *Al-Malki v Reyes* [2017] UKSC 61, [2019] AC 35 at [10]-[11]:

> "10. It is not disputed that, so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. That is especially the case where the statute gives effect not just to the substance of the treaty but to the text: … .
>
> 11. The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969): "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 principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for interpreting the parties' intentions."

117. Referring to the Convention text in issue in *Al-Malki*, Lord Sumption said at [12]:

> "(1) Like other multilateral treaties, the text was the result of an intensely deliberative process in which the language of successive drafts was minutely reviewed and debated, and if necessary amended. The text is the only thing that all of the many states party to the Convention can be said to have agreed. The scope for inexactness of language is limited.
>
> (2) The Convention must, in order to work, be capable of applying uniformly to all states. The more loosely a multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. A domestic court should not therefore depart from the natural meaning of the Convention unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them."

118. I would add that although the intensely deliberative process means that the scope for inexactness of language is limited, it may also mean that individual provisions are expressed in ways that are either inherently difficult to interpret as giving rise to clearly ascertainable or binding obligations or that different provisions are in tension with each other, even to the extent of appearing irreconcilable.

119. A number of strands emerge from these authorities:

i) First, there is no general rule that a national court shall never determine a question of interpretation of an unincorporated international treaty;

ii) That said, a national court should be cautious about trespassing into the separate plane and legal system of international law where it has no authority to decide questions of interpretation and where its intervention may be positively unhelpful for the mechanisms that are in place for resolving disputes, whether by seeking to achieve consensus in the international sphere or by reference of disputes to another court or forum;

iii) The approach to interpretation is that mandated by the Vienna Convention;

iv) The Court should adjust its approach by reference to where in the spectrum from the broad and largely political or aspirational, or statements of high principle, to the rigidly precise and prescriptive the provisions in question lie. Where the provisions lie towards the broad, political or aspirational (described in the *Heathrow v HM Treasury* case as "the softer end of the spectrum"), "tenability" is likely to be the appropriate approach for the court to take. For the same underlying reasons, "tenability" is likely to be the appropriate course for the court to take where the articles of an unincorporated treaty are "vague and broad brush" as in *Corner House*;

v) The absence of established jurisprudence tends to support a "tenable view" approach rather than a national court purporting to reach a hard-edged and exclusive meaning;

vi) Despite the need for caution, there may be circumstances where it is necessary for the national court to decide a point of international law and appropriate for it to do so because there is an ascertainable answer. In such cases, the "tenability" approach may be displaced.

120. Applying these principles to the Defendants' understanding of the provisions of the Paris Agreement I am in no doubt that the "tenable view" approach is appropriate, for a number of related reasons.

121. First, the relevant language of the Paris Agreement is towards the aspirational and high-level political end of the spectrum. Thus Article 2(1) records that it is "enhancing the implementation of" the UNFCCC and that it "aims" to strengthen the global response to the threat of climate change. Articles 2(1)(a)-(c) are not statements of exclusive or exhaustive obligations ("including by") and must be read "in the context of sustainable development and efforts to eradicate poverty". Furthermore, to the extent that they may appear to be hard-edged, the edge is further softened by Article 2(2), which provides that the 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." It is immediately clear that the implementation (and, therefore, meaning) has degrees of latitude and flexibility built in that militate against hard-edged interpretations. This flexibility of approach can be seen again in Article 4, which records that the "aim" of reaching global peaking of GHG emissions "as soon as possible", and also recognises that peaking will take longer (the duration being

undefined) for developing countries. Once again, the Article introduces the qualifying context "of sustainable development and efforts to eradicate poverty." A further degree of flexibility of obligation is introduced by the "ratchet" mechanism under Article 4(3). It means that the parties' present positions and commitments are not fixed and will change. This involves a tacit acceptance that both science and the global response to climate change is expected to change with time. While not of itself irreconcilable with the fixing of present obligations, this provides further context for any interpretation of the Agreement.

122. Second, different stated aims or steps under the Paris Agreement are in tension, if not in frank opposition to one another. This is a point to which I will return when considering FoE's grounds, but a single example is sufficient illustration for present purposes. It is FoE's case that the Paris Agreement prohibits the financing by developing countries of any project that increases GHG emissions, because it offends against Article 2(1)(c); and that "new oil and gas production is not consistent with the Paris goals …". (Taken to the most extreme end, this submission implies that financing any project that causes GHG emissions is prohibited, though in reply FoE accepted that a net increase in emissions could be lawful provided that net zero is ultimately achieved.) Yet the development of Mozambique's LNG by the Project is integral and essential to its attempts to eradicate poverty for millions of its citizens. The tension between these two objectives suggests that it is too simple to assert that a course of action is contrary to the Paris Agreement because it goes against one or more principles established by the Agreement while satisfying one or more others. It supports the view that the Agreement is not to be treated as if it were a prescriptive road map that can be followed slavishly to a certain outcome. This is not a criticism of the Agreement: it is a reflection of the intensely deliberative negotiating process to which I have referred and to the fact that the Paris Agreement is what the parties were willing and able to agree – nothing more, nothing less.

123. Third, although we were taken to cases from other jurisdictions that have considered the Paris Agreement, there is no established jurisprudence reflecting a consensus or authoritative view of the interpretation to be given to specific relevant provisions. Specifically, there is no established jurisprudence on the meaning to be given to Article 2(1)(c), which forms a central pillar of FoE's case. This is despite (or, possibly, because of) the provisions of Articles 14, 15 and 24 of the Agreement which provide mechanisms for dispute resolution and to facilitate implementation of and promote compliance with its provisions.

124. Fourth, it bears repeating that this Court is not authorised to decide questions so as to bind the near-200 sovereign parties to the Paris Agreement. FoE submitted that a decision of this Court providing a firm interpretation of individual provisions of the Agreement would be of interest to other parties. If there is any substance in this submission at all, I am confident that it can be overstated. It is not of itself a good reason to adopt an approach to interpretation or the Defendants' views that would not otherwise be justified.

The foreign act of state doctrine

125. The existence of the doctrine is not in doubt, even if its contours are not yet fully defined. Whether it has relevance in the present case is contentious because FoE assert

that they do not criticise the present or future actions of Mozambique. We are concerned, if at all, with "the third rule."

126. A convenient starting place is the Judgment of Lord Neuberger in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964. At [123] he said:

> "The third rule has more than one component, but each component involves 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 rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; "Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory": per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237. Nissan was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in *Mohammed (Serdar) v Ministry of Defence; Rahmatullah v Ministry of Defence* [2017] AC 649, 787, but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule 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. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels: see *Shergill v Khaira* [2015] AC 359, paras 40, 42."

127. The principles underpinning the doctrine had previously been explained by the Court of Appeal in *R (Khan) v Foreign Secretary* [2014] EWCA Civ 24, [2014] 1 WLR 872. The claimant alleged that the defendant had passed information to the authorities of the United States who had used it to guide drone strikes in Pakistan, one of which had killed the claimant's father in circumstances that, the claimant alleged, were unlawful and amounted to murder. At [25] the Court said:

> "It is common ground that our court will not decide whether the drone strikes committed by US officials are lawful. Moses LJ stated the principle correctly in his judgment [2012] EWHC 3728 (Admin) at [14]-[15]:
>
> > "14. It is necessary to explain why the courts would not even consider, let alone resolve, the question of the legality of United States' drone strikes. The principle was expressed by Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* (1897) 168US 25, 252: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own

> territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves"… .
>
> "15. The principle that the courts will not sit in judgment on the sovereign acts of a foreign state includes a prohibition against adjudication on the "legality, validity or acceptability of such acts, either under domestic law or international law": … . The rationale for this principle, is, in part, founded on the proposition that the attitude and approach of one country to the acts and conduct of another is a matter of high policy, crucially connected to the conduct of the relations between the two sovereign powers. To examine and sit in judgment on the conduct of another state would imperil relations between the states: … ."

128. In *Belhaj*, Lord Sumption identified two main considerations underlying the doctrine at [225]:

> "There is, first and foremost, what is commonly called "comity" but I would prefer to call an awareness that the courts of the United Kingdom are an organ of the United Kingdom. In the eyes of other states, the United Kingdom is a unitary body. International law, as Lord Hoffmann observed in *R v Lyons* [2003] 1AC 976 at para 40, "does not normally take account of the internal distribution of powers within a state." Like any other organ of the United Kingdom, the courts must respect the sovereignty and autonomy of other states. This marks the adoption by the common law of the same policy which underlies the doctrine of state immunity. Secondly, the act of state doctrine is influenced by the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive. This is why the court does not conduct its own examination of the sovereign status of a foreign state or government but treats the Secretary of State's certificate as conclusive: … ."

129. In *Re Al M* [2020] EWHC 2883 (Fam) the Court analysed the judgments in *Belhaj* and provided the following summary of principles, which I endorse and adopt:

> "(a) Although the rule applies to acts which fall to be judged "on the plane of international law", it is not itself a rule of international law. It is an artefact of the common law: see Lord Neuberger at [150].
>
> (b) The rule is based on "judicial self-restraint" or abstention: see Lord Mance at [11(iv)], Lord Neuberger at [146] and [150]. It prevents the determination of issues which it would be inappropriate for the courts of the United Kingdom to resolve: Lord Neuberger [123] and [144].

> (c) The rule can in principle extend to acts taking place or having effects outside the territory of the foreign state concerned: Lord Mance at [11(iii)]; Lord Neuberger at [146]; Lord Sumption at [237]. However, even the government appellants did not contend that the rule applied to acts done or having effects in the UK … and Lord Sumption accepted at [237] that it was arguable that the doctrine did not apply to such acts.
>
> (d) Likewise, the rule can in principle extend to unilateral acts. However, the acts to which the rule applies will "almost always" be ones involving more than one state and will "normally" involve "some sort of comparatively formal, relatively high-level arrangement", but these are not hard-edged requirements for the application of the rule: Lord Neuberger at [147].
>
> (e) A paradigm instance of the application of the rule is the case where there are "no judicial or manageable standards" by which the domestic court can resolve the issue or where "the court would be in a judicial no-man's land": Lord Wilberforce in *Buttes Gas*, cited by Lord Mance at [44] in a passage referred to by Lord Neuberger at [150].
>
> (f) In considering whether the rule prevents it from examining a particular issue, the court will have regard to the extent to which fundamental rights and access to justice are engaged by the issue: Lord Mance at [11(iv)]; Lord Neuberger at [144]."

130. For present purposes it is sufficient to note that the involvement of a foreign state does not automatically prevent the domestic courts of England and Wales from deciding issues of foreign law. This is apparent from the judgments in *Belhaj*, and from the observation of the Court of Appeal in *The Law Debenture Trust Corpn plc v Ukraine* [2018] EWCA Civ 2026, [2019] QB 1121 at [163] that "the domestic courts in England and Wales are quite often prepared to rule on issues of international law, which are implicated by some relevant plea of domestic law." The question will be whether there is a relevant "foothold" in domestic law in relation to the issue.

The parties' submissions

131. FoE's case on Grounds 1(a) and 1(b) are closely interlinked, both as pleaded and as presented in their written and oral submissions for the hearing.

FoE's case as pleaded in the Amended Statement of Fact and Grounds

132. Under Ground 1(b) FoE's case is that, in order to determine whether providing UK public finance for the Project was consistent with the UK's obligations under the Paris Agreement (that being the ultimate question asked by Ground 1(a)), the Defendants should have considered whether funding of the Project:

    i) Was consistent with the long-term temperature goals of the Paris Agreement, including the 1.5°C goal taking into account (a) the requirement that emissions peak as soon as possible and that net zero is achieved by 2050, (b) the best

available science on the emissions gap and the production gap, and (c) the fact that 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, which widens the production gap over time;

ii) Was compatible with the UK's obligation to make finance flows consistent with a pathway towards low GHG emissions and climate-resilient development and/or to provide financial resources to assist Mozambique, as a developing country, with respect to both mitigation and adaptation under the Convention and enabling Mozambique to achieve a speedier reduction in its emissions than would otherwise be possible.

133. In support of this case, FoE asserts that a Climate Change Risk assessment for a Category A project should address the question: "What are the current and anticipated climate risks (transition and/or physical as defined by the Task Force on Climate Related Financial Disclosure Recommendations 2017 Recommendations ("TCFD")) of the Project's Operations?" and needed to assess transition risks and physical risks, including Scope 3 emissions if possible. This is alleged to provide the relevant context for assessing the Defendants' *Tameside* duty to ask questions and secure relevant information; and FoE's case is that the Defendants failed to address those questions *at all*.

134. Specifically, FoE's case is that:

i) No regard was had to the global Emissions Gap and Production Gap as addressed by the UNEP report;

ii) No regard at all was had to the Scope 3 emissions of the project. FoE alleges that UKEF evidently accepted that these emissions were relevant but "failed to take them into account because it was unable to obtain them from the client." It is evident from this allegation and elsewhere that FoE's contention is that the Defendants were obliged to obtain and take into account quantified estimations of Scope 3 emissions. FoE's case is that the Defendants' failure to do so "fatally undermines the decision";

iii) No proper assessment of lock-in/transition risk was carried out. FoE alleges that the Defendants adopted a "finger in the air" approach without any attempt to quantify risks; and it criticises the conclusion in the CCR that "it appears more likely than not that, over its operational life, the gas from the Project will at least replace some and/or displace some more polluting fuels, with a consequence of some net reduction in emissions." FoE's case is that the Project raises significant risks of "lock in";

iv) No regard was had to the UK's obligations in relation to finance flows under Articles 2(1), 4(5) and 9 of the Paris Agreement;

v) The Defendants failed to consider the risk of stranded assets, at least to the extent that no metrics or parameters were considered as required by the TFCD Report.

135. The failures alleged under Ground 1(b) feed FoE's case on Ground 1(a), the central thrust of which is that funding the Project is not in alignment with the UK's obligations

under the Paris Agreement and that therefore the Defendant's belief that it was in alignment was based upon a material error of fact or law. FoE asserts three respects in which funding the Project is not consistent with the United Kingdom's obligations under the Paris Agreement, namely:

i) "Achieving a Paris Agreement pathway to low GHG emissions, either in Mozambique or globally";

ii) "Making finance flows consistent with a pathway towards low GHG emissions and climate resilient development, involving rapid reduction in emissions, including by providing financial resources to assist developing country Parties with mitigation and adaptation in continuation of their existing obligations under … Articles 2(1)(c), 4(5) and 9 of the Paris Agreement";

iii) "The obligation to assist developing countries to meet their commitments under the Paris Agreement".

136. Under the first of these headings, FoE points to the production and emissions gaps highlighted by the UNEP Report (see [28] above) and submits that the MZLNG will be additional to existing fossil fuel energy production. Its case is that, in order to assess the climate impacts of the Project having regard to the Paris Agreement and other authoritative statements, UKEF should have assessed the Project's Scope 1, 2 and 3 emissions against the remaining global regional and national budgets: self-evidently, this would require quantified estimation of all emissions and remaining global, regional and national carbon budgets. Had that been done, it is FoE's case that "any application for support for the Project should have been refused, since it is clear that emissions resulting from the Project will consume 0.85% of the total global emissions budget post 2024, which is not compatible with even the 2°C goal set by the Paris Agreement." This aspect of FoE's case is neatly summarised as follows: "[UKEF's] task is to decide whether its funding will result in GHG emissions and, if so, the acceptability of those emissions and the likely impacts on the climate system, the environment and people. It cannot avoid that task by speculating about possible (albeit wholly uncertain) reductions elsewhere."

137. FoE alleges that UKEF committed a "fundamental error" in assessing the Scope 1 emissions that would be generated by two trains rather than six, ten or even fourteen. On a proper approach, it is alleged that the Project "will result in an increase in Mozambique's (Scope 1) emissions equivalent to its entire NDC pledge, requiring Mozambique to double its mitigation to meet its NDC." FoE's expert describes the doubling of Mozambique's mitigation as "doubly ambitious if not heroic."

138. Under the second of the three headings, FoE highlights the observation in the CCR that "renewable energy offers by far a more environmentally sustainable pathway". It points to UKEF's understanding that the Project would take place irrespective of whether the United Kingdom provided support for it; that it would be preferable for Mozambique to develop its significant renewable resources; but that Mozambique needed to develop its LNG production so as to fund its development of renewables. Its case is that:

> "In that context, the Decision to provide UK public finance of $1.15bn to the Project was plainly contrary to its obligations under Articles 2(1)(c), 4(5) and 9 of the [Paris Agreement]. A compatible

> approach would have been for UKEF to provide the funding to UK businesses/investors in order to assist Mozambique with its development of renewables and, specifically, the achievement of its strategy as set out in its INDC, its National Climate Change Adaptation and Mitigation Strategy 2012 (NCCAMS"), its Strategy for New and Renewable Energy Development (2011) and its National Biomass Strategy, to which the CCR refers, as well as Mozambique's broader obligations under the Paris Agreement. It does not appear, however, that the Defendants even assessed the possibility of proceeding in that way, including the potentially much greater benefits for British jobs."

139. Under the third of the three headings, FoE alleges that it was incumbent on UKEF to have regard to the likely contribution of any project it supports to the NDCs of that country. FoE alleges that UKEF either failed to carry out any such analysis or failed to carry it out properly, relying upon its expert evidence that includes: "onsite emissions from the Project are so high as to more than double Mozambique's current national CO_2 output. The project must therefore be incompatible with Mozambique's INDC of reducing its GHG output by approximately 10% over the current decade" and "while the emissions associated with this project look set to jeopardise delivery of Mozambique's NDC, they completely undermine any chance of holding to a national budget aligned with the Paris 1.5°C to 2°C commitments." FoE's case is that support for the Project by UKEF does not align with Mozambique's commitments under the Paris Agreement. In other words, it is FoE's case that the Project is incompatible with Mozambique's commitments and obligations under the Paris Agreement and therefore should not be supported by UKEF.

140. In addition to the three headings set out above, FoE alleges that Scope 3 emissions from the Project should have been factored into the UKEF reporting of emissions from the Project and that the implications of all emissions from the Project for the UK's domestic emissions reductions should have been considered, because of the global impact of emissions, wherever occurring. It is not clear whether this is now pursued as a separate ground of challenge.

141. Finally, FoE dismisses UKEF's justifications for supporting the Project as irrational: "the only reasonable way for UKEF to align its funding policy with the Paris Agreement … would be for it to refuse the funding for this Project, leaving it with the option of using the same money to support the development of renewables in Mozambique."

FoE's case as presented at the hearing

142. The Amended Statement of Facts and Grounds was served on 9 November 2020. As at that date, the Defendants' disclosure of material documents was by no means complete. Specifically, the WM final report was disclosed to FoE on 25 June 2021; and documents showing the responses of Dr Caldecott and EGAC were disclosed on 10 September 2021. I mention this not in order to reignite past debates about the rights and wrongs of the disclosure that was given from time to time, but as context for the shifts in FoE's position between that set out in the Amended Statement of Facts and Grounds and the case as presented at the hearing. Although I identify those shifts in position below, that does not mean or imply criticism of FoE.

143. FoE's case on Ground 1(a) was largely unchanged at the hearing. It was summarised in their Skeleton Argument as being that:

> "the Project is not consistent with the low emissions pathway and climate resilient development and further, it makes it impossible in reality for Mozambique to meet its climate commitments under the PA. Accordingly, the Decision is contrary to the UK's obligations in relation to finance under the PA, as well as its obligation to assist Mozambique, as a developing country Party (and a particularly vulnerable one) not only to meet its climate change commitments but to increase them."

At this point I merely note that this formulation reiterates the allegation that the Project is incompatible with Mozambique's ability to meet its climate change commitments, let alone to increase them.

144. FoE submits that the ordinary meaning of Articles 2(1)(c), 3, 4(1)-(3) and (5) and 9(1), (3) and (4) is that the United Kingdom is obliged to ensure that all its flows of public finance are consistent with "a low emissions pathway and sustainable development" and that its obligation is to provide support to developing countries such as Mozambique for the implementation of their Article 4 obligations, which include aiming to reach global peaking of GHG emissions as soon as possible and undertaking rapid reductions thereafter in accordance with best available science by adopting nationally determined contributions that will be subject to "ratcheting" in accordance with Article 4(3); and that the United Kingdom has a separate obligation under Article 9 to provide financial resources to assist developing countries such as Mozambique with respect to both mitigation and adaptation in continuation of their existing obligations by progressive mobilization of climate finance beyond previous efforts.

145. Expanding on the summary of Ground 1(a) that I have set out above, FoE submits that a low emissions pathway is one that enables the temperature of 1.5°C (and well below 2°C) to be met. In oral submissions FoE submitted that projects should only be funded if they would reduce the aggregate global emissions level that would otherwise obtain. (In reply, FoE accepted that a net increase in emissions could be lawful provided that net zero is ultimately achieved, this appearing to involve an acceptance at least that peaking will take longer for developing countries.) It submits that any consideration of pathways was done by reference to a 2°C increase and that therefore any consideration of compliance was vitiated by assessing against the wrong benchmark. Second, it submits that the CCR's conclusions only took into account a demand perspective – namely that in 2040 over 50% of the world's energy demand will still be met by oil and gas and that energy demand will increase notwithstanding the necessary falls in emissions in the next 30 years. Third, it submits that fossil fuel production (even without the Project LNG) was already well in excess of the levels that had to be achieved in order to limit global temperature increases to either 1.5°C or 2°C. Fourth, it submits that there was no sound basis for an assumption that MZLNG emissions might replace other emissions and that the CCR failed to take into account that MZLNG might in some circumstances displace lower emitting energy sources such as renewables and nuclear.

146. The second limb of FoE's submissions on Ground 1(a) is that finance for the project will not assist Mozambique to meet its current NDC: it will make it impossible to do

so. It will also not assist Mozambique to "ratchet" its commitments in future. FoE relies upon its case that the correct number of trains is at least six. It contrasts observations in the CCR that the country's emissions will have "a significant impact" and that renewables would "offer a more sustainable pathway for Mozambique's domestic energy needs and to meet the aims of the Paris Agreement" with UKEF's conclusion that the Project was "still in alignment with Mozambique's stated policies and by extension their [Paris Agreement] commitments". It contests UKEF's assessment that the Project would generate increased domestic income that could contribute to the means available to enable Mozambique's adaptation and mitigation strategies and its proposed reduction in its domestic GHG emissions by pointing to the fact that the effect of the Project will be to increase both domestic and foreign emissions; and it submits that the Project will cause lock in that has not been taken into account by the Defendants.

147. As presented in the skeleton argument, Ground 1(b) has undergone a degree of change. It is now summarised as being:

> "[T]he first Defendant reached its conclusion that the Project and its financing were compatible with the UK and Mozambique's obligations under the PA on the basis of a wholly peremptory analysis, which:
>
> > a. considered a non-PA consistent pathway (2°C rather than a 1.5°C) and concluded, without basis, that the Project would result in global emissions reductions, such as to meet the low emissions pathway.
> >
> > b. failed to consider the most basic elements essential for an assessment of compatibility with the low emissions pathway, including failing even to [quantify] the Greenhouse Gases ("GHGs") that will be produced from the LNG (Scope 3 emissions), failing to consider all emissions (Scopes 1-3) against the relevant low emission pathway, such as those set out by the IPCC in its 2018 Special Report … and failed to have regard to the UNEP Production Gap Report … over the Project's 32 year lifespan: … .
>
> Internal documents show that the first Defendant was aware of these failings and inadequacies but took the view that there was insufficient time available to remedy them by seeking appropriate outside expertise: … ."

148. FoE submits that the questions whether (support for) the Project was consistent with the UK and Mozambique's obligations under the Paris Agreement "could not be answered without quantification, consideration and analysis of (a) the quantity of GHG emissions that would be generated by the LNG from the Project over its lifetime (scope 3 emissions); (b) the quantity of scope 1 and 2 emissions, including methane, having regard to the planned or reasonably foreseeable number of production trains over the lifetime of the Project; (c) those Scope 1, 2 and 3 emissions, including methane, considered against PA low emissions pathways to 1.5°C, as provided in the IPCC SR15 Report and having regard to the UNEP Emissions and Production Gap Reports."

149. Expanding on this summary, FoE submits that:

i) The Defendants did not quantify or even estimate the Scope 3 emissions. This was recognised at the time by Dr Caldecott as "a big gap in the analysis". Instead the Defendants concluded that there was too much uncertainty for Scope 3 emissions to be estimated. In fact, it is submitted, there are well-established methods for calculating Scope 3 emissions, including the GHG Protocol methodology. In response to the Defendants' assertion that UKEF was not obliged to quantify and consider cumulative emissions or Scope 3 emissions, FoE submits that it is impossible to ascertain climate impacts of a Project without having an estimate of the quantities of GHG that will be emitted as a consequence.

ii) The Defendants did not assess climate impacts by reference to carbon budgets and pathways aligned with the Paris Agreement and did not assess the UNEP Gap Report. That required consideration of the totality of emissions from the Project against the remaining, available carbon budgets having regard to the relevant timescales for their use and the UNEP Production and Emissions Gap Reports;

iii) The Defendants did not instruct WM to consider relevant issues and, as a result, WM did not do so and looked at a 2°C pathway;

iv) Without necessary support from WM and without any justification UKEF concluded in the CCR that the LNG from the Project would result in reduced global emissions. In addition to submitting that there was no basis in evidence or fact for this conclusion, FoE submits that "climate impacts must be assessed by reference to the absolute amount of emissions that the relevant Project involves not by reference to some possibility that the Project may have the result of displacing other emissions";

v) The Defendants' assessment of Scope 1 and 2 emissions was fundamentally flawed because it was done on the basis of 2 trains rather than at least 6. FoE submits that they were obliged to take into account likely future expansion of the project over its 30 year lifespan;

vi) The Defendants failed properly to consider lock-in or transition risk, which may be defined as "the tendency for certain carbon-intensive technological systems to persist over time, "locking out" lower-carbon alternatives, owing to a combination of linked technical, economic, and institutional factors."

vii) The Defendants failed properly to consider a real risk of stranded assets. FoE's case is that this must be done on the basis of quantified assessments of risk.

150. In opening its case on Scope 3 emissions, and as a central feature of its argument, FoE maintained the submission outlined at [149(iv)] above: namely, that the Defendants had concluded that the Project would lead to an overall reduction in GHG emissions. For the reasons I set out below, and as confirmed by the Defendants at the commencement of Day 2 of the hearing, this submission was factually incorrect

The Defendants' pleaded case

151. The Defendants take issue with FoE's "hard-edged" approach to interpretation of the Paris Agreement, it being their case that it is not framed in terms that admit of interpretation and application by domestic legal authorities or, to the extent that they are, that the test when considering the approach adopted by the Defendants is "tenability". They also take the point that compliance with the Paris Agreement (however that be determined) was not at any stage either before or at the time of the decision a decisive or determining criterion for their decision. Rather, climate change impacts and the Paris Agreement were considerations that ought to be taken into account alongside other factors in reaching their decision. They challenge the notion that the Paris Agreement requires any contracting Party to meet any specific emission reduction level or to take any particular action to reduce emissions. On the Defendants' case, the Paris Agreement imposes no enforceable obligation on individual states to implement its goals in any particular way; and they contend that FoE's assertion that supporting the Project is not "in alignment" with the UK's Paris Agreement commitments are merits arguments.

152. The Defendants' case on their conclusions on consistency with the Paris Agreement are set out at [75] of their Detailed Grounds as follows:

> "75.1. UKEF concluded, in essence, that the Project would have a significant impact in climate change terms due to increased GHG emissions, but also that it would contribute to the overall global energy mix for the transition to a low carbon future and that there was scope for the Project to replace or displace more polluting hydrocarbon sources (such as oil and coal in countries like China, India and Indonesia), which would result in lower net emissions than using these energy sources. Using gas instead of coal, for example, reduces emissions by around half when producing electricity and by around one-third when providing heat. UKEF concluded that LNG was fundamental to enabling the energy transition without massive disruption and whilst maintaining energy security (a view supported by the International Energy Agency, among others).
>
> 75.2. UKEF considered the international climate change impacts associated with the Project and undertook a high-level qualitative assessment of Scope 3 emissions. UKEF went as far as it considered appropriate given the uncertainty associated with the Project's LNG off-taking arrangements. UKEF took the view that the remaining uncertainty could not be resolved with further analysis or due diligence.
>
> 75.3. UKEF concluded that it was more likely than not that, over its operational life, the Project would at least result in some displacement of more polluting fuels, with a consequence of some reduction in GHG emissions. On the basis that the Project LNG would replace or displace the use of more polluting fossil fuels – as was judged most likely – it was concluded that the net effect would be a decrease in future GHG emissions.

75.4. UKEF concluded that the Government of Mozambique considered the Project to be an important contributor to the country's energy transition, in line with its NDC, and part of the country's climate change plans. UKEF noted that the Project would have a significant impact on the country's emissions but considered that it was in alignment with Mozambique's stated climate policies and therefore its PA commitments.

75.5. UKEF concluded that Mozambique needed financial resources to support the country's climate resilience and that the financial outputs of the Project would act as a catalyst towards enabling its climate change plans to be fulfilled, including by allowing investment in its electricity distribution network and in the renewables sector. UKEF concluded that the Project was in overall alignment with Mozambique's stated climate change policies.

75.6. UKEF concluded that providing support in relation to the Project would align with the UK Government's commitment to support developing countries to respond to the challenges and opportunities of climate change, as part of the UK's own PA commitment.

75.7. UKEF took the view that the Project would contribute to the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, recognising Mozambique's national circumstances. UKEF concluded that Mozambique considered the Project to be in line with its NDC and its PA commitments. The NDC would be part of a progression over time and recognising the position of Mozambique as a developing country where peaking will take longer. The Project would foster climate resilience and increase Mozambique's ability to adapt to the adverse impacts of climate change. Judged in context, the Project would represent lower GHG emissions development than was the case with coal and oil and existing gas production.

75.8. UKEF concluded that providing export finance in connection with the Project would support Mozambique to respond to climate change as part of its PA commitments and would be consistent with a pathway towards low GHG emissions and climate-resilient development.

75.9. These judgements were in line with the broadly-cast aims and goals of the PA, as set out for example in Articles 2, 3 and 4. This was enough to allow UKEF rationally to conclude that the Project, and UKEF's support in relation to it, was broadly consistent with the PA.

75.10. Prior to its decision to grant consent, HM Treasury was provided with and considered UKEF's ESHR due diligence review report and climate change report.

153. In their Detailed Grounds of Resistance, the Defendants address FoE's main allegations under Ground 1(a), in summary, as follows:

i) Pathway towards low GHG emissions: there was no legal duty upon the Defendants to assess all GHG emissions associated with the Project (including Scope 3) quantitatively or against the remaining global regional and national budgets. No basis for such a legal duty has been identified. The Defendants' case is that it was sufficient that UKEF had regard to GHG emissions, including Scope 3 emissions, to the extent it considered appropriate. There being no single prescribed way in which climate change and compatibility with the Paris Agreement must be considered, it was for UKEF to decide how to consider those matters and how far to go in doing so. Nor was it a fundamental error to proceed on the basis of 2 trains. That was the scope and the size of the Project which UKEF was proposing to support. There was no policy or other legal requirement that obliged UKEF to proceed on the basis of more than 2 trains even if it would, in other circumstances, be either mandated or recommended. Separately the Defendants' case is that there is no requirement for individual decision-makers to decide whether their support will result in GHG emissions; but in any event, it is clear that the Defendants' decision does *not* result in GHG emissions as the Project is already underway and will go ahead regardless of UKEF's support;

ii) Finance flows - pathway towards low GHG emissions and climate resilient development: the Defendants reject the suggestion that the only acceptable approach would be for UKEF not to support the project but to fund the development of renewables for two reasons. First, providing support for the Project does not prevent UKEF from providing support for renewables projects. Since there was no proposed renewable project it cannot be said that support for a renewable project was prevented by the support for the Project. Second, UKEF expressly considered whether the decision was consistent with a pathway towards low GHG emissions and concluded that it was. There was no arguable error of law in that conclusion;

iii) Assisting developing countries to meet their commitments under the Paris Agreement: the Defendants' case is that UKEF was not under any obligation to police whether a project which has been consented to by another contracting party is in compliance with that contracting party's NDC. That is a matter for the host country (in this case Mozambique) and it is inappropriate for either the Defendants or FoE to assert non-compliance. In any event, the Defendants made an assessment (that the Project was in Mozambique's long-term interests) which cannot be shown to be wrong where the Paris Agreement does not impose a ban on a project that generates emissions or on funding such a project;

iv) Compliance with the UK's own commitments under the Paris Agreement: the Defendants' case is that this is an impermissible merits challenge which demonstrates no error of law. UKEF looked at the impact of emissions both at the host country level and at the international level and formed a judgment that is not shown to be irrational;

v) Justification for funding the Project: the Defendants again challenge FoE's contention that the only reasonable way for UKEF's support to be aligned with its obligations under the Paris Agreement was to use its money to support the

development of renewables in Mozambique, for the reasons outlined above. The Defendants' case is that it was not irrational to reach the conclusions on climate change and the Paris Agreement that it did.

154. Turning to Ground 1(b), the Defendants' pleaded case as set out in its Detailed Grounds has two central features. First, it contends that the scope of the enquiry that should be undertaken, and the factors that should be taken into account in decision making were matters for UKEF as decision maker to decide, subject only to irrationality limits. Second, most of the matters relied upon by FoE were in fact considered by the Defendants; to the extent that they were not, on the facts of the case, so obviously material that it would be irrational not to take them into account. I understand this limb of the Defendants' argument to be that any matters that they did not take into account were not, on the facts of the case, so obviously material *to the decision that was to be taken*, that it would be irrational not to take them into account.

155. More specifically, it is the Defendants' case that:

i) There was nothing about the UNEP Emissions Gap and Production Gap Reports that made them mandatory considerations for UKEF when taking this particular decision; and, in any event, it is plain from the CCR that the Defendants were aware of and took into account the central message of the reports, namely that more needed to be done to decarbonise and to bridge the emissions gap;

ii) There was no policy or other legal requirement to consider emissions quantitatively and it was not irrational to consider Scope 3 emissions as UKEF did;

iii) Lock in, transition risks and stranded asset risk were all considered and the consideration and conclusions were not irrational.

The Defendants' case as presented at the hearing

156. The Defendants maintain their pleaded position, namely that the Paris Agreement contains broad objectives rather than hard-edged prohibitions. Specifically, the Defendants do not accept that the Paris Agreement means or implies a prohibition on the provision of export finance in relation to any project which may increase global GHG emissions. They submit that such an interpretation is inconsistent with the drafting of the Paris Agreement as a whole, not least because of its recognition that emissions from developing countries may peak later and because of the competing demands to eradicate poverty and ensuring resilience of under-developed countries in the face of adverse climate change impacts.

157. The Defendants' primary position is that it was rational for them to conclude that supporting the Project (and the Project itself) was "in alignment" with Mozambique's NDC, based on the policy and actions there listed or to which reference is made and having regard to the specific circumstances facing Mozambique. In addition, the Defendants invoke the Foreign Act of State doctrine in relation to FoE's submission that supporting the Project will make it impossible for Mozambique to meet its commitments as expressed in its current NDC or any future "ratcheting" NDCs.

158. The Defendants challenge the submission that they were obliged to quantify Scope 3 emissions on the basis that there was no policy or other legal obligation to do so. Similarly, they submit that FoE has not identified any basis for an obligation requiring the Defendants to benchmark Scope 3 emissions against either national or global carbon budgets. They submit that assessing Scope 1 and 2 emissions by reference to two trains was justified because UKEF (and the CCR) had set out to consider the Project, meaning the development defined in the financing agreements in relation to which UKEF was proposing to provide export finance: and the Project as defined was a two-train Project.

The submissions of the Interested Parties

159. The submissions of the Interested Parties largely make common cause with the Defendants. They include a detailed review of differences in approach adopted by the experts engaged by FoE, not in order to persuade the Court to enter the "forbidden territory of adjudicating between the competing but rational views of experts" but to demonstrate that, contrary to FoE's submissions, there is no universally acknowledged and accepted approach to certain key features of the case, the most notable being the quantification of Scope 3 emissions.

160. Other themes developed by the Interested Parties' submissions are that:

i) FoE's citations from and consideration of the Paris Agreement (which it characterises as "a statement of political intent") are partial, most notably in failing to acknowledge the features of (a) common but differentiated responsibilities, (b) respective capabilities, (c) different national circumstances, and (d) the compelling need for a country such as Mozambique to eradicate poverty;

ii) FoE's real objection is to the Project, with the logical consequence of their submissions being that no less developed country may develop is fossil-fuel natural resources;

iii) FoE fails to acknowledge the transformative benefits of the Project for Mozambique. Fighting poverty is, for Mozambique, entirely in line with its obligations under the Paris Agreement;

iv) It is not for FoE or for the Court to rule on whether the development of the Project is or is not compatible with Mozambique's obligations under the Paris Agreement.

Discussion

161. The main point underpinning FoE's case, both for Ground 1(a) and for Ground 1(b) is that the CCR was inadequate to such an extent that the Defendants' decision was vitiated by a failure to have proper regard to the climate change impacts of the Project; most importantly it is that the CCR was inadequate because it did not adequately address (and quantify) the GHG emissions that would be generated by the Project during its development and operation. It must be recognised at the outset that the Defendant's decision did not itself cause or affect those climate change impacts, since development of the Project was already under way and it would happen whether UKEF supported it or not. I leave on one side the expressed hope that the United Kingdom's

participation would enable it to exercise influence by embedding improved environmental and other standards and the fear that its influence would be reduced if it did not participate: see [57] and [80(ii)] above. While these hopes and fears were material considerations in relation to the overall public good, they were not and were not treated as being sufficiently certain as to influence the estimation of future global emissions.

162. In order to assess the validity of FoE's central case it is necessary to identify (a) UKEF's purpose in preparing the CCR, (b) how the CCR developed, (c) what the CCR said, and (d) the use to which it was put.

UKEF's purpose in preparing the CCR

163. The context for the decision to prepare what became the CCR was the prior decision by UKEF that climate change impacts and consideration of the Paris Agreement were considerations that should be taken into account alongside other factors in making its decision for the Project. No legal or policy obligation to consider them has been identified and there is no reason to reject the Defendants' evidence that UKEF was breaking new ground as a department in deciding to take them into account. It did so at a time when the giving of such support was consistent with government policy but it was known that (a) cross-governmental consideration was being given to the development of policy for the future and (b) there was some significant ministerial opposition to any support for fossil fuel projects, particularly in the run up to COP26. This provided an added layer of political decision-making complexity, which was recognised by Mr Taylor in his submission to the Secretary of State (see [80(viii)] above), in paras 6(a) and 13 of the Treasury's advice to the Chancellor (see [84] and [85] above), and in Mr Taylor's submission to the Prime Minister (see [90] above).

164. The CCR's limitations were apparent on the face of the document and reflected its origins and development. First, WM's scope of work was limited: they did not attempt to quantify emissions, instead providing advice on whether there was scope for MZLNG to displace more polluting fuels. Second, the scope of the CCR was constrained as evidenced by the factors discussed with EGAC and Dr Caldecott: see [60]-[68] above. It is therefore apparent that UKEF in general and Mr Taylor in particular was fully aware of the limitations of the CCR.

165. Additional context is provided by UKEF's statutory purpose - to ensure that no viable UK export fails for lack of finance or insurance from the private sector - and the fact that, on any view, there were multiple public interests to be taken into account in determining whether or not to support the Project. In addition to the policy position to which I have just referred, it is sufficient to mention two other public interests here: first, the prospect of generating in excess of £1bn-worth of UK Content contracts, specifically for hard-pressed industry in Scotland and the North of England; and second, the prospect of lifting millions out of poverty. Further context for the CCR was provided by the fact that the CCR was one document and source of information amongst a number considered by decision-makers that, in combination, addressed a wide range of issues and interests.

166. Although FoE's challenge has concentrated almost exclusively on matters relating to climate change, the existence of these multiple high-level political policy considerations provides strong support for Mr Taylor's evidence, which I would accept,

that the decision to be taken by UKEF was "multi-faceted, based on promoting significant UK economic benefits in line with UKEF's statutory purpose and mission"; and that it required "a range of judgments to be made across a wide spectrum of policy areas involving questions of political policy, economic and scientific judgment." The existence of the range of judgments to which he refers lends internal coherence to his assertion that, while UKEF took steps to be informed on matters relating to climate change and the Paris Agreement, consistency with the Paris Agreement was not a requirement or pre-requisite for a decision by UKEF to support the project. This assertion is also supported by the manner in which the CCR was developed and by UKEF's understanding during its development and use of the CCR in the decision making process as appears from the contemporaneous documents, to which I will refer in greater detail below.

167. Viewed overall, I consider it plain that the purpose of the CCR was to provide information to UKEF on one non-determinative factor amongst a number of others. There is no sign that climate change was given the pre-eminent importance that FoE would advocate either generally or in the context of these proceedings.

How the CCR developed

168. It is apparent that UKEF had no precedent for the level of information that it should seek or the form of what became the CCR. The document developed substantially both in form and content between V2 (which is the earliest version of which the court has knowledge) and the final version.

169. The genesis of the CCR, which shaped its ultimate approach, lay at least partially in the instructions to and advice from WM. While I can accept that it would be a relatively simple calculation to estimate the carbon content of a given quantity of MZLNG, such a calculation would be of limited value in any attempt to assess the impact of the Project either quantitatively or qualitatively. First, although the Project's production capacity could be estimated, the amount of LNG that would be used would be uncertain, being dependant on a number of uncertain variables. Those variables included whether and to what extent there was free headroom in potential users' carbon budgets over time, it being the case that Scope 3 emissions from MZLNG would fall overwhelmingly to be accounted for in other countries' carbon budgets and responsibilities. This uncertainty was reflected in the fact that the forward contracts for the sale of MZLNG were on a take-or-pay basis and allowed buyers a wide degree of flexibility, as was explained in the April 2020 UKEF Risk Group paper for ERiCC. It could not, therefore, be assumed, that all or any particular proportion of the Project's capacity would be used or how its use would be spread over time. Second, even if an estimate of the quantity that would be used could be made, another variable that went directly to impact was the feature identified by WM, namely that it could not be known either what use would be made of MZLNG or to what extent its use would be simply incremental (i.e. in additional to what would be used if the Project had not happened) or would displace more or less carbon-intensive fuels. If and to the extent that the LNG displaced more carbon-intensive fuels, it would lead to a reduction in aggregate global emissions; if and to the extent that it displaced less carbon-intensive fuels, it would lead to a net increase.

170. WM identified these uncertainties of usage in setting out their scope of work in February 2020: see [51] above. Their suggestion was that they should review the reduction of emissions if MZLNG were to be 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. Although heavily criticised by FoE, who advocate a quantified calculation of the impact of the Project's LNG, I am not persuaded that WM's proposal, though limited, was unreasonable or that UKEF acted unreasonably in accepting it. As I identify elsewhere, there was no precedent for UKEF to follow and there was no policy or legal requirement that required them to carry out a fully quantified estimate of emissions and impact. Nor am I persuaded that WM were wrong to advise that the variables that would have to be catered for would render the outturn either useless or nearly so: the accumulation of variables would lead to a spread of predictive results that would add little or nothing to a qualitative assessment.

171. The iterative process by which the CCR came to its final form was reflected in the changing of the name it was allocated and the descriptions it was given with time. V2 was referred to as a climate change assessment framework; but it was evidently at a preliminary stage of development, not least because it did not mention the Paris Agreement at all.

172. It is also apparent that there was from the outset a mismatch between what UKEF were preparing and what EGAC, and Dr Caldecott in particular, would have regarded as satisfying their conception of a "framework": see [60] above. From his specialist perspective as an academic and member of EGAC, Dr Caldecott was suggesting a more closely defined and detailed approach, which would involve defining criteria for what would be acceptable and what would not. By mid-April 2020 UKEF understood the general feedback to be that the structure of the document needed to be refined and be made clearer; but also that the document was not missing anything significant. Dr Clark and Dr Caldecott were told that there was insufficient time to engage consultants to do the work they were suggesting – that being attributable to the current (externally imposed) deadlines for the decision. In addition to that limitation, Mr Taylor is recorded as saying that negative climate implications would not necessarily prevent UKEF support and that what was required was to consider the implications before reaching a decision based on all relevant factors: see [61] above. This discussion supports the inference that UKEF's purpose was to achieve sufficient information on climate change as one of a number of considerations rather than trying to achieve the level of detailed information being suggested by EGAC, which could be said to be akin to a full-blown Environmental Impact Assessment ("EIA")as commonly understood. That inference is given further support by the introduction to V6: see [62] above.

173. The existence of time pressure for the making of a decision is supported by the minutes of the ERiCC meeting on 30 April 2020 and was evidently something that weighed on UKEF's minds in deciding how to proceed, not least in relation to the CCR: see [63] above. There were therefore cross-currents of pressure, including Dr Caldecott's view that WM's conclusion that it was impossible to state with any certainty what the Scope emissions would be was "a big gap in the analysis": see [64] and [66] above. Certainly, UKEF were aware of Dr Caldecott's views and that the exercise they were conducting fell short of the sort of assessment of impact that might be expected of a baselined Environmental Impact Assessment: see [66] above. That was reflected in the somewhat nuanced self-description of the document's function at that time as providing "a number of climate change related matters to assist decision makers to gain an understanding of and consider the possible climate change implications of a project." What is lacking is any evidence that the purpose of the CCR (or UKEF's assessment as a whole) at any

stage was to reach a level of quantified detail that might be expected of a full-blown EIA as commonly understood.

174. The CCR's treatment of the Paris Agreement was discussed with Dr Clark and Dr Caldecott on 20 May in terms which recognise both the novel nature of the exercise being undertaken and that there was no precedent or clear cut methodology for the assessment of Scope 3 emissions impacts. FoE's expert evidence went to great lengths to persuade the court that there were steps that could (and should) have been taken and methodologies that could (and should) have been adopted; but it is clear that the expert evidence provided to UKEF by EGAC towards the end of May 2020 was that (a) UKEF was "at the beginning of the curve" in carrying out its assessment, (b) there was no precedent of people who had tried to undertake the necessary analysis, (c) there were pilot studies to test methodologies (but not, by implication, fully developed or established ones), and (d) the failure to adopt a more quantitative approach was "not a terrible thing": see [68] above.

175. I shall return later to the question whether it was lawful for UKEF to proceed on the basis of the CCR as it had been developed rather than as FoE submit it should have been. I shall consider at that point whether UKEF was obliged in the light of the advice it received from time to time either to obtain a quantified estimate of Scope 3 emissions or, failing that, was obliged not to take an investment decision at all. What is plain, in my judgment, is that the CCR was never intended to provide a quantified calculation of emissions or their national global impact in the manner for which FoE contends. Proceeding on the basis of the information it had, including the CCR, was a deliberate decision.

What did the CCR say?

176. The CCR described its function as follows:

> "This document summarises the climate change matters considered by [UKEF].
>
> These climate change matters are to be considered alongside all other project information (including but not limited to UKEF underwriting considerations, background information documentation, the E&S review and the ERiCC assessments) before a final decision whether to support the project is reached."

177. In FoE's oral opening to the court, Ms Simor QC submitted that the Defendants had proceeded on the basis that the Project would lead to an overall reduction in GHG emissions when compared with the situation that would obtain if the Project did not go ahead. This submission was based in part on para 75.3 of UKEF's Detailed Grounds (which repeated what had been said in an equivalent passage in its earlier Summary Grounds), which I have set out at [152] above. It was also based upon FoE's understanding of the terms of the CCR and, in particular, to the use in the CCR of the phrase "net [reduction/increase] in [global] emissions". For the reasons set out below, and as confirmed by Sir James Eady QC on Day 2 of the hearing, this submission was mistaken. More importantly, and looking ahead to the use that was made of the CCR, there can in my judgment be no doubt that UKEF understood and acted on the basis

that the Project would lead to a significant overall increase in Scope 3 emissions when compared with the situation that would obtain if the Project did not go ahead.

178. I have described the structure of the CCR at [74]ff above. There are 12 references to "net [increase/reduction] in emissions", of which three appear in the summary section at internal pages 8 (two) and 11 (one). To understand that summary section in context, it is necessary to look at what it set out to summarise. The first two references[11] in the summary (on page 8) relate to the section on International Impact, which starts at page 27: I have set out the page 8 summary at [77(v)] above. The third reference[12] in the summary (on page 11) is a summary "Conclusion", which I have set out at [77(vi)] above.

179. At pages 12-14, the section on the Host Country summarises Mozambique's NDC, strategies and plans in terms which emphasise Mozambique's view of LNG as a transition fuel, the need to relieve poverty and to develop a low-carbon and green economy.

180. The extent and implications of the Project's GHG emissions are considered in the "GHG Emissions" sub-section starting at page 19. Dealing first with Scope 1 and 2 emissions, it records (by reference to Mozambique's NDC) that they could account for approximately 6-10% of Mozambique's national GHG emissions, which is assessed as being "of major negative significance". On any view, what is contemplated is the generation of significant quantities of Scope 1 and 2 emissions despite project design changes intended to minimise them. However (also on page 19) the CCR records that from a Scope 1 and 2 GHG emissions perspective, the Project compares favourably with a representative selection of other LNG projects, this being based upon Appendix A5 of the WM report and being relevant to the issue of stranded assets in due course.

181. Turning to "Resource Efficiency and Pollution Prevention" at page 21, the CCR records that the Project "has utilised energy efficient technology in line with good international industry practice" and that "the Project compares favourably to other LNG Projects in terms of its Scope 1 and 2 GHG emissions." In answering the question "does the Project contribute to fossil fuel transition/GHG emissions reduction at a country level?" the CCR notes that (a) Mozambique will use some of the MZLNG itself and, in doing so, is likely to displace higher carbon oil and traditional biomass fuel sources but (b) the Project "will result in a significant increase in its emissions". The CCR comments that "the Paris Agreement recognises that emissions in developing countries will take longer to peak in the context of poverty reduction and the Project should therefore be viewed within this context": see page 23, first paragraph. Page 23 also addresses the issue of lock-in, explaining why there is no CCCE data available for the Project. Addressing the question whether the Project will displace renewable energy potential or low carbon solutions, the CCR identifies the need for investment from the international community for Mozambique to develop its energy resources, including renewable sources and its currently limited electricity distribution network. It notes that investment into the natural gas sector may contribute to fossil fuel lock-in for Mozambique "however the need for financial resources to support Mozambique's climate resilience are noteworthy"; and it records the Government of Mozambique's indication to the AfDB

[11] "Net References 1 and 2"
[12] "Net Reference 3"

that proceeds from the Project will improve their overall resilience and ability to respond and adapt to a changing climate.

182. At page 24, the CCR summarises the preceding sub-section including an important passage on which both sides rely:

> "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, but it should be recognised that the same financial incentives do not exist to attract such investment into the renewables sector, and it is unlikely that Mozambique will attract significant international investment into the renewables sector without first being in receipt of financial resources from investment into sectors such as natural gas. Mozambique needs investment from the international community to develop its energy resources, including renewable sources and its currently limited electricity distribution network. 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."

183. FoE relies upon this passage because of its recognition that investment in renewable energy would offer a more environmentally sustainable pathway for Mozambique's domestic energy needs and to meet the aims of the Paris Agreement. Unsurprisingly, the Defendants rely upon the words that follow and the unlikelihood that Mozambique will attract significant international investment into the renewables sector without first being in receipt of financial resources from investment into sectors such as natural gas. I accept the proposition upon which FoE relies: it is obviously true that renewables offer a more environmentally sustainable pathway than fossil fuels. That said, there is no evidence to cast doubt on the reservation upon which the Defendants rely: as things stand, there is no evidence of any potential scheme or opportunity for international investment in renewables that could do away with Mozambique's perceived need to develop the Project. Should any such scheme or opportunity emerge, there would be no impediment to UKEF providing it with financial support, whether or not the present investment in the Project has gone ahead.

184. At pages 24-26 the CCR responds to the question "How does the Project impact on the NDC, the Paris Agreement and other related national climate strategies?" Given its position in the document the question at this point is directed to the position of Mozambique. The answer deserves to be read in full. In outline, it recognises the complexity of reconciling sustainable development priorities for developing nations such as Mozambique and sets against the economic benefits of the Project the negative impact of the Project's GHG emissions. It expresses the view that "whilst the impact on the country's emissions is significant, the Project is in overall alignment with [Mozambique's] state climate policies". This is so even though the production of LNG does not directly align with the Strategy for New and Renewable Energy Development, and it takes into account the potential for MZLNG to act as a transition fuel and as a

means of displacing coal-fired power in South Africa. The summary of the sub-section states that "[t]he 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."

185. After a short passage recognising Mozambique's particular vulnerability to climate change, which is amplified by its low adaptive capacity, poverty, limited investment in modern technology and weaknesses in its infrastructure and social services, the CCR turns to the international impact of the Project at page 27, this being an important passage in the dispute between the parties. It should be read in full in order properly to appreciate the scope of the argument. I highlight points that seem to me to be of particular relevance, starting with the observation that the CCR has thus far acknowledged that the Project's Scope 1 and 2 emissions will have a significant impact on the country's emissions and that this is a "significant negative impact".

186. The first two paragraphs of the new section, responding to the question "What are the estimated scope 3 GHG emissions of this Project?", rehearse the reasons why (in UKEF's understanding) there are currently no estimates of Scope 3 emissions from the Project. One of the points made is that there is no way of knowing the uses to which the MZLNG will be put. Pursuing that point, the report then introduces three possible scenarios each of which are said to assume that all the Project LNG will be used as gas fuel in power production. It is said that UKEF considered the "reasonable worst-case net impact scenarios[13] in each" and is immediately caveated by the statement that the scenarios are based on "general and, as yet, unverified assumptions .., the purpose being … to provide some context to UKEF's Mozambique LNG Scope 3 considerations." It is plain that the assumption that all the Project LNG will be used as gas fuel in power generation is a hypothetical because the premise of the section and the CCR as a whole is that there is no way of knowing the uses to which the Project LNG will be put.

187. On page 28 the first scenario (described as a possible best-case scenario) assumes that all exported LNG is used as gas fuel to replace heavier GHG emitting power production. It is said that "this would result in a net reduction in future GHG emissions[14]. However it is recognised that greater reductions in GHG emissions would be achieved through replacement of any fossil fuel generated power production by renewable energy production." In context this is incontrovertible and clear because the hypothetical assumptions are that *all* MZLNG is used on power production and *all* of it displaces heavier GHG emitting fuels for that power production.

188. Scenario 2 (which is described as a possible worst-case scenario) assumes that the MZLNG is all used for new gas power production which is in addition to existing power generation and does not result in any decommissioning of any more polluting sources of power production; and it may displace new renewable energy sources. "This scenario would result in a net increase in future GHG emissions."[15] Again, in context, this is incontrovertible and clear because it is assumed that (a) all MZLNG is used for generating power, (b) all MZLNG power generation is in addition to existing power generation by more polluting sources of power generation, and (c) some MZLNG use

[13] "Net Reference 4"
[14] "Net Reference 5"
[15] "Net Reference 6"

will have the additional detrimental effect of displacing less carbon-intensive fuels. In other words, the only possible fuel displacement will be of less carbon-intensive fuels.

189. On page 29, Scenario 3 (which is described as a possible mid-case scenario) again makes the hypothetical assumption that all MZLNG will be used for power generation and that "some of the LNG will displace some new coal and oil power generation for incremental demand needs and replaces other coal and oil power stations that are being decommissioned. Some of the LNG may also replace existing declining indigenous or regional piped gas supplies. This is considered the most likely scenario for the use of the Project's LNG based on the SPAs. 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."[16] Again, this is incontrovertible on the stated assumptions. To the extent that MZLNG displaces fossil fuel alternatives, the generated GHG emissions will be lower than would have been the case if it had not done so.

190. The CCR then refers to analysis by US EXIM of coal displacement as a proxy for carbon emissions, recording information that between 2015 and 2040, use of gas consumption in China would grow by 4.8% whilst coal consumption would fall by 0.8%. "The Project would likely have a direct contribution on this and therefore result in a net reduction of GHG emissions."[17] Again the meaning of this is clear: on the assumption and to the extent that the MZLNG contributed to the reduction in coal use by displacing it, it would result in a net reduction of GHG emissions to that extent.

191. The CCR goes on to refer to the possibility of coal and oil displacement in northwest Europe. "Whilst this would also have a net decrease in future GHG emissions, a greater reduction in GHG emissions would occur if European derived gas was utilised instead of the Project LNG"[18]. Once again, read in context, this is clear and incontrovertible on the assumptions being made. But, as before, it is limited to the extent that MZLNG displaces the use of coal or oil in power generation in northwest Europe. The same paragraph goes on to consider the effect of some MZLNG being used to replace declining indigenous or regional derived piped gas supplies in Asia and in northwest Europe. "This would lead to higher net GHG emissions due to the emissions associated with the compression, cooling and transportation of the LNG."[19] Once again this, on the stated assumptions, is restricted to the limited extent of the displacement.

192. The response to the question about estimated Scope 3 GHG emission of the project concludes with a paragraph entitled "Summary":

> "Summary: The above high-level qualitative assessment indicates that the potential Scope 3 emissions from the use of the Project's exported LNG will be high as they will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities, and will also likely significantly exceed 25,000 tonnes CO_{2e} per year (the threshold set by the IFC for determining whether GHG emissions are considered 'significant'). However,

[16] "Net Reference 7"
[17] "Net Reference 8"
[18] "Net Reference 9"
[19] "Net Reference 10"

> whether the Project leads to a net reduction or increase in global GHG emissions[20], 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). It is worth noting that 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."

193. Two points may be noted about this summary. First, the potential Scope 3 emissions "will be high as they will significantly exceed Scope 1 and Scope 2 emissions… ."

194. Second, Net Reference 11 relates back to the earlier references that I have just described. With that and the statement that Scope 3 emissions will be high and will significantly exceed Scope 1 and 2 emissions as the context, and with specific reference to what I have described as Net References 7-10, Net Reference 11 should be read as having the limited meaning that, *to the extent that it is used to replace or displace more polluting fossil fuels*, use of the Project LNG will lead to a net reduction in emissions when compared with the emissions that would have been generated had the more polluting fossil fuels not been replaced or displaced and had been used. It does not purport to say anything about use of the Project LNG that is additional to the use of more polluting fossil fuels and neither replaces nor displaces them; nor does it purport to say anything about the opposite effect if use of the Project LNG replaces or displaces less polluting fuels, though the deleterious effect of that possibility is recognised elsewhere; nor does it purport to assert that the use of the Project LNG will in fact lead to the generation of less GHG emissions than would be generated if the Project LNG were not extracted and used. The sentence immediately following Net Reference 11 merely involves the assessment that there is likely to be *some* replacement or displacement globally of more polluting fossil fuels. It does not say or imply that there will be so much replacement or displacement that the use of the Project LNG will mean that there are fewer GHG emissions overall than would be the case if the Project LNG were not extracted and used.

195. On pages 30-31 the CCR then addresses Question 14, which I have set out at [75] above and which includes references to use of LNG as a transition fuel, displacement of renewable energy potential or low carbon solutions, compatibility with the Paris Agreement (citing the correct temperature targets) and fossil fuel lock-in. The information provided against Question 14 deals expressly with each of these topics save that it does not mention the Paris Agreement or the UNEP Production Gap report by name. However, the paragraph referring to the analysis by Nature is evidently directed to that issue, recognising the substantial production gap even by reference to 2°C.

196. There follows what is described as a summary of the answer:

[20] "Net Reference 11"

> "Summary: It cannot be stated with certainty whether or not the Project will contribute to fossil fuel transition 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 an unavoidable consequence of the Project's offtaking arrangements and could not be resolved with further analysis or due diligence. 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.
>
> On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the gas from the Project will at least replace some and/or displace some more polluting fuels, with a consequence of some net reduction in emissions.[21]"

197. Net Reference 12 must be read in the context provided by the summary of which it forms part and the preceding information to which it relates. When viewed in context, it is plain that Net Reference 12 is once more talking about a limited impact that, *to the extent that it is used to replace or displace more polluting fossil fuels*, use of the Project LNG will lead to a net reduction in emissions when compared with the emissions that would have been generated had the more polluting fossil fuels not been replaced or displaced and had been used. As before, it does not say or imply that there will be so much replacement or displacement of more polluting fossil fuels that the use of the Project LNG will mean that there are fewer GHG emissions overall than would be the case if the Project LNG were not used. This, to my mind, is made clear by the preceding information as a whole with the acceptance in the summary that the Project LNG will have Scope 3 impacts across a range of countries, and the balancing observations about the impact of Project LNG Scope 3 emissions where it replaces more or less polluting fuels respectively.

198. Scope 3 emissions were also referred to on page 42 where UKEF recorded the decision of EKN, the Swedish ECA, to reject transactions relating to the project:

> "on the basis that it is a large new natural gas extraction project, with very high GHG emissions with a long planned period of operation, and that was felt would have an unacceptable impact on the global climate. 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. Therefore, their Board decided that transactions related to the Project are not in line with EKN's sustainability policy. It is important to note that Wood Mackenzie studies suggest the Project volumes may

[21] "Net Reference 12"

> facilitate the displacement of coal to gas in certain markets. This information has since been relayed to EKN."

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

199. Having attempted to establish the context, I return to review Net References 1, 2 and 3, which appear in the section which purports to summarise pages 27 ff and the summary "Conclusion". Once again, in my judgment these references need to be read in the context of the CCR as a whole and, specifically, having regard to the passages that they attempt to summarise or on which the conclusions are based, including the other Net References which I have just reviewed.

200. The immediate context for Net References 1 and 2 is provided by the introductory statement that "The majority of scope 3 GHG emissions relate to international emissions. A high level qualitative assessment indicates that the potential Scope 3 emissions from the use of the Project's exported LNG will be very high and will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities … ." In that context, and in the wider context of the section on international climate change impact that I have reviewed above, it is in my judgment impossible to read Net Reference 1 or the paragraph in which it is placed as suggesting that the use of the Project LNG will or may lead to global GHG emissions being lower than would be the case if the Project did not go ahead. It is worth noting that the paragraph in which Net Reference 1 is found, is closely based upon the summary paragraph on page 30 in which Net Reference 11 is found. That closeness supports the conclusion that Net Reference 1 and the paragraph in which it is found are not suggesting that the use of the Project LNG will or may lead to global GHG emissions being lower than would be the case if the Project did not go ahead.

201. The following paragraph on page 8 is closely modelled on the Summary paragraph on page 31, which I have set out at [196] above. It is followed by the short paragraph containing Net Reference 2. Once again, in its immediate context and in the context of the CCR as a whole, including specifically the other Net References, it seems to me to be clear that the paragraph is referring to the prospect of limited displacement of more polluting fuels, which would to that extent result in a net reduction of emissions: it is not saying or implying that the use of the Project LNG will or may lead to global GHG emissions being lower than would be the case if the Project did not go ahead.

202. Net Reference 3 is preceded by a repetition of the conclusion that the Project's Scope 1 and Scope 2 emissions will significantly increase Mozambique's GHG emissions and that the Project's Scope 3 emissions will significantly exceed Scope 1 and Scope 2 emissions. I would accept that, viewed in isolation, the sentence containing Net Reference 3 can be read as meaning that use of the Project LNG may lead to global GHG emissions being lower than would be the case if the Project did not go ahead "provided that the Project LNG is used to replace and/or to displace the use of more polluting fossil fuels." That reading is made possible by the use of "provided that" rather than "to the extent that" or similar language. However, such a conclusion would not be justified by the evidence summarised in the CCR and would be inconsistent with

the whole tenor of the rest of the CCR, which is that the prospective use of Project LNG is not known, Scope 3 emissions from the use of Project LNG will be very high (and will significantly exceed Scope 1 and Scope 2 emissions) and that "net reductions" will occur and be limited to the (unknown) extent to which Project LNG is used to displace more polluting fossil fuels.

203. I would therefore accept the criticism of the conclusion that includes Net Reference 3 that it is literally ambiguous and, viewed in isolation, can be read as meaning that use of the Project LNG will or may cause global GHG emissions to be lower than would be the case if the Project did not go ahead. However, viewed in the context of the rest of the CCR I consider that such a reading of the sentence containing Net Reference 3 is aberrant and inconsistent with the passages it is intended to summarise and upon which it is based. On a fair reading of the CCR as a whole, it should not be taken as subverting or overwhelming the consistent approach of the rest of the document.

204. Viewed overall, and despite Net Reference 3, the tenor of the CCR is that Scope 3 emissions will be very high and significant and will contribute to the GHG emissions of a range of countries and be spread across them; and that, on the assumption that some of the Project LNG serves as a transition fuel that displaces more polluting fossil fuels, there will to that extent be some net reduction in GHG emissions. Separately, the CCR recognises that, to the extent that Project LNG displaces less polluting fossil fuels or is simply incremental to the global use of fuels that would otherwise obtain, the effect will be to cause a net increase. No attempt is made to quantify such net increases or reductions.

205. Nor do I consider that para 75.3 of the Defendants' Detailed Grounds supports FoE's understanding of the Defendants' case. Viewed in isolation, it merely said that "the Project would at least result in *some* displacement of more polluting fuels, with a consequence of *some* reduction in GHG emissions." (Emphasis added). Any decrease in future GHG emissions would be similarly limited. Any residual doubt is removed when para 75.3 is read in context, which is immediately provided by para 75.1 and the statement that "UKEF concluded … that the Project would have a significant impact in climate change terms due to increased GHG emissions" and that there was "scope for the Project to replace or displace more polluting hydrocarbon sources" in limited markets. In that context, and with knowledge of what the CCR actually said, it is in my judgment clear that [73.5] is not asserting or suggesting that development of the Project will have the effect that global emissions are lower than would be the case if the Project were not developed and the MZLNG were left in the ground.

206. In the course of submissions, FoE criticised UKEF's acceptance of LNG as a transition fuel and its judgment that Scenario 2 was the most likely of the three. Neither of these criticisms is justified. While there is clearly a debate about the extent to which, if at all, LNG may operate as a transition fuel, it was Mozambique's view that it could and would, and the role of LNG as a transition fuel was endorsed by the AfDB: see [58] and [179]. Turning to the choice of Scenarios, the extreme nature of the assumptions underpinning Scenarios 1 and 2 and the advice from WM about the potential function of LNG as a displacement fuel on its own justifies the view that Scenario 3 was the most likely. The fact that the actual extent to which LNG might act as a displacement was uncertain, so that the exercise undertaken by WM and referred to in the CCR was no more than "indicative guidance", does not render the exercise inappropriate or its use in the CCR irrational. As elsewhere, the extent of the information to be included

and analysis conducted was for the judgment of the decision maker, subject to challenge only on grounds of irrationality.

207. It is convenient to mention here the CCR's treatment of other topics that feature in FoE's challenge to the Defendants' decision:

i) Scope 1 and Scope 2 emissions: I have referred to these extensively already. They are referred to on pages 6, 10, 30 of the CCR which consistently recognise that they will be significant. Elsewhere the point is made that the Project compares favourably with both coal and oil and other LNG projects because of its efficient modern plant, relatively low methane losses and low CO_2 content of feed gas: see, for example page 39;

ii) Lock-in: the risk of lock-in for Mozambique is addressed on page 23 of the CCR, which recognises the Project's potential contribution to lock-in but sets against that risk the need for financial resources to support Mozambique's climate resilience. Page 31 of the CCR, after referring to the view of some sources that gas is a fundamental transition fuel, refers to other analyses that view gas "not as a companion to renewables but as competition, and as contributing to fossil fuel lock-in, increasing the world's reliance on polluting fuels.";

iii) Stranded assets: the risk of the project becoming a stranded asset during its projected economic life was considered low ("and particularly over the tenor of the UKEF financing") because of (i) the continuing role of LNG as a transition fuel, (ii) the project's robustness to withstand reasonable low oil price scenarios, (iii) the likelihood of support from its sponsors and shareholders (including the Government of Mozambique) because of its importance to the future prosperity of the country, (iv) the fact that the Project will produce lower emissions than other LNG projects at a competitive price: see pages 9, 11, 37 and 38 of the CCR.

208. In addition to the topics that have been the focus of attention in the present proceedings, the CCR also addressed other material factors such as climate-related, technological, market, policy and legal risks and the involvement of other financial entities: see in particular, pages 33-43 of the CCR.

The use to which the CCR was put

209. Mr Taylor was closely involved with the development of the CCR. He was copied in on Dr Caldecott's comments and participated in the discussion with EGAC on 14 April 2020. Thereafter the documents record him being copied in on email traffic as the CCR was developed: see [65] and [67] above.

210. The first recorded use of the CCR was its presentation for approval to the meeting of ERiCC on 29 May 2020, which Mr Taylor attended: see [78] above. Paragraph 5 of the minutes repeats Net Reference 3 almost verbatim and there is no other reference to the specific passages of the CCR, which was to be approved at the meeting. There is no information about the process of approval save that Mr Taylor says that ERiCC members had the opportunity to read and discuss both the CCR and the ESHR; and, in

his submission to the First Defendant on 1 June 2020, he told the Secretary of State that it had been considered as part of ERiCC's assessment of the Project.

211. Mr Taylor annexed the CCR and other papers to his 1 June 2020 submission to the Secretary of State for International Trade, with a specific recommendation that the Secretary of State review it in full. At para 56(e) he made plain his understanding that the Project would have "significant impact" due to increased GHG emissions, while putting the Project LNG in context as part of the overall energy mix for the world's power transition.

212. It does not appear that the CCR was provided with the submission to the Chancellor. However, it is implicit in the submission that the Project will generate substantial emissions. Hence: (a) the reference to it being "highly contentious" because it is a fossil fuel project; (b) the outline of current policy, which was to provide support for fossil fuel projects except for new support for thermal coal projects; (c) the reference to potential for Project LNG to displace heavier carbon fuels in some markets; and (d) the fact that not offering support would have no impact on global emissions.

213. It does not appear that the CCR was provided to the Prime Minister, but Mr Taylor's submission dated 18 June 2020, with the background of ministerial disagreement, evidently left the Prime Minister in no doubt that the Project would generate substantial emissions that were sufficient to have given rise to serious ministerial disagreements. Hence the Prime Minister's requiring a proposal on CCUS to offset the emissions that the Project would generate. Nothing that happened thereafter carried any suggestion that the emissions would be other than very significant.

UKEF's Tameside duty

214. I have set out the relevant principles at [97] ff above. I believe it to be uncontentious and would hold that the scope of the *Tameside* duty is determined and circumscribed by the nature of the decision that is to be taken. It is therefore essential to identify what was the decision that UKEF had to take. It is convenient to start by stripping away issues that UKEF was not required to decide and did not purport to decide. First, the decision here was not whether the Project should go ahead. It was going to go ahead in any event. This was a central consideration for UKEF, as is clear from the repeated references in advice from the Department of International Trade (see [57] above), the CCR (at pages 10, 18 42), the EHSR (at paras 19, 20), the submission to the Secretary of State (see [80(iii)] above), the submission to the Treasury (at para 10, see [83] above) and to the Prime Minister (at para 10: "The Project will go ahead whether UKEF provides financial support or not."). A second issue that did not fall for decision was whether the UK should purchase and use MZLNG thereby generating Scope 3 emissions that would have to be accommodated within the UK's carbon budgets.

215. That being so, the decision to be taken by UKEF was whether it should, in accordance with its stated mission, provide export finance support so as to maximise UK Content in a Project that was going to proceed anyway. To my mind, these are central considerations when assessing UKEF's *Tameside* duty as its decision was going to have no material or relevant impact on global emissions. That did not stop it being highly contentious, with overt opposition from some minsters, not least after the criticisms from the House of Commons EAC and in the run up to COP26 at a time when the Government was reviewing its climate change policies; but, properly analysed, UKEF's

decision was not "about" emissions and did not affect the emissions from the Project to any material extent.

216. In my judgment, the contemporaneous documents are consistent with Mr Taylor's evidence that I have summarised at [48] above and I would accept it. Specifically, I would accept that UKEF took steps to be informed on matters relating to climate change and the Paris Agreement but that consistency with the Paris Agreement was not a requirement or a pre-requisite for a decision by UKEF to support the Project. Although this was not set out expressly in advance, there seems to me to be no doubt in the light of the chronology of steps and discussions that I have set out earlier that this was the case. In my judgment, the litigation process and FoE's single-minded concentration on quantifying emissions is capable of leading to a distorted view of the process that was being undertaken by UKEF, which elevates the importance of climate change and the Paris Agreement to the decision to be taken by UKEF to giddy heights that are not justified.

217. As I have said, the CCR was not at any stage intended to be a full-blown EIA assessing in detail the quantity and effect of the emissions that would be generated by the Project. There was no policy or legal obligation to obtain such an assessment. While the experts pointed out limitations in the CCR in development, including in particular Dr Caldecott's observation that the lack of a Scope 3 calculation was "a big gap in the analysis", I would not accept that this advice of itself automatically gave rise to an obligation to conduct such a calculation: it was for UKEF to weigh the advice, which they clearly did. The reasons for not taking particular steps were recorded in the various minutes that I have summarised at [59] ff. The end position that was reached with the experts was recorded as being that, in addition to time constraints that had been mentioned earlier, there was no precedent for assessing projects against the Paris Agreement because UKEF were "right at the beginning of the curve", a proposition with which Dr Caldecott is recorded as agreeing; and that not doing a CCCE analysis was "not a terrible thing." What the various meetings and exchanges demonstrate is that the limitations of the CCR were pointed out to UKEF in terms which meant that UKEF were clearly aware of them: see for example Ms Meekings' express acknowledgement, recorded at [65] above, that the current iteration what became the CCR did not "set out to "assessment" the climate impact of a project in the traditional sense of an environmental impact assessment … ."

218. I have already explained why, in my judgment, UKEF was entitled to a significant margin of appreciation on the facts of this case: see [103] above. I would add that this is a case where the court should adopt a relatively low intensity of review, given that UKEF's decisions involved balancing a number of different public interests, all of which contribute to the overall public interest and because, in my view, the decision that UKEF had to make was essentially political rather than technical. This is demonstrated by the fact of the ministerial opposition, with the Ministers' grounds of opposition being essentially political, and the perceived need to involve No. 10 and the Prime Minister. Put in slightly different terms, as the decision involved a high degree of policy judgment, I consider that the decision-maker was entitled to adopt a less rigorously technical approach to climate change as one feature amongst many than would have been necessary or appropriate in other circumstances, such as if it had been the only material feature or the sole determinant for the decision.

219. Applying these principles, I am not persuaded that quantifying Scope 3 emissions or adopting a more rigorous approach to the impact of the Project's emissions was necessary or required as a result of UKEF's *Tameside* obligation. There are, to my mind, a number of related reasons why this is so in addition to those I have just discussed.

220. First, it was always recognised that the impact of the Project's emissions would be, at least, "significant". This is shown by (a) the Project being initially classified by UKEF as being in Category A because of its potential for significant adverse environmental impacts; (b) the acknowledgement in the ERiCC meeting on 30 April 2020 that the Project would have a significant impact on Mozambique's GHG emissions and that Scope 3 emissions were expected to be "significantly higher" than its Scope 1 and 2 emissions; (c) the recognition in para 24 of the ESHR that the Project was classified as Category A, a classification shared by the wider Lender Group; (d) the recognition in para 85 of the ESHR that Scope 3 emissions were anticipated to be "significantly higher" than Scope 1 and 2; (e) the CCR's assessment (on page 8) that the potential Scope 3 emissions would be "very high"; and (f) the reference in para 56(e) of the submission to the Secretary of State to the "significant impact that the project will have due to increased GHG emissions… ."

221. Second, it has not been shown that quantification of emissions and their impact would or should have been necessary or material to the decision that UKEF had to take given that (a) UKEF was proceeding on the basis that Scope 3 emissions would be very high and that their impact would be significant, (b) UKEF's decision would have no impact on the Project's emissions, and (c) UKEF's decision was directed to fulfilling its mission of ensuring that no viable UK export failed for lack of finance or insurance from the private sector. FoE submitted that the failure to quantify emissions rendered any conclusion or decision arbitrary. I am unable to accept that submission. At its highest, quantification would lend a possibly spurious precision to a policy decision that did not depend upon precise outcomes.

222. Third, FoE place great weight upon the provisions of the Paris Agreement. Yet if FoE's interpretation of the Paris Agreement and its consequences is correct, the fact that the Project (rather than UKEF's decision) would generate very high levels of emissions both for Mozambique and globally, and that (at least arguably) the Project would lead to delay in the peaking of Mozambique's emissions and in Mozambique's achieving of carbon neutrality is all that is required to sustain FoE's submission that UKEF's investment decision was in breach of the provisions of the Agreement. Neither of these features, as it seems to me, are really in doubt given the obvious impact of bringing into projection a major LNG field in a poor and under-developed country such as Mozambique.

223. Fourth, UKEF's decision not to attempt quantification of Scope 3 emissions was founded on evidence from WM that this calculation would involve so many variables as to make accurate quantification impossible. UKEF summarised that advice and the reasons for there being no estimates of Scope 3 emissions from the Project on pages 27-28 of the CCR. UKEF was entitled to rely upon that advice when commissioning the WM report. Although Drs Clark and Caldecott later asserted that such a calculation could be done, UKEF was under time constraints by then, and it appears to have been accepted that there was not enough time to engage consultants: see [61] above. Later advice from Drs Clark and Caldecott, to which I have already referred, suggested that

there was no established methodology and that UKEF were at the beginning of the curve: see [68] above. The minutes and communications do not evidence or suggest that Drs Clark and Caldecott advised that UKEF could not proceed without plugging the gap in the analysis.

224. Before reaching any final conclusions on this issue I shall consider FoE's case that the questions whether support for the Project was consistent with the UK and Mozambique's obligations under the Paris Agreement could not be answered without quantification of the Project's emissions. This involves an exercise of interpreting the Paris Agreement which, for reasons I have explained, should be approached with caution: see [119]-[124] above. I agree with the observations of Dove J set out at [114] above: essentially for the reasons he gave, the issue is whether UKEF's views on the overall application of the Paris Agreement were tenable.

The Paris Agreement

225. I have set out or summarised the main provisions in dispute at [18]-[23] above. For present purposes I highlight the following features:

i) The importance of efforts to eradicate poverty is emphasised by the successive references in Articles 2(1) and 4(1);

ii) The importance of equity as between country Parties is emphasised by the successive references in Articles 2(2) and 4(1);

iii) The importance of differentiated responsibilities, respective capabilities and different national circumstances is emphasised by the successive references in Articles 2(2) and 4(2);

iv) Article 3 recognises the different pathways and the need to support developing companies. Article 4 expressly recognises that peaking will take longer for developing countries: it impliedly recognises that reductions after peaking may also take longer for developing countries;

v) The Paris Agreement does not purport to prohibit projects that generate emissions or funding for such projects;

vi) The three examples contained in Article 2(1)(a)-(c) are global aspirations and illustrations of how the Agreement "aims to strengthen the global response to the threat of climate change". Formulation of quasi-contractual "obligations" arising out of the examples is not straightforward, not least because (for example) holding the increase in the global average temperature requires an effort of global will going well beyond the capabilities of any one country Party;

vii) The fluidity of the Agreement is enhanced the fact that the three examples contained in Article 2(1) are to be implemented "in the context of sustainable development and efforts to eradicate poverty" and "to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

226. In the course of submissions I understood FoE's attitude to new Projects to shift somewhat; but I hope it is not unfair to characterise it as being that although

Mozambique might develop the Project to reflect equity and its particular national circumstances, no developed country Party may provide finance for that development. A more severe variant of FoE's position is that it should not develop the Project because it will put it in breach of its NDC. As FoE recognised during submissions, either of these outcomes (if enforced directly or otherwise) gives rise to the classic injustice of which developing country Parties are eloquent advocates: the developed country Parties have had the advantage of developing their fossil fuels but seek to prevent their under-developed (and, generally, underfunded) neighbours from securing the same advantage with theirs, thereby condemning the developing countries to continuing poverty. The facts of the present case provide a perfect illustration of that problem and dilemma.

227. There are, to my mind, a number of difficulties that emerge from Article 2(1)(c) as soon as one attempts to generate hard-edged legal obligations from its somewhat opaque language. It is not clear what is meant by "a pathway towards low greenhouse gas emissions … ". What is meant by "towards"? Or by "low" GHG emissions? Equally it is not clear what is meant by "a pathway towards … climate-resilient development?" I find these concepts less than self-evident in a world where, by common consent, the Parties' current commitments are inadequate to prevent the increase in the global average temperature to 2°C, let alone 1.5°C. I am not alone: see [29] above and the SCF's statement that Article 2(1)(c) "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." Quite how that is meant to be applied to a case such as the present, where Mozambique's ability to make its way to a carbon-free economy and climate resilient development is dependent upon the income stream from the Project, is unclear.

228. FoE's case is rather different and is that a low emissions pathway is one that enables the temperature of 1.5°C (and well below 2°C) to be met. I do not understand what that means in practice in circumstances where the world is so far off meeting those targets that no country's reductions could or would enable the temperature goals to be met. It is not even clear whether the assessment under Article 2(1)(c) should be carried out from the perspective of the country receiving the finance or the global community. I will accept for the purposes of argument (but without finding) that a finance flow that increases aggregate global emissions is not, when viewed in isolation, consistent with a pathway towards low greenhouse gas emissions, at least in the short term. But, to my mind, that does not necessarily or even probably put the person providing that finance out of alignment with the Paris Agreement. First, it is necessary to look beyond the short term. Second, it is necessary to look at the counterfactuals, including the emissions impact on the country carrying out the financed development of not developing, and the emissions impact if the financing in question is not pursued. Third, it is necessary to look at other aspects of the project and whether it engages other provisions of the Paris Agreement. Only once all of these steps have been taken is it possible to reach a balanced view of whether a project and its finance can be said to be out of alignment with the Agreement.

229. Taking its arguments to their logical conclusion, FoE submits that, in order to act compatibly with the Paris Agreement, UKEF should have provided funding to UK businesses and investors in order to assist Mozambique with its development of renewables and "its broader obligations under the Paris Agreement." This apparently simple submission seems to me to demonstrate the complexity of the problem that arises

when one attempts to create hard-edged and free-standing obligations from individual terms of the Paris Agreement. It also, as it seems to me, demonstrates a lack of realism: providing finance in order to assist Mozambique with its development of renewables was not, on the evidence before the Court, an available option. This was expressly recognised by the CCR at page 24, in the passage I have set out at [182] above; and the complexity of the decision facing UKEF was well summarised at pages 24-26 of the CCR, to which I have referred at [184] above. There was no doubt in UKEF's thinking that "renewable energy offers by far a more environmentally sustainable pathway". However, leaving on one side the fact that the Project was going ahead anyway, what confronted Mozambique, and UKEF in making its decision, was that the Project provided the only available pathway to a low carbon economy based on renewable energy or to lifting millions out of poverty, the first of which is an acknowledged aim of the Paris Agreement and the second of which is an imperative that it expressly recognises. While accepting the Defendants' submission and evidence that UKEF would be able and willing to provide such finance if the opportunity arose, I reject FoE's submission that UKEF, in order to act compatibly with the Paris Agreement, should have funded the development of renewables in the circumstances of this case and this decision. I am also unable to accept any variant of the argument that the development of the Project is to be taken conclusively as contrary to the aims of the Paris Agreement simply because it leads to the generation of emissions that would not be generated if the Project is not developed. That argument, however expressed, is far too simple and hard-edged, for the reasons I have attempted to explain.

230. I have already referred to the need for caution. In approaching the interpretation of the Paris Agreement, the words of Lord Brown ring loud and clear: see [108] above. In the present case the Court is being asked to consider deep and difficult questions of construction that are of profound importance to the whole working of the Convention without the benefit of any established Convention jurisprudence. The case does not fall within the categories of case identified by Lord Sumption in *Benhkarbouche* as being cases where the court is bound to supply an ascertainable answer. Accordingly, I do not attempt or purport to give a definitive interpretation of the provisions of the Paris Agreement to which we have been referred or their legal effect.

231. That said, in my judgment UKEF adopted a reasonable approach to the complicated question whether "the Project" was in overall alignment with Mozambique's stated climate policies. Its approach was set out at pages 24-26 of the CCR and is summarised at paras 75.4 and 75.5 of the Defendants' Detailed Grounds: see [152] above. Once the Paris Agreement is approached on the basis that it does not give rise to hard-edged free-standing obligations but should be seen as a composite package of aims and aspirations that may be – and in this case are – in tension or frankly irreconcilable, UKEF's approach, which involved recognition of those conflicting aims and aspirations and an evaluative balancing exercise in order to come to a conclusion, cannot be criticised. The only remaining question arising from that interpretation of the Paris Agreement, is whether UKEF's view that the Project was in overall alignment with Mozambique's stated climate policies was tenable. I consider that it clearly was. To hold otherwise provides a direct route to the inequitable conclusion, expressly recognised by FoE in submissions to be unjust, that Mozambique is condemned to continued poverty by an inability to fund either the development of its natural assets or a low carbon economy based on renewables. It is plain that Mozambique places the need to reduce poverty at the forefront of its obligations and aspirations: see [41], [43] and [77(iv)] above. UKEF

was entitled to give that feature very considerable weight in its assessment: precisely what weight and what the result should be were for UKEF to decide.

232. Furthermore, I do not consider that it is open to this Court to pronounce on whether developing the Project has caused or will cause Mozambique to act in breach of its obligations under the Paris Agreement. That, as it seems to me, is a matter for Mozambique to resolve, both now and in the future as it seeks to ratchet up its commitments with time, because of the operation of the Foreign Act of State doctrine: see [125] ff above. That would be so even if the Project was not going to have the transformative impact upon Mozambique's economy that has the potential (a) to provide a pathway to a low emissions economy that would not otherwise be open to it and (b) to lift millions out of poverty. Allowing for the sake of argument (and without deciding) that the Project's emissions and their funding, viewed in isolation, tend to offend against the principle of Article 2(1)(c), that cannot be the end of the enquiry since the relief of poverty is a compelling counterweight in the argument. If it is felt that Mozambique is not implementing the Paris Agreement, the remedy provided by the Agreement is to be found in Articles 14 and 15; and the Committee will pay particular attention to the respective national capabilities and circumstances of the Parties i.e. Mozambique.

233. Turning to UKEF's assessment of its own obligations under the Paris Agreement, the Defendants' case is summarised at paras 75.6 to 75.9 of the Detailed Grounds: see [152] above. It reflects the discussion at pages 22-26 of the CCR (summarised at pages 10-11), which led to the conclusion that the Project was in alignment to Mozambique's stated climate policies and by extension with their Paris Agreement commitments. Unless one accepts FoE's hard-edged approach to Article 2(1)(c), which I do not, there is no sound basis on which to challenge UKEF's evaluative conclusion that providing support for the Project would align with the UK Government's overall obligation and commitment to support developing countries (in this case, specifically, Mozambique) to respond to the challenges and opportunities of climate change. The judgment that Mozambique's current NDC would be part of a progression over time and peaking would take longer for Mozambique as a developing country was a judgment that UKEF was entitled to make; as was its judgment that the Project would foster climate resilience and increase Mozambique's ability to adapt to the adverse impacts of climate change. These judgments were rightly made in the context of Mozambique's efforts to eradicate poverty: see pages 10, 23, 24 and 25 of the CCR. They would have been judgments that UKEF was entitled to reach even if UKEF's participation was going to make any difference to emissions, which was not the case for reasons that I have already stated.

234. Returning to the question posed at [224] above, I reject the submission that the questions of consistency with the UK and Mozambique's obligations could only be answered with the benefit of quantification of the Project's Scope 3 emissions. To my mind, quantification would add nothing material to the qualitative assumptions that were being made for the purposes of either (a) assessing compliance on the part of the United Kingdom or Mozambique with the Paris Agreement or (b) the ultimate decision that the Defendants had to take. Put another way, UKEF's decision to take its decision without quantifying Scope 3 emissions was not irrational and is not open to challenge.

235. It remains to deal with a number of miscellaneous points that have been raised by FoE in support of the main thrust of its case. I can deal with them more shortly, as follows:

i) The submission that UKEF's consideration of pathways was done by reference to a 2°C increase is wrong. Question 14 on page 31 of the CCR asked the specific question: "… consider whether the Project: … is compatible with the Paris Agreement i.e. to reduce emissions well below 2°C with effort to limit to 1.5°C". The response (by reference to analysis by Nature) identified that the unabated use of global fossil fuel reserves was incompatible with a warming limit of 2°C, which carried necessary implications for compatibility with a warming limit of 1.5°C. It is clear from the question posed that UKEF had in mind the correct aspiration under the Paris Agreement. This challenge is in essence an inadmissible merits challenge;

ii) I reject the submission that no regard was had to the global Emissions Gap and Production Gap as addressed by the UNEP report. Although not specifically mentioned, the reference to the Nature analysis on page 31 of the CCR addressed the gap issues directly. This challenge is in essence an inadmissible merits challenge;

iii) The risk of lock-in was the subject of a specific question as part of Question 14 and was addressed in the CCR: see [206(ii)] above. There was ample material to sustain UKEF's judgment. This challenge is in essence an inadmissible merits challenge;

iv) The risk of the Project becoming stranded assets was specifically addressed: see [206(iii)] above. There was ample material to sustain a rational finding that the Project was at low risk of becoming stranded assets;

v) It was not unreasonable or irrational to assess Scope 1 and 2 emissions by reference to two trains. UKEF's proposed support was for the Project as defined in the relevant financing agreements, namely the initial project comprising two trains. Further developments would require further finance and investment decisions. The Defendants' analyses and information referred to the prospect of additional trains, which was regarded as being a beneficial feature when considering Reserve Risk; and the CCR referred expressly to the Project's gas reserves being "sufficient to develop up to eight further trains". However, neither of these features should be taken as determinative of what scope of work UKEF needed to undertake in order to make its decision. In my judgment it cannot be said to be irrational for UKEF to have decided to limit its information to the Project as defined and for which, in the broadest sense, it was being asked to provide support for the benefit of the prospective UK Content. As with the Scope 3 emissions, it was not necessary to assess the overall possible impact of the Project over its entire life in order to make that decision.

Conclusions

236. The scope of the Defendants' duty to inform themselves was defined and circumscribed by the nature of the decision they had to take. That decision would have no material impact on the emissions generated by the Project, which was and is going to be developed in any event. It was a decision that was to be taken in accordance with UKEF's purpose and mission to ensure that no viable UK export failed for lack of finance or insurance from the private sector. It was multi-faceted, based on promoting significant UK economic benefits in line with UKEF's statutory purpose and mission;

and it required a range of judgments to be made across a wide spectrum of policy areas involving questions of political policy, economic and scientific judgment. The decision-makers' judgment about what information they required in order to make their decision is entitled to a wide margin of appreciation and a relatively low intensity of enquiry and review.

237. There was no legal or policy obligation to quantify Scope 3 emissions. Nor was quantification of Scope 3 emissions necessary for the purposes of the Defendants' decision. It was implicit, obvious and accepted that the development of a major LNG field would lead to very high levels of emissions. Quantification (if it could be achieved) would not advance arguments in relation to the decision that the Defendants had to take. UKEF was entitled to decide that, although it chose to include consideration of climate change impacts and the Paris Agreement alongside other factors in making its decision, it was not obliged to give them greater prominence or weight or to obtain further and more technical information than it did.

238. The CCR did not go to the lengths or into the detail that might be expected in other circumstances; but it was not obliged to. Specifically, the CCR did not set out or purport to be akin to a full blown Environmental Impact Assessment; nor did it set out or purport to provide a comprehensive calculation and assessment of the Project's Scope 3 emissions. It was not obliged to, not least because (a) the Defendants' decision would have no impact on emissions; (b) Scope 3 emissions (and how they could be accommodated in carbon budgets) would be the responsibility of purchasing Countries in the light of the use to which the MZLNG was put; (c) UKEF was entitled to accept the advice of WM that the variables affecting future use and generation of Scope 3 emissions would render any calculations too uncertain to be of value; and (d) the Defendants could rationally take their decision without having quantified estimates of Scope 3 emissions.

239. FoE has adopted a hard-edged approach to the obligations of both Mozambique and the United Kingdom which is inconsistent with a proper understanding of the Paris Agreement. The Agreement contains numerous aims or aspirations that may prove to be in tension or frankly irreconcilable on the facts of a given case, this case being a paradigm example.

240. UKEF was entitled to form the view that the support for the Project that was in contemplation was in accordance with its obligations under the Paris Agreement as properly understood. That view was at least tenable. If it were necessary or appropriate to do so, I would hold that its view has not been shown to be wrong.

241. For similar reasons, if it were necessary and appropriate to do so, I would hold that UKEF's view that the Project was in overall alignment with Mozambique's stated climate change policies was tenable and has not been shown to be wrong. However, my primary conclusion is that this Court should not entertain FoE's submissions to the contrary, because of the application of the Foreign Act of State doctrine.

242. The Defendants' decision that is the subject of these proceedings is not vitiated by the other matters of which FoE complain, or any of them.

243. I have seen in draft the judgment of Thornton J, which reflects a different approach to the application of the relevant principles to the facts of this case. I acknowledge and

respect the cogency of her reasoning. For the reasons I have given, however, I conclude that FoE's challenge should fail.

Thornton J

Introduction

244. I respectfully disagree with the analysis of Stuart-Smith LJ in relation to the quantification of the indirect, downstream greenhouse gas emissions from the processing and use of the LNG generated by the Project (Scope 3 emissions). I have reached the conclusions, that in the circumstances of this case:

i) UKEF failed to discharge its duty of inquiry in relation to the calculation of Scope 3 emissions. Its judgment that a high-level qualitative review of the emissions impact was sufficient, was unreasonable.

ii) The failure to quantify Scope 3 emissions, as well as other flaws in the climate assessment, mean that there is no rational basis on which to demonstrate that the funding for the Project is consistent with Article 2(1)(c) of the Paris Agreement on Climate Change.

245. I agree with Stuart-Smith LJ's recitation of the factual background and the legal/policy framework. Although I appreciate that it is repetitive, I have provided my own summary of some relevant matters in order to make my judgment self-explanatory.

246. The starting point for this challenge is that UKEF – lawfully and reasonably – decided to take the Paris Agreement on Climate Change into account in its decision making. It did so by the preparation of an assessment of the climate risks of the Project, which in the words of its submission to the Prime Minister, considered "*support of the Project in the context of the UK's … Paris Agreement commitments*".

247. FoE contends that UKEF's climate assessment is contrary to both the Paris Agreement on Climate Change and general principles of English public law.

Background - the climate impacts of the Project

248. The recitals to the Paris Agreement recognise that climate change represents an "*urgent and potentially irreversible threat to human societies and the planet*" (preamble to the UNFCC Paris Agreement and Adoption Decision dated 12 December 2015, cited by the Supreme Court in R(Friends of the Earth) v Secretary of State for Transport [2021] 2 All ER 967 at §70).

249. It is now well established that there is a direct correlation between the concentration of greenhouse gases, which retain the heat radiated by the earth, in the earth's atmosphere, and the rise in average global temperatures. The release of greenhouse gases leads, and has led, to a rise in global temperatures. Carbon dioxide is the most dominant greenhouse gas over long time periods as it can remain in the atmosphere for many thousands of years.

250. The environmental and social impacts of the increase in global temperature are potentially catastrophic. They include extreme heat, drought, precipitation, rise in sea

levels and disruption of ecosystems that could jeopardise the food supply. The warming may also result in tipping points, as a result of which the climate on earth, or in particular regions of earth, will change abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world. Some of these consequences are already happening. This analysis has been repeated in Court judgments around the world, including the Divisional Court in R(Spurrier) v Secretary of State for Transport [2020] PTSR 240; the Supreme Court of the Netherlands in Netherlands v Stichting Urgenda (Number 19/00135 20 December 2019 ECLI :NL:HR 2019: 200) and, in the New South Wales Land and Environment Court in Australia in Gloucester Resources Limited v Minister of Planning ([2019] NSWLEC 7).

251. Detailed scientific analysis published by the Intergovernmental Panel on Climate Change (IPCC), in 2018, was significant in being the first authoritative scientific analysis to identify the material difference in outcome between limiting global warming to 1.5°C as opposed to 2°C. It concluded that limiting global warming to 1.5°C above pre-industrial levels will significantly reduce the risks of challenging impacts on the ecosystems and human health and wellbeing. It will require "*deep emissions reductions*" and "*rapid, far-reaching and unprecedented changes to all aspects of society*". To achieve the 1.5°C target, global net emissions of CO_2 will need to fall by about 45% from 2010 levels by 2030 reaching zero by 2050 (R(Friends of the Earth) v Secretary of State for Transport [2021] 2 All ER 967 at §90). The IPCC Report was described by the expert witness instructed by the First Interested Party, the operator of the Project and a subsidiary of the French international energy group TotalEnergies (Total) as a "*key reference point for the Paris Agreement and the culmination of years of work by many notable authors worldwide*".

252. The Report also addresses the well-established concept of carbon budgets, a concept based on the proven relationship between the cumulative anthropogenic emissions of greenhouse gases and the increase in average temperature. The level of greenhouse gas emissions reductions required to meet a temperature target are estimated, producing a carbon budget which must be met in order to limit global warming. In its decision, the Netherlands Supreme Court in Netherlands v Stitching Urgenda (Number 19/00135 20 December 2019 ECLI: NL:HR 2019: 200) described the concept as follows:

> *"It is clear that the world has very little leeway left when it comes to the emissions of greenhouse gases. The total worldwide leeway that now remains for emitting greenhouse gases is referred to as the 'carbon budget'" (para 2.1(7)*

(See also the discussion of the concept in the Australian case of Gloucester Resources Limited v Minister of Planning [2019] NSWLEC 7 at §441 – 445).

253. The IPCC report estimates the remaining carbon budget for the world to be 420 gigatonnes of CO_2, for a 66% probability of limiting global warming to 1.5°C, or 580 gigatonnes of CO_2 for a 50% probability of limiting warming to 1.5°C:

> *"Limiting global warming requires limiting the total cumulative global anthropogenic emissions of* CO_2 *since the preindustrial period, that is, staying within a total carbon budget (high confidence). By the end of 2017,*

> *anthropogenic* CO_2 *emissions since the pre-industrial period are estimated to have reduced the total carbon budget for 1.5°C by approximately 2200 ± 320 Gt*CO_2 *(medium confidence). The associated remaining budget is being depleted by current emissions of 42 ± 3 Gt*CO_2 *per year (high confidence). The choice of the measure of global temperature affects the estimated remaining carbon budget. Using global mean surface air temperature, as in AR5, gives an estimate of the remaining carbon budget of 580 Gt*CO_2 *for a 50% probability of limiting warming to 1.5°C, and 420 Gt*CO_2 *for a 66% probability (medium confidence). Alternatively, using GMST gives estimates of 770 and 570 Gt*CO_2*, for 50% and 66% probabilities, respectively (medium confidence). Uncertainties in the size of these estimated remaining carbon budgets are substantial and depend on several factors."* (C1.3 Summary for Policy Makers).

254. The focus of this claim is on the greenhouse gas emissions associated with a specific project, which tend to be categorised and reported as direct and indirect emissions. Direct greenhouse gas emissions are emissions from sources that are owned or controlled by the company reporting the emissions. Indirect emissions are a consequence of the activity of the company, or in this case, the Project, but occur at sources owned or controlled by others.

255. The Greenhouse Gas Protocol initiative comprises an international partnership of businesses, governments, NGO's and others convened by the World Resources Institute and the World Business Council for Sustainable Development. It has developed internationally accepted greenhouse gas accounting and reporting standards and tools with the aim of providing a credible and transparent approach for quantifying and reporting GHG emissions from projects. The Protocol was described by Total's expert witness in his evidence as a "*widely recognised and widely applied framework*".

256. The Protocol divides emissions into three 'scopes'. Scope 1 emissions are the direct emissions from facilities owned or controlled by the reporting company. Scope 2 are the indirect emissions from the off-site generation of energy purchased for use by a particular project. Scope 3 emissions are all the other indirect emissions that occur in a company's value chain, including downstream emissions from distribution, storage and use of the product generated by the project in question. It is common ground that the relevant Scope 3 emissions in this case arise from the processing and use of the LNG. In particular, Total's expert considers that the largest Scope 3 emission from the Project are likely to arise from the combustion of the natural gas at its point of end-use.

257. There is no dispute that the Project will be a highly significant generator of greenhouse gases. The initial development is expected to produce 16 trillion cubic feet of gas (TcF) and 93 million barrels of condensate over a 30-year development and production period. 95% of the LNG produced will be exported around the world, with 5% to be used in Mozambique. It was common ground that the greenhouse gas emissions from the combustion of the gas in the countries of import will dwarf the greenhouse gas emissions generated in Mozambique. The major climate impact of the Project will be the indirect, downstream, international greenhouse gas emissions arising from the Project.

258. UKEF estimates the direct greenhouse gas emissions from the Project site in Mozambique will be 6 million tonnes of carbon dioxide equivalent per annum during the operational period of the project (Scope 1 emissions). By way of context; the threshold set by the relevant International Finance Corporation/World Bank Group Performance Standard, which UKEF follows as part of its decision making, for determining whether greenhouse gas emissions are considered significant is 25,000 tonnes of CO_2 (equivalent) emitted per year. The emissions from the Project will constitute approximately 6 - 10% of Mozambique's annual greenhouse gas emissions under the Paris Agreement (as per its nationally determined contribution under the Agreement).

259. At the end of the decision-making process, at the request of the UK Prime Minister, the Department for Business, Energy and Industrial Strategy produced a rough estimate of the Scope 3 emissions associated with the Project. The figure calculated was 805 million tonnes of CO_2 over the 25-year lifetime of the project. If, as reported by the IPPC, the world's remaining carbon budget is estimated to be 420 gigatonnes of CO_2 for a 66% probability of limiting global warming to 1.5°C, the Project alone will use up almost 0.2% of the world's remaining carbon budget. On a remaining budget of 580 gigatonnes for a 50% probability of limiting global warming to 1.5°C, the figure is 0.14%.

260. In June 2019, the House of Commons Environmental Audit Committee reported on the scale and impact of UKEF's support for overseas fossil fuel projects, of which the Project under scrutiny is one. The Committee concluded that Scope 3 emissions are essential for calculating the full emissions impact of a project. It recommended that UKEF report the Scope 3 emissions of the fossil fuel projects it provides funding for and pointed to the Greenhouse Gas Protocol for Project Accounting as providing a methodology for doing so:

> *"148. Scope 3 emissions are essential for calculating the full emissions impact of a product, asset or portfolio. Scope 3 emissions are particularly high for fossil fuel-related projects. UKEF claim that there is no universally accepted measure for Scope 3emissions. However, Scope 3 emissions are already being used in many private sector companies using the GHG Protocol, and the Canadian Export Credit Agency has already expressed its ambition to work towards the G20 Taskforce on Climate-related Financial Disclosure (TCFD) standards (which would include Scope 3 emissions)."*
>
> *"149. UKEF should report the Scope 3 emissions of all projects, and in particular of all fossil fuel-related projects where Scope 3 emissions are particularly high. The GHG Protocol provides a methodology for calculating Scope 3 emissions, and the TCFD recommendations provide a readily-available source of guidance for this work. If Government considers that existing methodologies for modelling Scope 3 emissions are inadequate, it should support research to develop an agreed model, and should promote this model amongst its ECA peers."*

The legal context – the Paris Agreement - Article 2(1) (c) - finance flows

261. One of FoE's core contentions about UKEF's decision is that it cannot be considered compatible with Article 2(1)(c) of the Paris Agreement ('Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development').

262. In addition to the analysis of Stuart-Smith LJ, concluding that the Defendants need only satisfy the Court that their interpretation of the Paris Agreement was tenable (rather than correct), with which I agree, I make the following points. In doing so, I interpret the Paris Agreement in accordance with its ordinary meaning, in its context and in light of its object and purpose (Article 31 Vienna Convention on the Law of Treaties).

263. First; 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development' is one of three core aims in Article 2, expressed to be directed at 'strengthening the global response to the threat of climate change'. Referred to colloquially as the 'finance goal' it sits alongside a 'temperature goal', which is to hold the increase in the global average temperature to 'well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5 °C'. The third goal is to increase the ability of countries to adapt to climate change ('the adaptation goal').

264. Second, in the present context, the finance goal is relevant to the UK's obligations under the Agreement, not those of Mozambique. This is because of the principle of 'common but differentiated responsibilities', first enunciated in 1992 in the Rio Declaration on Environment and Development (principle 7) and the United Nations Framework Convention on Climate Change, then repeated in Article 2(2) of the Paris Agreement. The principle 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. The principle includes two elements. The first concerns the common responsibility of states for the protection of the environment whilst the second concerns the need to take account of differing circumstances, particularly in relation to each state's contribution to the creation of a particular environmental problem and its ability to prevent, reduce and control the threat. In practical terms, the application of the principle may lead, as in the present case, to environmental standards that impose differing obligations on states. (Sands et al Principles of International Environmental Law (2018 4th Ed CUP) excerpts page 244 – 249).

265. Third, the direct correlation between emissions of greenhouse gas emissions and increase in temperature means that the reference in Article 2(1)(c) to "*low greenhouse gas emissions*" must be understood by reference to the temperature goal in Article 2(1)(a). Thus, the provision of finance must be consistent with a pathway towards holding global warming to well below 2°C above pre-industrial levels and pursuing efforts to limit warming to 1.5°C. Flows of finance are therefore a core element in meeting the temperature goal.

266. Fourth; making finance flows consistent with a "*pathway towards*" low greenhouse gas emissions does not mean that all finance flows have to achieve explicitly beneficial climate outcomes, providing the pathway to the temperature goal is evident. The Standing Committee on Finance which serves the Paris Agreement expressed matters as follows in its 2018 assessment of finance flows in the context of Article 2:

> *"…although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole …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."*

267. Fifth: there was no dispute between the parties that, on its ordinary meaning the finance goal in Article 2(1)(c) applies to all finance flows, not just to climate finance. Although not a defined term in the Paris Agreement, climate finance is directed specifically at the provision of financial resources from developed countries, such as the UK, to assist developing countries, such as Mozambique, to mitigate against, and adapt to, the effects of climate change. In particular, it is to enable them to 1) reach peak national emissions as soon as possible and thereafter reduce towards net zero emissions in the second half of this century and 2) to adapt to the effects of climate change (Articles 4(5) 7(13) and 9(1)). It was common ground between the parties that the export finance under scrutiny in this claim is not climate finance.

268. Accordingly, applying the above interpretation of the Paris Agreement to the present case: in order for UKEF to demonstrate compliance with Article 2(1)(c), it had to demonstrate that funding the project is consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C. The broad wording of Article 2(1)(c) affords UKEF discretion in how it goes about demonstrating compliance.

269. The 2019 Green Finance Strategy, issued by the Department for Business, Energy and Industrial Strategy comes to the same interpretation of the Paris Agreement in the context of overseas development funding:

> *"Aligning UK's ODA with the Paris Agreement … we will be taking action to ensure the UK Government leads by example through aligning the UK's Official Development Assistance spending with the Paris Agreement… In practical terms this will include… ensuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans…"*

270. It was also the interpretation adopted by UKEF in the Climate Report for the Project. The Report poses the question "*is [The project] compatible with the Paris Agreement i.e. to reduce emissions well below 2 degrees Celsius with effort to limit to 1.5*". In this respect, no issue arises as to the tenability of UKEF's interpretation of the Paris Agreement. Its interpretation was tenable, and in my view, correct. UKEF did not seek to argue that, in the present context, it only needed to 'aim' to comply with Article 2(1)(c).

The applicable principles of English public law – environmental impact assessment

271. I agree with Stuart-Smith LJ that in such a case as this the Court must accord considerable respect to UKEF's decision making. In general terms, assessing the climate impacts of the Project was a complex, predictive exercise. The Court may closely scrutinise the reasoning for a decision yet still consider it is proper to accord the

decision maker a broad margin of discretion (R(Packham) v Secretary of State for Transport [2021] Env LR 10). In addition, I make the following points.

272. The Climate Change Report produced by UKEF was described in submissions to Ministers as "*an assessment of climate change risks*". It was the offshoot of a more traditional assessment of the environmental social and human rights impacts of the project undertaken by UKEF in accordance with its policy on environmental due diligence. In substance, the Climate Report is an environmental impact assessment. UKEF staff acknowledged the analogy:

> *"It's a fair point from Ben's side that it doesn't set out to 'assessment' [sic] the climate impact of a project in the traditional sense of an environmental impact assessment"*
>
> (internal email dated 07/5/20 from the Head of UKEF's CEO's office.

273. The Defendants acknowledged the legal analogy in their skeleton argument:
> "*Courts have warned against requiring an 'unrealistic counsel of perfection; even in the context of heavily regulated environmental impact assessments ((R Blewett) v Derbyshire CC [2004] Env LR 29 at para 41 (endorsed by the Court of Appeal in R(Plan B Earth) v SSfT [2020] PTSR 1446 at paras 126 – 144)*"

274. The broad purpose of an environmental impact assessment is to evaluate the effects from a major project with the potential to significantly affect the environment, so as to inform the decision maker. It is often described as an anticipatory environmental management tool. Its procedural nature bears consideration in the context of a multifaceted decision like the decision under scrutiny in these proceedings.

> *"[I]t should be emphasised that EIA is not a procedure for preventing actions with significant environmental impacts from being implemented, although in certain circumstances this could be the appropriate outcome of the process. Rather the intention is that actions are authorised in the full knowledge of their environmental consequences. Because EIA takes place in a political context, it is therefore inevitable that economic, social or political factors will outweigh environmental factors in many instances.*"
>
> (Environmental Impact Assessment: A comparative review.
> Christopher Wood 2nd Ed, Pearson Prentice Hall, pg3)

275. A similar characterisation appears in the decision of the Court of Appeal in R(Plan B Earth v Transport Secretary [2020] PTSR 1446. Whilst rejecting the proposition advanced by Counsel that there is material distinction between the procedures in the EU Environmental Impact Assessment Directive (EU Directive 2011/92) and the EU Strategic Environmental Impact Assessment Directive (EU Directive 2001/42/), no objection was taken by the Court to the characterisation of the role of environmental impact assessment within the context of wider decision making as:

> "*an assessment of the likely significant effects on the environment of an individual project within a decision-making process in which the merits of*

project and its credentials as sustainable development, must also be judged against policy" (§141).

276. In my view, UKEF envisaged the same procedural role for the climate assessment in its decision making, as is apparent from the minutes of a meeting with the Chair of EGAC in April 2020:

> *"4. Decision making*
>
> *I. Gordon asked what weighting the climate change assessment would have in overall decision making. In response, Alistair suggested that we should not discuss weightings at this point of the process (a view echoed by Louis), but what is important at this stage is that we can show we have fully acknowledged the climate change risk of this project.*
>
> *II. Once this has been evidenced, it can then be coherently presented to the ultimate decision makers alongside the other project considerations. [redacted]*
>
> *III. Louis emphasised that a project having negative climate implications does not necessarily prevent UKEF support, but it is important that we have fully considered the implications before reaching a holistic decision based on all the relevant factors."*
>
> (Minutes of an EGAC meeting dated 14 April 2020. (Emphasis added))

277. Domestic Courts have considered the lawfulness of the content of environmental impact assessments on numerous occasions, albeit in the context of the materially different EU/domestic legal regime of Environmental Impact Assessment (Directive 2011/92 EU of European Parliament and Council on the assessment of the effects of certain public and private projects on the environment). The well-established principle from these cases is that the decision-maker's judgment as to the information to be included in an environmental statement can only be challenged on grounds of irrationality or, in its more modern formulation, unreasonableness. Unreasonableness comprises two aspects; either that the decision under review cannot be justified or there is a demonstrable flaw in the reasoning that led to it (R (Law Society) v Lord Chancellor [2019] 1 WLR 1649 §98). Recent and topically relevant confirmation of the principle appears in the Supreme Court's decision in R(FoE) v Secretary of State for Transport ([2021] 2 All ER 967), a challenge to a third runway proposed at Heathrow Airport, which was based, in part, on climate grounds (see §142). In its analysis in the same case, the Divisional Court drew an analogy with the principle as expressed in environmental cases and the more general Tameside duty on a decision-maker to take reasonable steps to obtain information relevant to his/her decision, relied on by FoE in the present case (R(Spurrier) v Secretary of State for Transport [2020] PTSR 40 at §434). As the Defendants point out, if this is the approach of the Courts under the heavily regulated EIA regime, the margin of appreciation must apply with even greater force in the present context for the reasons explained by Stuart-Smith LJ. UKEF was conducting a complex, scientific, predictive evaluation.

UKEF's climate assessment

Preliminary

278. I make the following preliminary points about UKEF's climate assessment.

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

280. UKEF set out to produce a climate impact assessment that would "*fully acknowledge*", "*fully consider*" and "*evidence*" the climate change risks presented by the project so that they could be "*coherently presented to the ultimate decision makers, alongside the other project considerations*" (see minutes of EGAC meeting dated 14 April 2020).

281. It is apparent from the evidence that UKEF set out to assess the Project against the Paris Agreement. Several questions in the report ask whether the Project is compatible with the Paris Agreement including the question *'is it compatible with the Paris Agreement i.e. to reduce emissions well below 2ºC with effort to limit to 1.5ºC'* (Qn 14). Another question is '*how does the Project impact on the …the Paris Agreement…'* (Qn 11), to which the answer given includes a reference to "*Investment in renewable energy would offer a more environmentally sustainable pathway…to meet the needs of the Paris Agreement*". Further, as mentioned, UKEF's submission to the Prime Minister refers to "*a specific climate change report, considering support of the Project in the context of the UK's … Paris Agreement commitments*".

282. It is also apparent that UKEF set out to quantify the Scope 3 emissions because the Climate Report poses the question "*what are the estimated scope 3 emissions of the project?*" This is not surprising given the recommendation of the House of Commons Environmental Audit Committee, six months earlier, that UKEF should do so. In setting out to do so, UKEF must be taken to have acknowledged that the indirect, downstream greenhouse gas emissions were a relevant consideration to take into account in its decision making.

Lack of framework or benchmarks in the climate assessment

283. The Climate Report produced by UKEF was the offshoot of a more traditional assessment of the environmental social and human rights impacts of the Project which set out its methodology explaining how the assessment was done and the criteria by which the Project would be judged acceptable for funding. In contrast, the Climate Report does not indicate the climate benchmarks against which the Project will be assessed or provide any detail on the methodology. Instead, the Report simply poses (and answers) a series of questions, including:

> *"Does the Project contribute to fossil fuel transition/GHG emissions reduction at an international level? If so how?*
>
> *In the process of answering this question consider whether the project: - displaces renewable energy potential or low carbon solutions; adversely affects the country's transition to lower emissions; it is compatible with the Paris Agreement i.e. to reduce emission to well below 2 with effort to limit to 1.5 – contributes to fossil fuel lock in/increasing reliance on fossil fuel."*

284. There is no further analysis of the requirements of the Paris Agreement in the Report. UKEF produced a background information document but this simply lists, without analysis, Articles 2 and 4 of the Paris Agreement.

285. UKEF's specialist climate advisor, Dr Caldecott, repeatedly expressed concerns about the absence of a framework or benchmarks for the assessment. He made the comment below in relation to a version 2 of the draft report (his comments 2 April 2020):

> *"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 would influence a decision, and more details about the process of an assessment (who does the assessment, who reviews it, etc). The template doc and pro forma questions wouldn't pass as a UKEF climate framework for me. But I'm sure that this material is elsewhere, it just wasn't clear to me from the document.*
>
> *I would also provide a clearer structure: climate risks and impacts followed my mitigation measures (if applicable). Then broader non climate environmental risks and impacts also followed by mitigation measures. Peer analysis/comparison (including tables and other ways to compare/list what others have done/are doing)."*

286. Dr Caldecott repeated his concerns about the absence of an apparent framework in his comments on a later version (version 6):

> *"Is there a generic framework document I can review. Usually, a framework is set out and then it is applied to an instance, in this case the Moz LNG project"*

287. By an email dated 2 May 2020 to the Head of UKEF's CEO's office, he again repeated his concerns:

> *"I sense that the LNG project is driving the creation of this UKEF CC assessment framework. Ideally the framework would be developed first through an appropriately robust and comprehensive process and then we'd apply it to this project (and other projects) systematically.*
>
> *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'd*

> *also like to understand the FI peer analysis that is meant to be benchmarking this.*
> *I haven't been close to the process, so apols if there is a framework doc separate to what I have seen. Would be good to see if so."*

288. A narrative explanation of why UKEF considered a decision to fund the Project is consistent with the Paris Agreement first appears in the Defendants' summary grounds of defence, repeated in its detailed grounds of defence and is set out in full at paragraph 152 of the judgment of Stuart-Smith LJ.

Quantification of Scope 3 greenhouse gas emissions

289. FoE advanced a number of criticisms of the Climate Report. At the hearing, the main focus of its criticism was on UKEF's alleged failure to quantify the Scope 3 emissions from the Project. In this regard, FoE contended that the quantification of the Scope 3 emissions was fundamental to any meaningful climate change impact assessment of the Project given 95% of the LNG will be exported such that the global emissions from the Project will dwarf the direct emissions. FoE pointed to the Greenhouse Gas Protocol as a well-established methodology for calculating them. In response, UKEF submitted that its high-level qualitative assessment that the emissions produced would be "*significant*" was sufficient. The CEO of UKEF was under no illusions as to the scale of the emissions and UKEF's ESHR policy did not require it to consider Scope 3 emissions, let alone quantify them.

Internal UKEF reservations about Wood Mackenzie's advice that Scope 3 could not be quantified

290. In the preparation of its climate assessment, UKEF requested that the Project Operator, the First Interested Party, procure Wood Mackenzie, a gas market consultant, to assess the emissions. However, Wood Mackenzie advised that any Scope 3 calculations would be "*inaccurate and therefore likely to be misleading*". UKEF did not point Wood Mackenzie to the observations of the House of Commons Environmental Audit Committee in relation to the use of the Greenhouse Gas Protocol to calculate the emissions.

291. Wood Mackenzie proposed instead to calculate the reduction in CO_2 emissions if gas from the Project was used to generate electricity in a power plant in an Asian Country instead of using more polluting coal and oil. UKEF had internal reservations about Wood Mackenzie's approach from the outset:

> *"This scope would only seem to partly address what the [Export Credit Agencies] ECAs should be looking to ascertain and I wonder how much reliance one can gain from extremely broad-brush assumptions of energy displacements that are predicted to occur in yet to be defined locations"*
>
> (email to UKEF staff member dated 13 Feb 2020. The author's name and position is redacted)

292. Wood Mackenzie duly produced a report which concluded that it could not model the emissions impact from the Project with any certainty but said it saw some scope for the

gas produced to replace coal and oil which could lower carbon emissions. Internally, UKEF continued to have reservations about Wood Mackenzie's analysis:

> *"…the Woodmac report* is *very light and makes very high-level assumptions…I would have hoped they could have made some high level assumptions in what this means in terms of the overall impact of the global climate change. Is it likely to be a positive contributor, neutral or negative?"*
>
> (internal UKEF email dated 29/2/20)
>
> *"…at a somewhat simplistic level it appears that one can say that LNG as a fuel feedstock for power generation has considerably less emissions associated with it than coal fuel oil and gas oil"*
>
> (internal UKEF email dated 28/2/20)

293. Despite UKEF's reservations, Wood Mackenzie's analysis formed the basis of the climate report produced by UKEF.

Advice of UKEF's own experts that Scope 3 calculation was necessary

294. UKEF was given clear advice by its own experts that a failure to quantify the Scope 3 emissions undermined the credibility of the climate assessment.

295. The Chair of the statutory expert committee advising UKEF (EGAC) warned that the information on Scope 3 emissions was insufficient:

> *"2. Scope 3 emissions*
>
> *I. Alistair posited that the current information on Moz LNG's scope 3 emissions was insufficient. As such, Alistair asked the group whether we could capture*
>
> *i) what markets the gas will be exported to and*
>
> *ii) what energy sources it will replace. Without hard data, Alistair suggested we pursue a "What If" modelling approach based on rational assumptions.*
>
> *II. In response, [UKEF staff member] explained that this would be difficult to achieve and that Wood Mackenzie [a specialist consultancy] ("WoodMac") 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 (2 C) instead."*
>
> (Minutes of a discussion with the Chair of EGAC, 14 April 2020) (As FoE noted in its submissions, the requirement of the Paris Agreement is 'well below 2°C', not 2°C as Wood Mackenzie suggested in its report).

296. The Chair of EGAC also advised UKEF that there were other specialists who could model the climate change impacts of the project.

> *"6. External consultants*
>
> > *I. 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 Moz LNG. However, it was accepted there is not enough time left to engage consultants for this project."*

297. UKEF's specialist external climate advisor, Dr Caldecott, described the failure to calculate the emissions as a 'big gap in the analysis'. Internally, UKEF staff accepted the validity of his criticism:

> *"it's a fair point that it doesn't set out to 'assessment' [sic] of 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."*
>
> (internal staff email dated 7 May 2020)

298. UKEF decided not to take further steps to calculate the emissions.

299. Within Government, the Director General of Energy Transformation and Clean Growth at the Department for Business, Energy and Industrial Growth (Julian Critchlow) was also critical of the position saying it

> "*undermines the credibility of the Climate Change Report in my opinion".*

300. In addition, he questioned the suggestion that Scope 3 emissions were too complex to be calculated:

> *"I am confused as why they are unable to calculate the* CO_2 *resulting from combustion of the LNG? The conservation of mass seems like a good place to start…"*

301. Nonetheless, in answer to the question "*what are the estimated Scope 3 GHG emissions of this project*", the Climate Report states that there is no estimate because Wood Mackenzie advised any estimate would be "*inaccurate and therefore likely to be misleading*". Further explanation was provided in UKEF's environmental/human rights report to the effect that Scope 3 emissions could not be reported "*due to considerable uncertainty in the measurement and reporting of these data*" and that "*this could not be resolved without further analysis or due diligence*". The reservations of UKEF's experts in this regard are not mentioned.

302. The Report went on to express the view that "*A high-level qualitative assessment indicates that the potential Scope 3 emissions from the use of the Project's exported LNG will be very high and will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities, as well as exceeding 25,000 tonnes CO_{2e} per year.*" As matters transpired, on the calculation of Scope 3 emissions subsequently produced by the Department for Business, the order of magnitude of the Scope 3 CO_2 emissions from the Project is 1000 times greater than the 25,000 tonnes referred to in the Report.

The Defendant's position on calculation of scope 3 emissions

303. Before the Court, the Defendants relied on the absence of any applicable legal or policy requirement to calculate Scope 3 emissions. Whilst I accept that, of itself, there is no such requirement, the House of Commons Environmental Audit Committee advised UKEF that *"Scope 3 emissions are essential for calculating the full emissions impact of a product, asset or portfolio."* UKEF's specialist external climate advisor, Dr Caldecott, described the failure to calculate the emissions as a "*big gap in the analysis*". Within Government, the Director General of Energy Transformation and Clean Growth at the Department for Business, Energy and Industrial Growth considered the absence of the information "*undermined the credibility of the assessment".*

304. The Defendants also submitted that the absence of any applicable policy or standard for calculating Scope 3 emissions is telling and uncertainty over the method of assessment is a relevant consideration when judging whether and how to take something into account. They cited, in this regard Packham v Secretary of State for Transport [2021] Env LR 10 and R(Friends of the Earth) v Secretary of State for Transport [2021] 2 All ER 967 at §166. However, the Greenhouse Gas Protocol provides a methodology for calculating Scope 3 emissions, which the House of Commons Environmental Audit Committee had endorsed. Moreover, the House of Commons Committee had specifically rejected UKEF's suggestion that there is no established methodology:

> *"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… The GHG Protocol provides a methodology for calculating Scope 3 emissions"*

305. The Protocol was described by Total's expert as "*well known and established*".

Other flaws in the assessment of the global emissions impact

306. Instead of calculating the gross emissions from the Project, the Climate Report presents an assessment of the emissions 'avoided' by the Project going ahead. However, the GHG Protocol on Project Accounting expressly states that if avoided emissions are addressed this must be done separately *"Any claims of avoided emissions related to a company's sold products must be reported separately from the company's…scope 3 inventories."* (GHG Protocol Technical Guidance for Calculating Scope 3 Emissions Version1.0 (2013), Category 11 page 114). This is because Scope 3 emissions and avoided emissions are separate concepts. The former is an estimate of the gross emissions from a Project whilst the latter identifies a counterfactual baseline of emissions that will be emitted in the absence of a proposed project and assesses the reduction in emissions which come about as a result of the project in question

proceedings (thereby arriving an assessment of the emissions 'avoided' by the project). UKEF staff had recognised the conceptual difference at an earlier stage of the decision making: "*Whether the Project displaces more fossil fuel (or not) is considered under the transition fuel argument section. It is not considered in the calculation of Scope 3 emissions as it will not change the Project's Scope 3 emissions.*" (internal UKEF email exchange dated 5 May 2020).

307. In the present case, the broad counterfactual in the Climate Report is that the gas from the Project displaces the use of more carbon intensive fuels, in the countries of export. In this regard, the Climate Report lists three potential scenarios of displacement, so far as global emissions from the Project are concerned:

i) a best-case scenario where all the exported LNG is used to replace more polluting fuels. This would result in a net reduction in emissions;

ii) a worst-case scenario where the gas used does not result in any decommissioning of more polluting sources of power production and might also displace renewable energy sources; and

iii) a mid-case scenario where some of the LNG will displace some new coal and oil power generation.

308. The Report identifies the mid-case scenario, that the LNG will displace some new coal and oil power generation, as the most likely scenario. The evidential basis for this conclusion is however, unclear. UKEF itself stated in the Report that it did not know with any confidence whether the LNG produced would replace more polluting fuels:

> *"It cannot be stated with certainty whether or not the Project will contribute to fossil fuel transition 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 an unavoidable consequence of the Project's off taking arrangements and could not be resolved with further analysis or due diligence.*

309. Wood Mackenzie had concluded that it is <u>not</u> possible to determine whether the emissions would replace other more polluting emissions:

> "*we cannot know whether the LNG is*
>
> - *Replacing other (more carbon intensive) fuels in existing facilities (and so lowering emissions) or*
>
> - *Replacing other less carbon intensive facilities (like nuclear plants) and so increasing emissions*
>
> - *Meeting incremental gas demand or replacing indigenous gas supplies (and so increasing emissions)"*

310. The Report cites the analysis of the US export credit agency, US EXIM:

> "*US EXIM also analysed coal displacement as a proxy for carbon emissions, focusing on China as a region for which the Project LNG will be delivered. Given the growth of the Chinese market, their analysis concluded that it is unlikely that coal plants would be shut down to be replaced with gas fired power plants. Therefore, their analysis focused on future coal use, using data from the US Energy Information Agency, and showed that between 2015 and 2050, use of gas consumption in China would grow (+4.8%) whilst coal consumption would fall (-0.8%). The Project would likely have a direct contribution on this and therefore result in a net reduction of GHG emissions*." (emphasis added)

311. However, as is apparent, US Exim was of the view that the Project would not replace more polluting emissions because it was unlikely that coal plants would be shut down to be replaced with gas fired power plants. The best that can be hoped for is that the gas will be used instead of new coal developments. Yet, as Wood Mackenzie noted, the LNG might also displace lower emitting energy sources such as renewables and nuclear; a point that UKEF staff were alive to internally:

> *"In some instances like Japan it might replace even nuclear power which has zero* CO_2 *emissions and hence once could not argue that having this project is a positive from an environmental point of view*."
>
> (email from a staff member in the Credit Risk team at UKEF dated 14 February 2020).

312. The summary section of the report expresses the view that it is more likely than not that the project will result in some displacement of more polluting fuels, leading to a net reduction in global emissions:

> *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.* (emphasis added)

313. Similarly, the section in the main body of the report on international impacts addresses the same matters in more detail and expresses the same view.

> *On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the gas from the Project will at least replace some and/or displace some more polluting fuels, with a consequence of some net reduction in emissions.*

314. However, a section of the report headed "Conclusion" is more circumspect:

> *"It is therefore UKEF's view that although the Project's Scope 3 (along with its Scope 1 and 2) emissions will contribute to global GHG emissions the net effect may be a decrease in future GHG emissions provided that the Project LNG is used to replace and/or displace the use of more polluting fossil fuels."* (emphasis added)

315. The inconsistency became apparent during the hearing when FoE's Counsel made her submissions on day 1 of the hearing on the basis that the climate assessment concludes that there will be a net reduction in global greenhouse gas emissions from the Project. This led us to query the position at the start of the second day.

316. In part therefore, the climate assessment expresses the view that, on balance, the Project will lead to a net reduction in global emissions. Elsewhere however, there is an acknowledgment of the potential for an increase in global emissions from the Project, albeit that the increase may be offset to the extent the gas from the project replaces the use of more polluting fuels. For the reasons explained below, there is a material difference between the two positions under the Paris Agreement on Climate Change.

The information before Ministers

317. FoE submitted that the ambiguities in the Climate Report raised a material question as to how Ministers understood the impact of the Project on global emissions.

318. The Secretary of State for International Trade made the original recommendation to support the Project. She was informed that UKEF had a requirement to consider climate change risks as part of its support for the Project. She was reassured that, whilst the Project would have a "*significant impact*" from "*increased emissions*", gas was part of the overall transition to a low carbon future. She was told to read the Climate Report, as to which the summary section would have informed her that, on balance it appears more likely than not that the Project will lead to a net global reduction in emissions (see paragraph 313 above). No mention was made of the Paris Agreement in the submission. She was not told that UKEF had decided not to estimate the Scope 3 emissions from the Project despite the recommendation of its experts that it should do so. She was not aware of the Scope 3 estimate (805 million tonnes CO_2) as it had not been calculated at this stage. Instead, she was informed in the Climate Report that the Scope 3 emissions will exceed 25,000 tonnes CO_{2e} per year. In fact the order of magnitude of the emissions is 1000 times greater (based on the calculation subsequently produced by the Department for Business). She approved funding for the Project.

319. The Chancellor of the Exchequer was told that UKEF had assessed the climate risks and concluded that the Project met the relevant international standards. He was also told there was potential for the LNG to displace heavier carbon fuels, particularly in China, India and Indonesia. The analysis would reasonably have left him with the impression that the Project was beneficial on climate grounds. He was not given the 805 million tonne figure as it had not been calculated at this juncture. He gave his consent to the funding.

320. In light of the opposition to the Project, on climate grounds, from the Foreign Secretary, the Secretary of State for International Development and the Business Secretary, the views of the Prime Minister were sought. He was informed that UKEF had considered support for the Project in the context of the UK's commitments under the Paris Agreement. He was told that the much larger indirect emissions could not be accurately assessed but he was not told about the reservations of UKEF's own experts in this regard. He was then reassured that "*whilst gas is a fossil fuel … it is likely to displace higher polluting fossil fuels and result in a net decrease in emissions in those nations*

where that is the case" (emphasis added). He was not told in express terms whether the Project was considered to be compatible with the Paris Agreement or not.

Quantification of Scope 3 emissions in 24 hours

321. As part of his decision making, the Prime Minister requested advice on whether the emissions generated by the Project could be offset. During the course of research into the matter, UKEF and the Department for Business, Energy and Industrial Strategy quantified the Scope 3 emissions associated with the Project. They did so in 24 hours. This puts into context UKEF's earlier decision not to make further inquiries about calculating the emissions when its experts advised that the calculation should, and could be, done. The calculation was a simple one based on the expected gas production over the lifetime of the Project and a standard conversion factor based on the carbon intensity of the LNG. The Department for Business caveated the method as simplified and emphasised it should only be considered a rough estimate. Nonetheless, a figure was produced.

Calculation was not put to the decision making Ministers

322. The Scope 3 emissions from the Project were calculated on 30 June 2020. This was after the original recommendation on 10 June by the First Defendant Secretary of State for International Development to provide the funding and after the consent of the Second Defendant, Chancellor of the Exchequer to the funding, on 12 June 2020. It was approximately 5 hours before the UKEF CEO exercised his delegated power to issue final approval.

323. The Climate Report was not amended to reflect the calculation or sent back to relevant Ministers for further consideration in light of the calculation produced. This was despite the view expressed at this juncture by the Director General of Energy Transformation and Clean Growth at the Department for Business that the credibility of the Climate Report was undermined by the absence of an estimate of Scope 3 emissions.

324. The figure produced by the Department for Business demonstrates that the global emissions impact is significant. On the basis of the IPPC's analysis the Project will use up almost 0.1 - 0.2% of the worlds remaining carbon budget (based on a remaining budget of 580 gigatonnes of CO_2 for a 50% probability of limiting global warming to 1.5°C or 420 gigatonnes of CO_2 for a 66% probability).

325. To the extent that Ministers understood that the Project would lead to a net reduction in global emissions, the evidence base was unclear. To the extent that Ministers understood the Project would lead to a net increase in global emissions, they were not made aware of the scale of the gross global emissions when they approved the funding. In my judgment, neither the statement in the Climate Report that Scope 3 emissions will likely significantly exceed 25,000 tonnes CO_{2e} per year, or the reference in UKEF's submission to the Secretary of State for International Trade and the Treasury, to "*the significant impact that the project will have due to increased GHG emissions*" (emphasis added), convey the scale of the gross impact. The Defendants say that UKEF's CEO was under no illusions as to the scale of the emissions. However, before the Court, the Defendants did not seek to suggest that the knowledge of UKEF's CEO as to the calculation should be treated as the knowledge of the Ministers in question.

Nor did they seek to argue that the production of the calculation at the end of the decision making could cure earlier defects in the assessment exercise/Report, in the event the Court identified any.

FoE's other criticisms of the Climate Report

326. FoE raised a number of other criticisms of the Climate Report which are considered in Stuart-Smith LJ's judgment and which I need only mention in brief. FoE submitted that UKEF failed to take account of cumulative emissions, thereby significantly underestimating the greenhouse gas emissions attributable to Mozambique from the Project, such that it will be impossible for Mozambique to meet its commitments under the Paris Agreement. FoE also submitted that the Defendants were wrong to conclude that the Project will not lock Mozambique into unsustainable energy consumption over the 30-year life span of the project, with the result that Mozambique cannot meet its commitments under the Paris Agreement. Other arguments included that UKEF failed to consider the UNEP Production Gap report; it should have assessed the Committed Cumulative Carbon Emissions from the Project; and there is a real risk of the project becoming a 'stranded asset' in light of changes in climate policy making the technology unviable.

327. I have not been persuaded by FoE's arguments on these aspects. In my judgment, in large part, properly understood, FoE's submissions revolved around competing expert opinions as to UKEF's approach to relevant matters. It is not the role of a court in judicial review proceedings to resolve conflicts in expert evidence (R (Spurrier) v Sec of State for Transport [2020] PTSR 240 and R (Mott) v Environment Agency [2016] 1 WLR 4338. As an example, UKEF's specialist advisors agreed that the methodology of assessing the emissions from the Project against a carbon budget for the industry sector (Cumulative Committed Carbon Emissions) was in its infancy and had not previously been applied to a Project of this nature. In my view, UKEF cannot be criticised for not applying this methodology at the time of their decision making (November 2019- July 2020). Similarly, UKEF's judgment that there was no certainty about any expansion to the LNG production lines was not unreasonable. FoE may disagree, strongly, with UKEF's judgments, but that does not make them unlawful.

Compatibility with the Paris Agreement on Climate Change

328. In order for UKEF to demonstrate compliance with Article 2(1)(c), it had to demonstrate that funding the project is consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C. The broad wording of the provision affords UKEF discretion in how it does so.

329. The climate assessment does not include a calculation of the gross emissions from the Project (Scope 3). It conflates Scope 3 emissions with avoided emissions. It expresses inconsistent views on the global emissions impact. On the one hand it suggests that the Project can be expected to lead to a net reduction in global emissions, as to which the evidence base in support is unclear. On the other hand it expresses a circumspect view that the Project may lead to a decrease in future greenhouse emissions provided that the Project LNG is used to replace and/or displace the use of more polluting fossil fuels. In the context of the Paris Agreement, there is a material difference between the two positions because of the direct correlation between emissions and temperature rise.

As the Netherlands Supreme Court put matters in the Urgenda case: "*All greenhouse gas emissions led to a reduction in the carbon budget still available*." (7.4.3). Early on in the decision making process, a UKEF staff member posed the rhetorical question: "*what does the Project mean in terms of the overall impact of the global climate change. Is it likely to be a positive contributor, neutral or negative?*". The answers in the climate assessment are inconsistent.

Conclusion

330. I agree with Stuart-Smith LJ that in such a case as this the Court must accord considerable respect to UKEF's decision making. In general terms, assessing the climate impacts of the Project was a complex, predictive exercise. Aspects of the methodology were in their infancy at the time. I have borne in mind that the intensity of the review and the breadth of the margin of discretion are conceptually different. The Court may closely scrutinise the reasoning for a decision yet still consider it is proper to accord the decision maker a broad margin of discretion (R(Packham) v Secretary of State for Transport [2021] Env LR 10). I have afforded considerable respect to UKEF's decision making.

331. However, in the application of that test, I have reached the view that in the circumstances of this case, UKEF failed to discharge its duty of inquiry in relation to the calculation of Scope 3 emissions. Its judgment that a high level qualitative review of the impact was sufficient was unreasonable. In summary, my reasons are as follows.

332. UKEF set out to produce a climate impact assessment that would "*fully acknowledge*", "*fully consider*" and "*evidence*" the climate change risks presented by the project so that they could be "*coherently presented to the ultimate decision makers, alongside the other project considerations*".

333. The climate assessment does not, however, include a calculation of the Scope 3 emissions, which illustrate that the Project will use up 0.1- 0.2% of the world's remaining carbon budget. The House of Commons Environmental Audit Committee had advised in July 2019 that Scope 3 emissions are essential for calculating the full emissions impact of a project. There is a well-established methodology for doing so (the Greenhouse Gas Protocol) which the House of Commons Environmental Audit Committee had endorsed. UKEF was given clear advice by its own experts that the failure to quantify the Scope 3 emissions undermined the credibility of the climate assessment. The Chair of the statutory expert committee advising UKEF (EGAC) warned that the information on Scope 3 emissions was insufficient. UKEF's specialist external climate advisor, Dr Caldecott, described the failure to calculate the emissions as a "*big gap in the analysis*". Within Government, the Director General of Energy Transformation and Clean Growth at the Department for Business, Energy and Industrial Growth advised that the absence of a Scope 3 estimate "*undermines the credibility of the Climate Change Report".* The Chair of EGAC advised UKEF that there were other specialists who could model the climate change impacts of the project but it was decided there was not enough time to engage consultants to do the work and UKEF made no further enquiries before Ministers were asked to take a decision on funding. A rough estimate was produced by UKEF and Department for Business, Energy and Industrial Strategy within 24 hours, after the relevant Ministers had made their decisions. Ministers were not told about the calculation (805 million

tonnes CO_2 over the lifetime of the Project) and were not therefore aware of the scale of impact (0.1- 0.2% of the world's remaining carbon budget). Accordingly, in the circumstances of this case, UKEF failed to make reasonable and legally adequate enquiries in relation to a key consideration in the decision making (climate risks). The lack of information deprived Ministers of a legally adequate understanding of the scale of the emissions impact from the Project.

334. Other flaws in the assessment include the conflation of Scope 3 and avoided emissions; the expression of inconsistent views about the global emissions impact and an unclear evidence base in relation to the view expressed that the Project can be expected to lead to a net reduction in emissions.

335. The failure to quantify the Scope 3 emissions, and the other flaws in the Climate Report mean that there was no rational basis by which to demonstrate that funding for the Project is consistent with Article 2(1)(c) of the Paris Agreement on Climate Change and a pathway to low greenhouse gas emissions.

336. No question of relief follows from my conclusion as the claim fails given the judgment of Stuart-Smith LJ. Accordingly, I need say no more about the point other than to note that the Defendants did not seek to advance the case that their decision would have been the same had the errors I consider to be present not occurred. The climate impacts were a key consideration in the decision making. Given the complexities of the decision making and the wide range of public interest factors in play, it would not in my view be appropriate for the Court to make any further assessment of the matter beyond identifying that the Climate Assessment did not fulfil the purpose set for it by UKEF in that it failed to fully acknowledge the climate impacts of the Project, thereby depriving UKEF and Ministers of the full evidence base on which to decision make.

337. Finally, I emphasise that my conclusions do not, and are not intended to, address the merits of the Project or the other public interest considerations in play in the decision making. These are not matters for the Court. Judicial review is not and should not be regarded as, politics by another means. Where however, a Court reaches the view that a decision maker has erred as a matter of law in the approach taken to its assessment of the merits, it is the role of the Court to say so (R (CAAT) v SS for International Trade [2019] 1 WLR 5765 at §54 and §56.)