

## LITIGATION BRIEFING - DIVISIONAL COURT JUDGMENT

### Friends of the Earth v UK Export Finance (and others)

#### The Paris Agreement

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##### Key points

- One High Court Justice rules:
    - UK Export Finance (UKEF) acted unlawfully in deciding to finance TotalEnergies' project. It had 'no rational basis' to conclude financing the project was consistent with the Paris Agreement, Article 2 (1) (c).
    - Government Ministers approving the deal were misled.
    - For finance flows to be aligned to the Paris Agreement, they must be demonstrably aligned with the Agreement's temperature goal of limiting global heating to 1.5 degrees.
  - Second Judge rules decision was lawful. Split judgment means 'legal limbo' – FoE given permission to appeal by the Judges
  - Increased legal jeopardy for UKEF with High Court Judge ruling
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##### Introduction

1. Friends of the Earth challenged the decision of (1) UK Export Finance and the Secretary of State for International Trade, and (2) the Chancellor, in approving finance of up to \$1.15 bn USD for a new liquified gas project in Mozambique. A decision that is one of the largest ever financing packages offered by UKEF.
2. The project comprises the development of offshore deep-water gas production facilities 50km from the coast of Northern Mozambique with onshore liquefaction plant, to be operated by oil major TotalEnergies.
3. The project was already highly controversial, sited as it is close to a UNESCO biosphere reserve, forcing the relocation of local communities, and linked to fuelling an insurgency causing human rights abuses. [Research by the New Economics Foundation and Friends of the Earth](#) estimated it will produce 3.3 - 4.5 billion tonnes of CO<sub>2</sub> equivalent over the project's lifecycle, more than the combined annual greenhouse gas emissions of all 27 EU countries.
4. As well as seeking to extract UK finance from a hugely damaging project, UKEF's view of what the Paris Agreement meant, and the dire quality of their climate assessment, have been central concerns of the litigation as key governance issues.

## The legal challenge and outcome

5. When deciding to finance the project UKEF assessed it against the Paris Agreement. It concluded that the financing was consistent with the UK's obligations under the treaty. Friends of the Earth challenged this on two grounds, in essence:
  - a. the decision was based on an incorrect understanding of the Paris Agreement because the funding of such a large new fossil fuel project was plainly not consistent with the Paris Agreement, when considering the latest science; and
  - b. the decision was reached without 'lawful enquiry', i.e. UKEF failed to take reasonable steps to gather essential information, such as an estimate of the total emissions from the project (including emissions from the end-use of the gas).
6. The claim was issued in September 2020 and heard on 7 – 9 December 2021 by a Divisional Court of two judges: Lord Justice Stuart-Smith, and Mrs Justice Thornton.
7. Extraordinarily the two Judges reached starkly different views (outlined below) and the court split, creating legal uncertainty. Usually, a judicial majority is possible – but here both views carry equal weight. The Judges have given FoE permission to appeal against their ruling. The next stage is for the Court of Appeal to hear that appeal.
8. Friends of the Earth maintains that where a High Court Justice identifies unlawful conduct then the relevant public body should take corrective action. This is consistent with the rule of law.

## The judgment of Lord Justice Stuart-Smith (concluding UKEF decision lawful)

### *Adequacy and purpose of the climate assessments relied on*

9. Lord Justice Stuart-Smith was of the clear view that the claim was not successful in any respect. The government was under a duty to carry out sufficient enquiry prior to making its decision [97], but the scope of this duty was defined by the nature of the decision in question [101] [236]. Here, the decision required a range of difficult judgments to be made across a wide spectrum of policy areas and including scientific prediction [236]. Some of these judgments involved novel issues [103].
10. Fundamentally the decision was focused on finance for a project already underway, and it would have no material impact on the emissions occurring. UKEF's primary mission was to ensure that no UK export failed for lack of finance or insurance from the private sector, and as such it didn't have to elevate climate change and scrutinise it as FoE contended. The court should give UKEF a large amount of latitude in deciding for itself what enquiry it should make, and only lightly scrutinise that decision. [236]

### *Quantification of scope 3 emissions*

11. Stuart-Smith LJ did not agree that measuring total emissions from the project was essential to understanding its climate impact. There was no legal or policy requirement to do this, and it was already obvious that the development would lead to very high levels of emissions. It was lawful to decide no further information was needed. [237]
12. UKEF's Climate Change Report did not go into the detail that might be expected in other circumstances (e.g. Environmental Impact Assessments), but it was not obliged

to. The Defendants could rationally take their decision without emissions estimates due to the nature and purpose of their decision, and they had received some advice. [238]

13. He ruled: “...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.” [234]

#### *The Paris Agreement*

14. Stuart-Smith LJ was also unconvinced that the Paris Agreement could or should be interpreted. It contained “*somewhat opaque language*” [227], is not clear, and “*contains numerous aims or aspirations that may prove to be in tension or frankly irreconcilable on the facts of a given case, this being a paradigm example.*” [239]. This relates to his understanding that for Mozambique to alleviate poverty it needed to develop this gas field, which was in contradiction with action on climate change.
15. As such, UKEF was entitled to take a view that the financing was in accordance with Paris because that view is “tenable” when the Agreement is properly understood [240]. It is not hard-edged, but flexible in seeking to deliver differing objectives that may not be reconcilable. There is no sound basis to challenge UKEF’s conclusion that providing finance for a large new gas field causing very high emissions, but assisting Mozambique as a developing country, was inconsistent with Paris. [233]

#### **The judgment of Mrs Justice Thornton (concluding UKEF decision unlawful)**

16. Justice Thornton took a different view.

#### *Climate change and project emissions*

17. Her judgment took as its starting point the current science on climate change. She found that the environmental and social impacts of an increase in global temperature are potentially catastrophic and would “*jeopardise the lives, welfare and living environment of many people all over the world*” [250]. The Intergovernmental Panel on Climate Change (IPCC) in 2018 had established that limiting warming to 1.5 degrees above pre-industrial levels will significantly reduce the risk of impacts [251].
18. She explained that the IPCC and courts around the world acknowledged the need for reducing emissions by way of carbon budgets. [252] The IPCC established remaining carbon budget estimates globally [253], and the Greenhouse Gas (GHG) Protocol for Project Accounting is widely recognised for accounting project emissions. [255] The House of Commons Environmental Audit Committee had even criticised UKEF for its lack of reporting of project emissions and recommended this method to do so. [260]
19. What is more, the major part of the climate impact of this project will be from end use combustion. [257] Despite UKEF’s supposed inability to measure them, Justice Thornton calculated the end use emissions as 0.2% of the remaining global budget if we remain on track for 1.5 degrees warming with a 66% chance of hitting it [259].

#### *Article 2 (1) (c) of the Paris Agreement – finance flows*

20. Whilst agreeing with the principle that UKEF need only have a “tenable” view of what the Paris Agreement meant (see paragraphs 14 and 15 above), Thornton J. did

interpret Article 2 (1) (c) of the Paris Agreement in deciding the case. She did this in accordance with its ordinary meaning and in light of its objectives and purpose, as required by the Vienna Convention [262].

21. She identified Article 2 (1) (c), 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development', as a core aim to deliver the temperature goal. [263] Due to the direct correlation between GHG emissions and increases in temperature, the references to 'low greenhouse gas emissions' must be understood by reference to the temperature goal. [256]
22. She ruled that: "...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".[268]

#### *UKEF's Climate Assessment*

23. UKEF set out to "fully acknowledge", "fully consider" and "evidence" the climate change risks created by the project so they could be evaluated against the Paris Agreement including the temperature goal. This would be presented to Ministerial decision makers [280/281] as a key consideration among others. As part of this UKEF did in fact set out to quantify the emissions from end use [282] (but failed ultimately to do so).
24. Thornton J. found that there were many flaws in what they produced, which was criticised by UKEF's own expert advisors [283 – 288, 294- 298]. Reliance was placed on a report produced by Wood Mackenzie (WM) which said that quantifying total emissions would be 'inaccurate and misleading'. [290] They could not model the emissions impact with 'any certainty'. Despite UKEF's own experts advising it was possible and "a big gap in analysis", UKEF took no further steps to calculate the emissions. [298] UKEF's assertion that there was no established methodology was even rejected by Total's expert witness who acknowledged the GHG protocol [305].
25. Instead, the report relied on the approach of WM in assuming that emissions would be saved due to the displacement of other dirtier fuels, even though the conclusions were said to be unreliable and inconclusive. [308/309]. Thornton J. also found the conclusions in the report to be inconsistent [315/316], and that both the Secretary for International Trade and the Chancellor were misled by UKEF about the true picture [318/319].
26. Whilst Ministers were told that the emissions would exceed 25,000 tonnes of CO<sub>2</sub> and were significant, they were not told that "the order of magnitude of the emissions is 1000 times greater" [318]. A calculation of end use emissions was in fact produced for the Prime Minister within 24 hours for another purpose, despite UKEF insisting (and advising ministers), that this could not be accurately done. [320/321]. The Climate Change Report was never updated or returned to Ministers for re-consideration.

#### *Conclusions reached*

27. The climate assessment did not include a calculation of total emissions, conflated end use emissions with the separate concept of avoided emissions and expressed inconsistent views on the potential global emissions impact.
28. Even though considerable latitude was given to UKEF, Thornton J. ruled:

“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.” [244]

29. “The lack of information deprived Ministers of a legally adequate understanding of the scale of emissions impact from the Project” [333]

### Implications and wider significance

30. The Judges have disagreed on central parts of the claim, which are of wide importance: a) whether it’s necessary to measure GHG emissions to understand climate impacts, and b) what the Paris Agreement means in making finance flows consistent with the low GHG emissions pathway, and how it should be applied in this case.
31. Stuart-Smith LJ’s view on Paris - even though not seeking to rule definitively - is not only contradictory to the Government’s own line as COP26 President, but clearly undermines the purpose and object of the Paris Agreement - to strengthen the response to the urgent threat of climate change. He views the treaty as an ambiguous package of aims and aspirations that are contradictory. As such, he is able to endorse UKEF’s view that finance for a vast new gas project in current circumstances, without even quantifying its impact in climate terms, is in line with the treaty.
32. Thornton J interprets it differently, that finance flows are a core element of the Paris Agreement in achieving the temperature goal, and so UKEF: “*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*” [268]. Further, that in not quantifying total emissions it had “*no rational basis*” to conclude it was consistent. A logical view for a global system based on science, GHG budgets and measured baselines.
33. Whilst the claim has been disallowed essentially on a technicality, one of the two judgments establishes that UKEF acted unlawfully. If they don’t now pull out of the deal they will be operating under high legal risk, and they are stuck defending a position that contradicts current government policy banning this type of overseas financing, specifically to align with Paris goals. The new policy was brought forwards shortly after UKEF’s decision was challenged by FoE.
34. If they continue the litigation they must choose whether to support a judge’s view that said the Paris Agreement has irreconcilable aims of poverty reduction, sustainable development and climate action in this and other cases. That is of course wrong. Action on climate is exactly what will prevent the mass impoverishment of the most vulnerable, and there are alternatives to alleviating poverty than through more fossil fuel developments - *the developed world committed to fund them under the Paris Agreement itself*. If in any doubt you need look no further than the [IPCC Special 1.5 Report from 2018](#), for example.

## Conclusion

35. Often it is government-backed finance that allows controversial projects like this to go ahead because they are so commercially risky, but climate litigation risk is also increasing. Court disclosure showed that UKEF chose to assess compliance with Paris significantly because of Friends of the Earth's prior Heathrow litigation success in the Court of Appeal. Clearly government recognises it is increasingly vulnerable if it takes bad decisions on climate. In this instance another Judge has found Government to have acted irrationally, again.

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