

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

CA-2022-000759

[2022] EWHC 568 (Admin) (Stuart-Smith LJ and Thornton J)

BETWEEN

THE KING

on the application of

FRIENDS OF THE EARTH LIMITED

Claimant/Appellant

-and-

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

(2) CHANCELLOR OF THE EXCHEQUER

Defendants/Respondents

-and-

(1) TOTAL E&P MOZAMBIQUE AREA A LIMITADA

(2) MOZ LNG1 FINANCING COMPANY LIMITED

Interested Parties

-and-

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

Proposed Intervener

WRITTEN SUBMISSIONS ON BEHALF OF
THE PROPOSED INTERVENER

I. Introduction

1. The central question in this case is whether the government of the United Kingdom (“UK”) was entitled to find that financing a new offshore liquefied natural gas (“LNG”) export project in Mozambique is consistent with its obligations under the Paris Agreement. The dispute centres on what constitutes Paris-compliant financial flows, and whether calculation of the inevitable downstream or “Scope 3” emissions from the financed activities is a necessary and feasible part of that determination. This Court has an opportunity to correct the troubling position taken by Lord Justice Stuart-Smith in his judgment below (“the Judgment”).¹ It is respectfully submitted that he misconstrued the Agreement’s object and purpose and read in tension where none exists. His interpretation risks stripping the Paris Agreement of its proper legal effect.
2. It goes without saying that the Paris Agreement is a climate agreement. Its primary purpose is to “*strengthen the global response to the threat of climate change,*”² by preventing “*dangerous anthropogenic interference with the climate system.*”³ States parties are obliged to pursue this purpose through mitigation, adaptation, and a reorientation of financial flows,⁴ guided by the best available science,⁵ and in accordance with “*equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*”⁶ For the UK, a developed State, to finance new fossil fuel production hinders the global response to climate change by undermining the Paris Agreement’s long-term temperature goal. Such financing is not compatible with the Agreement.
3. Drawing on the text, context, and implementation of the Paris Agreement and the United Nations Framework Convention on Climate Change (“UNFCCC”) pursuant to which it was adopted, as well as other relevant sources of international law, this intervention focuses on the interpretation and application of Article 2.1(c). It makes three arguments. First, “*a pathway*

¹ [2022] EWHC 568 (Admin) [hereinafter “Judgment”].

² Paris Agreement, art. 2.1, 2015 T.I.A.S. No. 16-1104 (Dec. 15, 2015) [hereinafter “Paris Agreement”].

³ United Nations Framework Convention on Climate Change, art. 2, 1771 U.N.T.S. 107 (May 9, 1992) [hereinafter “UNFCCC”].

⁴ Paris Agreement, art. 2.1(a)-(c).

⁵ Paris Agreement, pmb., arts. 4.1, 7.5, 14.1 (preamble stating: “Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge” (emphasis added); UNFCCC, arts. 4(2)(c)-(d).

⁶ Paris Agreement, art. 2.2.

towards low greenhouse gas emissions” in Article 2.1(c) means a pathway towards the Agreement’s long-term temperature goal under Article 2.1(a), understood in light of the best available science to be limiting warming to 1.5°C. Second, for a financial flow to be *consistent* with a low greenhouse gas emissions (“GHG”) pathway means it must, at minimum, be compatible with, and not contrary to, a 1.5°C pathway. New fossil fuel production, which would lead to significant additional emissions in the future, when global emissions should have peaked and be in decline, is inconsistent with this pathway, and thus with Article 2.1(c). Financing that is at odds with the Agreement’s long-term temperature goal cannot be deemed Paris-compliant because it *may* generate revenue that the host country *could* use for poverty eradication or investment in renewable energy in the future. Accepting such an argument would mean any revenue-generating project could claim consistency with the Paris Agreement. Third, an assessment of whether financing is consistent with a 1.5°C pathway requires quantifying the total foreseeable emissions of the financed project—including Scopes 1, 2, and 3. For fossil fuel production, those emissions are inevitable and calculable, and cannot be counterbalanced by speculative assumptions about the potential displacement of other energy sources and uncertain avoided emissions.

4. Article 2.1(c) is a critical provision in the Paris Agreement. It captures the urgency and gravity of the needed global response to climate change by calling for an economy-wide, transformational shift in financial flows involving all actors—private and public—to achieve the Agreement’s mitigation and adaptation goals. This Court has an opportunity to ensure this provision is interpreted properly, in the manner intended, in light of best available science, and in line with the object and purpose of the Paris Agreement. This Court should not shy away from the implication of such a proper interpretation. Finding that financing new fossil fuel supply projects, such as the Mozambique LNG project at issue here, is incompatible with Article 2.1(c) follows from a correct reading of the Agreement; it should not be rejected as too “*hard-edged*” given the devastation that will come from failing to meet the global temperature goal of limiting warming to 1.5°C.

II. Article 2.1(c)'s directive to make finance flows consistent with a pathway toward low-greenhouse gas emissions must be read together with the temperature target in Article 2.1(a)

5. “*A pathway towards low greenhouse gas emissions,*” as set out in Article 2.1(c), is one that is consistent with the long-term temperature goal in Article 2.1(a), which aims to keep warming to 1.5°C. As laid out below, (i) the text and structure of the treaty; (ii) best available science; (iii) state practice⁷ and reports by UNFCCC bodies; and (iv) international human rights law⁸ all support the above interpretation of a “*low greenhouse gas emissions*” pathway.
6. Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) guide treaty interpretation.⁹ Under Article 31(1), Article 2.1(c) of the Paris Agreement shall be interpreted in “*accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*”¹⁰ Context includes agreements by all parties, relating to the treaty and made in connection with its conclusion.¹¹ Together with context, “*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*” and “*relevant rules of international law applicable in the relations between the parties*” shall be considered.¹² Article 32 provides that supplementary means of interpretation can be relevant to confirm the meaning resulting from the application of Article 31, or to determine the meaning if there is ambiguity or the interpretation as a result of Article 31 leads to a result that is manifestly absurd or unreasonable.¹³

⁷ State practice can be a relevant source of treaty interpretation under Articles 31 and /or 32 of the Vienna Convention on the Law of Treaties. See International Law Commission (ILC), *Report on the Work of the 68th Session*, ch. VI: Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/71/10, p. 93 Conclusion 4 (2) Commentary, at paras. 7-8, 16-18, 20, 24, 26-34, 37 (2016) [hereinafter “ILC, *Report on Subsequent Agreements and Practice*”]; *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. 7, at para. 138 (Sep. 25).

⁸ International human rights law is a relevant body of law between States parties under VCLT art. 31(3)(c).

⁹ *Vienna Convention on the Law of Treaties*, arts. 31, 32, signed May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31(1) [hereinafter “VCLT”].

¹⁰ VCLT, art. 31(1).

¹¹ VCLT, art. 31(2)(a).

¹² VCLT, art. 31(3)(b)-(c).

¹³ VCLT, art. 32; see also ILC, *Report on Subsequent Agreements and Practice* p. 84, Conclusion 2(5) (“The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in Articles 31 and 32.”).

5. The analysis of Article 2.1(c) must start with the text of Article 2 of the Paris Agreement, which sets out its object and purpose, three primary ways the Agreement will achieve that purpose, and the principles guiding implementation. Article 2 states:

“1. This Agreement, in enhancing the implementation of the Convention [United Nations Framework Convention on Climate Change (UNFCCC)], including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and 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; and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”¹⁴

6. The Paris Agreement is designed to advance implementation of the UNFCCC’s objective: *“stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system ... within a time-frame sufficient to allow ecosystems to adapt naturally to climate change ... and to enable economic development to proceed in a sustainable manner.”¹⁵* Thus, the Paris Agreement’s ultimate object and purpose is to *“strengthen the global response to the threat of climate change,”¹⁶* by *“prevent[ing] dangerous anthropogenic interference with the climate system.”¹⁷* Articles 2.1(a)-(c) are not mere aspirational *“examples”* or *“illustrations”* of how the Agreement’s object and purpose can be realized, as Stuart-Smith LJ suggested,¹⁸ but the express, priority means by which it is to be implemented.

¹⁴ Paris Agreement, art. 2.

¹⁵ UNFCCC, art. 2.

¹⁶ Paris Agreement, art. 2.1.

¹⁷ UNFCCC, art. 2; *see also* UNFCCC, arts. 3-4 (setting forth the principles guiding its implementation and the commitments made by States).

¹⁸ Judgment, para. 225.

7. The link between Article 2.1(c) and 2.1(a) is clear from the text of the Agreement. Article 2.1(a) reflects the Parties' political compromise on the long-term temperature goal.¹⁹ That goal sets the outer bounds for permissible levels of global emissions that would be consistent with the ultimate objective of the UNFCCC. Therefore, references throughout the Agreement to greenhouse gas emissions, such as the reference to "*low greenhouse gas emissions*" in Article 2.1(c), must be understood as relating to the temperature limit in Article 2.1(a).²⁰
8. The structure of the Agreement supports this interpretation.²¹ The Agreement is structured around the efforts Parties must undertake to fulfil the climate objectives set forth in Article 2, understood in light of the best available science.²² This architecture is reflected in Article 3, which requires Parties "*to undertake and communicate ambitious efforts as defined in Articles 4 [mitigation], 7 [adaptation], 9 [finance], 10 [technology], 11 [capacity] and 13 [transparency] with the view to achieving the purpose of this Agreement as set out in Article 2.*"²³ Moreover, a number of provisions throughout the Agreement refer back to Article 2 and/or specifically "*long-term goals,*" "*long-term temperature goal,*" "*mitigation,*" and "*adaptation.*"²⁴ Viewing Article 2.1(c) in light of this structure, it follows that the provision must be read as a means to support the mitigation and adaptation goals²⁵ laid out in Article 2.1(a) and (b).

¹⁹ Scientific evidence shows that current levels of warming are already having devastating impacts on people and the environment, jeopardizing fundamental human rights, suggesting that the temperature goals set out in the Paris Agreement are insufficient to prevent danger and harm due to climate change.

²⁰ Cf *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment [2008] ICJ Rep 177, at para. 123 (Jun. 4, 2008) (clarifying that where a provision of a Treaty sets a limit, other provisions must be read in light of and consistent with that limit). See para. 28 (discussing the effectiveness principle, which provides that provisions should be read harmoniously to give effect to all provisions).

²¹ VCLT: A Commentary p.582 (Oliver Dorr & Kirsten Schmalenbach eds., 2nd ed. 2018) ("the systematic structure of a treaty is of equal importance to the ordinary linguistic meaning of the words used").

²² Paris Agreement, pmbi., arts. 4.1, 7.5, 14.1.

²³ Paris Agreement, art. 3 (emphasis added). Achieving the goals of the Paris Agreement also includes conserving and enhancing sinks (art. 5), pursuing cooperative approaches to allow for higher ambition (art. 6), averting, minimizing, and addressing loss and damage (art. 8), and enhancing education, training, public awareness, public participation, and public access to information for greater climate action (art. 12).

²⁴ See Paris Agreement, arts. 4.1, 4.19, 6.4, 7.1, 9.1, 9.4, 10.2, 11.1, 13.5, 14.1.

²⁵ This submission focuses on the link to the mitigation goal given the nature of the project at issue which does not purport to advance adaptation. The language of Article 2.1(c) also clearly links to 2.1(b) by using some of the same language in its reference to low greenhouse gas emission and climate-resilient development.

9. Courts in other jurisdictions have held that the reports of the Intergovernmental Panel on Climate Change (“the IPCC”) reflect the best available climate science.²⁶ Those reports have affirmed the imperative to keep warming below 1.5°C. With the adoption of the Paris Agreement, which recognizes that Parties need to base climate action on the best available scientific knowledge,²⁷ the Parties invited the IPCC to provide a special report on the impacts of global warming of 1.5°C (“Special Report on 1.5”).²⁸ The report made clear that society at large will experience significantly greater “*climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth*” at 1.5°C warming,²⁹ with impacts becoming even more severe and potentially irreversible above that level.³⁰ In 2018, all 195 IPCC Member States approved by consensus the Summary for Policymakers of the Special Report on 1.5°C, demonstrating their acknowledgement of the need to keep warming below 1.5°C.³¹ Thus, best available science makes clear that to achieve the goals of the Paris Agreement and the UNFCCC, the long-term temperature target must be understood as 1.5°C.
10. Statements of UNFCCC bodies and States parties affirm that Article 2.1(c) financial flows must be “consistent” with the mitigation and adaptation goals in 2.1(a) and (b). For instance, the Biennial Assessment issued by the Standing Committee on Finance (SCF), the UNFCCC body mandated to assess information related to financial flows and the application of 2.1(c),³²

²⁶ *e. g. Thomson v. Minister for Climate Change Issues*, [2018] 2 NZLR 160, at para. 89-91, 93-94 (Nov. 2, 2017) (New Zealand); *Milieudefensie et al v. Royal Dutch Shell*, District Court of the Hague, case no. C/09/571932 / HA ZA 19-379, at para. 4.4.27 (May 26, 2021) (Netherlands) (English translation) [hereinafter “*Milieudefensie*”]. Courts routinely rely on IPCC reports. *E.g. The State of the Netherlands v. Urgenda*, Supreme Court of the Netherlands, Case. No. 19/00135 (Engels) (Dec. 20, 2019) (English translation) [hereinafter “*Urgenda*”] (relying on IPCC reports in its assessment).

²⁷ Paris Agreement, pmb., arts. 4.1, 7.5, 14.1.

²⁸ UNFCCC Conference of the Parties (COP), Decision 1/CP.21, FCCC/CP/2015/10/Add.1, at para. 21 (Jan. 29, 2016) [hereinafter “UNFCCC, Decision 1/CP.21”]

²⁹ Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, at para. B.5 (Oct. 8, 2018) [hereinafter “IPCC, *Special Report on 1.5°C*”]

³⁰ *Ibid.* at paras. A.3.2, B.2.2, B.4.2.

³¹ IPCC, Press Release 2018/24/PR, “Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments” (Oct. 2018).

³² UNFCCC COP, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, at para. 112 (Mar. 15, 2011) (establishing the Standing Committee on Finance); UNFCCC COP, Decision 4/CP.24, FCCC/CP/2018/10/Add.1, at para. 10 (Dec. 15, 2018) [hereinafter “UNFCCC COP, Decision 4/CP.24”].

links the task” of meeting the temperature goal in 2.1(a) with the finance flows task in 2.1(c).³³ In its Fourth (2020) Assessment, the SCF defined “*low greenhouse gas emissions and climate resilient development [as] [r]elates to Article 2, including 2.1a and 2.1b, in the context of equity, and poverty eradication.*”³⁴ The Conference of Parties has welcomed the SCF Biennial Assessments and endorsed key findings,³⁵ including the finding that achieving the goal in Article 2.1(c) “*depends on real-economy actions that reduce emissions in line with temperature goals and help to develop climate resilience.*”³⁶ Numerous State submissions³⁷ to the UNFCCC also show an understanding that Article 2.1(c) financial flows are linked with and “*essential for achieving*” the mitigation and adaptation goals.³⁸ For instance, the European Union and its Members States’ Article 9.5 Biennial submission states that Articles 2.1(a) and

³³ Standing Committee on Finance (SCF), *2018 Biennial Assessment and Overview of Climate Finance Flows Technical Report*, p. 101 at para. 342 [hereinafter “SCF, *Third BA* (2018)”]; see also Standing Committee on Finance (SCF), *Fourth (2020) Biennial Assessment and Overview of Climate Finance Flows Technical Report*, at p.149 (Oct. 29, 2021) [hereinafter “SCF, *Fourth (2020) BA*”]. The SCF’s Fourth (2020) Biennial Assessment published in 2021 focused on “climate finance flows for 2017 and 2018 and identifies trends from previous years where possible.” *Ibid.* p. 21 at para. 4; see also p. 4 at para. 6.

³⁴ SCF, *Fourth (2020) BA*, p. 149 (emphasis added).

³⁵ UNFCCC COP, Decision 4/CP.24, para. 3; UNFCCC COP, Decision 5/CP.26, FCCC/CP/2021/12/ADD.1, at para. 2 (Nov. 13, 2021) [hereinafter “UNFCCC COP, Decision 5/CP.26”].

³⁶ UNFCCC COP, Decision 5/CP.26, Annex I at para. 53; see also *ibid.* at para. 45.

³⁷ Cites submissions include: States parties’ UNFCCC National Communications from 2017, States Biennial Communications under Article 9.5 of the Paris Agreement submitted in 2020-2021 reporting on conduct during the preceding years and focus for subsequent years (see UNFCCC, COP serving as the meeting of the Parties to the Paris Agreement, Decision 12/CMA.1, FCCC/PA/CMA/2018/3/Add.1 (Dec. 15, 2018)), recent submissions to the Standing Committee on Finance on Article 2.1(c), and submissions to the ongoing Global Stocktake.

³⁸ Germany and the European Commission on behalf of the European Union and its Member States, *Article 9.5 Biennial Communication*, p. 5 (Nov. 20, 2020) [hereinafter “EU, 9.5 Communication”]; *ibid.* p. 13-15; Norway, *Article 9.5 Biennial Communication*, p. 10 (Feb. 26, 2021) [hereinafter “Norway, 9.5 Communication”]; United States of America, *Submission to the first Global Stocktake*, p. 11 (Jun. 9, 2022) [hereinafter “U.S., *GST Submission*”]; Canada, *Submission to SCF on Article 2.1(c)*, p. 1 (May 13, 2022) [hereinafter “Canada, 2.1(c) Submission”]; Chile on behalf of Asociación Independiente de Latinoamérica y el Caribe (AILAC) (representing Chile, Colombia, Costa Rica, Honduras, Guatemala, Panama, Paraguay and Peru), *Submission to SCF on Article 2.1(c)*, p. 1 (Apr. 29, 2022) [hereinafter “AILAC, 2.1(c) Submission”]; German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB), *7th National Communication on Climate Change*, p. 162 (Dec. 20, 2017) [hereinafter “Germany, 7th National Communication”]; see also Canada, *7th National Communication and 3rd Biennial Report*, p. 246 (Dec. 29, 2017) [hereinafter “Canada, 7th National Communication”] (Article 2.1(c) requires aligning investment with the goals set out in the Paris Agreement); Alliance of Small Island States (AOSIS) (representing 39 states), *Submission to the first Global Stocktake*, p. 8 (Jun. 12, 2022) [hereinafter “AOSIS, *GST Submission*”] (same); cf UNFCCC, Decision 1/CMA.3 Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1 at para. 24 (Nov. 13, 2021) hereinafter (connecting long-term low greenhouse gas emissions development strategies to achievement of the temperature goal); UNFCCC Secretariat, *Long-term low-emission development strategies (LT-LEDS): Synthesis report by the secretariat*, FCCC/PA/CMA/2022/8, p. 11 at paras. 5, 54 (Oct. 26, 2022) [hereinafter “UNFCCC Secretariat, *LT-LEDS Synthesis Report*”] (synthesizing 53 long-term low emissions development strategies (LT -LEDS) from 62 Parties to the Paris Agreement and showing that they align with the Agreement’s temperature goal).

2.1(b) “can only be achieved if global financial flows, including private finance and investment, national budgets and ODA support climate objectives.”³⁹

11. International human rights law, a “*relevant rule of international law*”⁴⁰ in accordance with which the Paris Agreement including Article 2.1(c) should be interpreted, further reinforces this understanding. The preamble to the Paris Agreement provides that States parties should “*when taking action to address climate change, respect, promote and consider their respective obligations on human rights.*”⁴¹

12. Interpreted consistently with States’ human rights obligations, Article 2.1(c) requires aligning financial flows with a 1.5°C low-emissions pathway. States must refrain from conduct that causes or contributes to a foreseeable threat to human rights,⁴² and take action to protect against such threats.⁴³ It is without question that climate change poses a foreseeable threat to the realization of a wide range of human rights.⁴⁴ In that context, States must “*avoid taking measures that could accelerate climate change,*” and take all appropriate measures to prevent climate change.⁴⁵ Given the IPCC’s finding that warming of 1.5°C would not be safe for most

³⁹ EU, 9.5 *Communication*, p. 13.

⁴⁰ VCLT, art. 31(3)(c); *see also Urgenda*, at para. 5.4.1-5.4.2 (citing ECtHR case law holding that “rules concerning the international protection of human rights” are relevant rules of international law per VCLT art. 31(3)(c).).

⁴¹ Paris Agreement, pmb1.

⁴² Human Rights Committee (HRC), General Comment No. 36, U.N. Doc. CCPR/C/GC/36, at para. 6, 7, 63 (Oct. 30, 2018) [hereinafter HRC, “General Comment No. 36”]; Committee on the Rights of the Child (CRC), General Comment No. 16, U.N. Doc. CRC/C/GC/16, at para. 26-27 (Apr. 17, 2013) [hereinafter “CRC, General Comment No. 16”]; David Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161, at para. 69 (Jul. 15, 2019) [hereinafter “Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*”].

⁴³ HRC, General Comment No. 36, at para. 18, 21-22; CRC, General Comment No. 16, at para. 28; Öneryıldız v. Turkey [GC], no. 48939/99, at para. 89, 101, 135 (2004).

⁴⁴ Committee on the Elimination of Discrimination against Women (CEDAW), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), CRC and Committee on the Rights of Persons with Disabilities (CRPD), Statement on human rights and climate change, U.N. Doc. HRI/2019/1, at para. 3 (May 14, 2020) [hereinafter “CEDAW et al, *Statement on human rights and climate change*”]; U.N. Special Procedures, Joint statement by UN Special Procedures on the occasion of World Environment Day: Climate change and human rights (Jun. 5, 2015) hereinafter; Convention on the Rights of the Child (CRC), Sacchi et al. v. Argentina, UN Doc. CRC/C/88/D/104/2019, at paras. 10.6, 10.11 (Oct. 8, 2021).

⁴⁵ CEDAW et al, *Statement on human rights and climate change*, at para. 7; *See* HRC, Portillo Cáceres v. Paraguay, U.N. Doc. CCPR/C/126/D/2751/2016, para. 7.3 (Sept. 20, 2019); Advisory Opinion OC-23/18, Inter-Am. Ct. H.R. (ser. A) No. 23, paras. 108-09, 118, 142, 149, 242(b) (Nov. 15, 2017) [hereinafter “Advisory Opinion OC-23/18”]; *Urgenda*, at paras. 5.2.2-5.2.4, 5.3.2; Neubauer et al v. Germany, Bundesverfassungsgerichtshof (BverfG) (Federal Constitutional Court), 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para. 144 (Apr. 29, 2021) (Germany) [hereinafter “Neubauer”].

people and that adverse impacts are already occurring at 1°C of warming,⁴⁶ it would contravene a State’s duties to pursue conduct that foreseeably contributes to warming in excess of 1.5°C. States must pursue all measures to keep warming below 1.5°C, including, at minimum, by ensuring that their financial flows are not inconsistent with a 1.5°C pathway.

III. Pathways consistent with limiting warming to 1.5°C exclude development of new fossil fuel supply

13. Financial flows that contribute to an overall increase in global emissions, out of line with a 1.5°C pathway, are not compatible with Article 2.1(c). Various sources show that ensuring financial flows are consistent (i.e. compatible) with a 1.5°C pathway—the Paris temperature target—requires public and private actors to shift from supporting high-emission sectors, such as fossil fuels, to supporting renewable energy and other low- or no-carbon investments. This interpretation of the provision is evident from: (i) the Text of the Agreement; (ii) best available science; (iii) statements of UNFCCC bodies and States parties, and (iv) international human rights law. Ensuring consistency of finance flows with a 1.5°C pathway entails a global transformative shift in financing,⁴⁷ so the Court should not reject as too “*hard-edged*”⁴⁸ the conclusion that financing new fossil fuel export projects is incompatible with Article 2.1(c).
14. The ordinary meaning of Article 2.1(c)—“*consistent with a pathway towards low greenhouse gas emissions*”⁴⁹—is that financial flows must be compatible⁵⁰ with—and thus not contrary

⁴⁶ IPCC, *Special Report on 1.5°C*, pp. 4-6, 9; see also CEDAW et al, *Statement on human rights and climate change*, para. 5.

⁴⁷ See United Kingdom Department for Business, Energy, and Industrial Strategy, *7th National Communication on Climate Change*, p. 230 (Dec. 30, 2017) [hereinafter “UK, 7th National Communication”]; Canada, *7th National Communication*, p. 211, 246; Germany, *7th National Communication*, p. 160; Canada, *Article 9.5 Biennial Communication*, pp. 7-8 (Jan. 18, 2021) [hereinafter “Canada, 9.5 Communication”]; EU, *9.5 Communication*, p. 5-6, 13-14; United Kingdom of Great Britain and Northern Ireland, *Article 9.5 Biennial Communication*, p. 14 (Dec. 11, 2020) [hereinafter “UK, 9.5 Communication”]; Republic of Senegal on behalf of the Least Developed Countries (LDCs) Group (representing 46), *Submission to SCF on Article 2.1(c)*, at para. 6 (Jun. 3, 2022) [hereinafter “LDCs, 2.1(c) Submission”]; AILAC, *2.1(c) Submission*, p. 1; see also UNFCCC, Decision 1/CP.21, pmb., at para. 5, 6, 9, 12, 15 (recognizing that urgent and deep reductions in global emissions needed to meet the ultimate objective of the UNFCCC and the long-term temperature goal in the Paris Agreement requires “the widest possible cooperation by all countries,” and non-party stakeholders including the financial institutions.); SCF, *Fourth (2020) BA*, p. 12 at para. 45, 47, p. 15 at para. 53.

⁴⁸ Judgment, para. 229.

⁴⁹ Paris Agreement, art. 2.1(c).

⁵⁰ See Oxford English Dictionary, “Consistent, adj. and n.” (Sept. 2022) (defining consistent as “compatible”).

to—the Agreement’s long-term temperature goal (1.5°C pathway). As per the text of the Agreement, a determination of consistency must be guided by the best available science.⁵¹

15. The IPCC’s modelled pathways for 1.5°C should be the starting point for assessing compatibility. The IPCC makes clear that temperature rise corresponds to cumulative emissions, such that limiting global warming requires keeping cumulative emissions below a certain level or “*carbon budget*.”⁵² The IPCC global temperature-target aligned emissions pathways correspond to a global carbon budget—the maximum cumulative CO₂ emissions consistent with a given probability of keeping warming to a given temperature rise—and the trajectory global emissions must follow to stay within that budget. The IPCC 1.5°C pathways consistently show the need for immediate and substantial reductions in global emissions.⁵³ In its 2018 Special Report on 1.5°C, the IPCC explained, “[C]umulative CO₂ emissions are kept within a [carbon] budget by reducing global annual CO₂ emissions to net zero.”⁵⁴ For a two-thirds chance of keeping warming to 1.5°C, the IPCC assessed the remaining carbon budget in 2018 to be 420 GtCO₂ (580 GtCO₂ for a 50% chance)⁵⁵—and it has only shrunk since as emissions have continued to rise. Staying within this budget requires global emissions to begin declining immediately, peaking before 2025 at the latest.⁵⁶ IPCC reports from 2018 and this year reiterate that limiting warming to 1.5°C requires global CO₂ emissions to be approximately halved by 2030 and to reach net zero by 2050 or sooner.⁵⁷

16. The modelled pathways consistent with limiting warming to 1.5°C show that a phaseout of fossil fuels—the primary driver of global warming and overwhelming source of emissions,

⁵¹ Paris Agreement, pmb. 4.1; *see also Ibid.* arts. 7.5, 14.1; UNFCCC, arts. 4(2)(c)-(d); UNFCCC COP, Decision 4/CP.24, para. 4 (“[e]ncourages the Standing Committee on Finance to take into account the best available science in future biennial assessments and overviews of climate finance flows.”).

⁵² *See* Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, pp. 8-9, 63-64 (Nov. 2, 2014) [hereinafter “IPCC, AR5”]; IPCC, *Special Report on 1.5°C*, at para. C.1.3.

⁵³ *See* IPCC, AR5, pp. 8, 17, 19-20, 63-64; IPCC, *Special Report on 1.5°C*, pp. 12, 13; IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, SPM-21-22 (Apr. 4, 2022) [hereinafter “IPCC, AR6 WGIII”].

⁵⁴ IPCC, *Special Report on 1.5°C*, p. 96.

⁵⁵ *Ibid.*

⁵⁶ IPCC, AR6 WGIII, TS-42 at table TS.3; *see also* IPCC, Press Release, *The evidence is clear: the time for action is now. We can halve emissions by 2030* (Apr. 4, 2022).

⁵⁷ IPCC, AR6 WGIII, SPM-21-22 at paras. C.1-C.2, p. 24 at table SPM.1; IPCC, *Special Report on 1.5 °C*, at paras. C.1, C.2, C.2.2; *cf.* Paris Agreement, art. 4.1 (acknowledging the need to reach net zero by mid-century).

accounting for 86% of anthropogenic CO₂ emissions in the last decade⁵⁸—is required. Building on its findings from 2018,⁵⁹ the IPCC’s most recent reports found that “[t]he ‘committed’ emissions from existing fossil-fuel infrastructure may consume all the remaining carbon budget in the 1.5°C scenario”⁶⁰—leaving no room for new fossil fuel investments. The IPCC has consistently urged that a rapid phase out of fossil fuels is thus required to align with a 1.5°C pathway. In the 2018 Special Report on 1.5°C, the IPCC found that “1.5°C consistent pathways are characterized by a rapid phase out of CO₂ emissions,”⁶¹ particularly from fossil fuels, and would require action across all sectors of the economy, including major transformations in energy production, among others.⁶² The most recent IPCC reports echo the earlier findings affirming that “[m]eeting the ambitions of the Paris Agreement will require phasing out fossil fuels from energy systems.”⁶³ Both reports warn that the failure to do so through delayed GHG emission reductions and continued investment in fossil infrastructure “leads to economic and institutional lock-in into carbon intensive infrastructure,”⁶⁴ and “energy systems will be locked-in to higher emissions, making it harder to limit warming to 2°C or 1.5°C.”⁶⁵ According to the U.N. Environment Programme 2020 Production Gap report, which documents the discrepancy between countries’ planned fossil fuel production levels and the levels necessary to limit warming to Paris-aligned temperature targets, gas production would have to decline annually by at least 3% to be consistent with a 1.5°C pathway.⁶⁶

⁵⁸ IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, TS-80 (Aug. 9, 2021) [hereinafter “IPCC, AR6 WGI”]; IPCC, AR5, p. 5; see also Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers 1854-2010*, 122 *Climatic Change* 229 (2014) [hereinafter “Heede, Tracing Anthropogenic Emissions”].

⁵⁹ IPCC, *Special Report on 1.5°C*, at para. 2.3.2.2.

⁶⁰ IPCC, AR6 WGIII, 17-65; see also *ibid.*, TS-54 (“Without early retirements, or reductions in utilization, the current fossil infrastructure will emit more GHGs than is compatible with limiting warming to 1.5°C.”); 6-114 (“These current investments [in fossil infrastructure] combined with emissions from proposed fossil infrastructure exceed the emissions required to limit warming to 1.5°C (medium confidence).”).

⁶¹ IPCC, *Special Report on 1.5°C*, at para. 2.3.2.

⁶² IPCC, *Special Report on 1.5°C*, fig. SPM.3b, para. C.2.

⁶³ IPCC, AR6 WG III, 17-64; see also *ibid.*, SPM- 32, SPM-36; TS-47, TS-53-54; 6-117, 6-126; 17-23 (“The achievement of long-term temperature goals in line with the Paris Agreement requires the rapid penetration of renewable energy and a timely phasing out of fossil fuels, especially coal, from the global energy system”).

⁶⁴ IPCC, *Special Report on 1.5°C*, at para. 2.3.5.

⁶⁵ IPCC, AR6 WGIII, TS-53.

⁶⁶ U.N. Environment Programme, *The Production Gap: 2020 Report*, p. 4.

17. The reports from the SCF and other UNFCCC bodies as well as State practice show that consistency with low-greenhouse gas emissions—or the 1.5°C pathway—requires a shift in financial flows away from high-emission sectors, such as fossil fuels.
18. According to SCF reports, Article 2.1(c) requires a “(re)direct[ing of] all finance and investment,”⁶⁷ away from investments that are inconsistent with the temperature target. “Consistency with a pathway towards,” the SCF explains “refers to finance flows that are ‘consistent with’, rather than aimed at, a pathway towards low-GHG and climate-resilient development.”⁶⁸ This means “[a]ctions that result in low GHG/carbon and climate resilient development, and actions that support shifts in finance flows away from unsustainable high GHG emission and low resilient development.”⁶⁹ At minimum, consistency requires that the financial flows “reduce the likelihood of negative climate outcomes.”⁷⁰
19. Such redirection must include shifting financing away from high-emitting sectors, including fossil fuels. The SCF Biennial Assessments expressed concern over the high amount of financial flows and stocks in GHG-intensive activities, specifically identifying fossil fuel investments and subsidies.⁷¹ This was a “key finding” endorsed by the COP,⁷² and is echoed in one of the UNFCCC Secretariat’s synthesis reports for the global stocktake.⁷³ In its Fourth (2020) Biennial Assessment, the SCF characterized using “public finances to facilitate the shift towards a decarbonized and resilient economy,” and “ensuring future public finance support

⁶⁷ SCF, *Third BA* (2018), p. 103 at para. 348.

⁶⁸ *Ibid.*, p. 25 at para. 29.

⁶⁹ SCF, *Fourth (2020) BA*, p. 149. The report suggests that there may be some “necessary investment in high GHG emission sectors or activities to support a transition. These may be in areas where ‘consistent’ activities are not yet available at scale due to technological innovation (e.g. steel and/or cement processes), where activities are needed to enable a transition (e.g. financing of mining activities, road building), or where financing is needed to wind down or responsibly manage retiring high GHG emission activities and transition communities away from their reliance (e.g. coal phase-out policies and subsidies)” *Ibid.* p. 153 at para. 469. Notably absent from these examples of “necessary investment” in high-emission sectors or activities is investment in new fossil fuel supply (expanded production of oil and gas).

⁷⁰ SCF, *Third BA* (2018), p. 12 at para. 49; *see also ibid.* p. 103 at para. 347 (using the formulation, “avoid increasing the likelihood of negative climate outcomes”); *accord* SCF, *Fourth (2020) BA*, p. 114 at para. 332. The COP has endorsed this “key finding” *see* UNFCCC COP, Decision 4/CP.24, Annex I, at para. 49; UNFCCC COP, Decision 5/CP.26, Annex I, at para. 47. *See also* Judgment, at paras. 29, 227 (citing the SCF report).

⁷¹ SCF, *Fourth (2020) BA*, p. 12 at para. 46, p. 86; *see also ibid.* p. 12 at para. 45; SCF, *Third BA* (2018), pp. 101 at para. 343, 102 at 351 (highlighting the World Bank’s announcement to end funding to the upstream oil exploration and extraction of oil and gas by 2019 as progress and calling on other multilateral banks to “follow this lead.”), 106 at para. 358-59.

⁷² UNFCCC COP, Decision 5/CP.26, Annex I, at para. 46.

⁷³ UNFCCC Secretariat, *Synthesis report for the technical assessment component of the first global stocktake: Synthesis report on the information identified in decision 19/CMA.1, paragraph 36 (d)*, at para. 48. (Apr. 20, 2022).

*projects that aid the environment and climate response,” as “critical actions ... [that are] directly relate[d] to Article 2.1.c.”*⁷⁴

20. Activities that “lock-in” future emissions, like investment in decades-long gas production, are fundamentally at odds with the temperature target. The investment criteria established by the Green Climate Fund (GCF), the largest climate finance body, are instructive here. Created by the UNFCCC to be a core part of its financial architecture and to bring about a “*paradigm shift towards low-emission and climate resilient pathways,*”⁷⁵ the GCF developed criteria to assess how projects contribute to “*low emission sustainable development pathways.*”⁷⁶ Notably, this includes considering the “*degree to which activity avoids lock-in of long-lived, high emission infrastructure,*” as those activities would not be consistent with a low-emission pathway.⁷⁷
21. State submissions to the UNFCCC reinforce the notion that making financial flows consistent with Paris mitigation goals requires “*shifting investments and finance away from activities that undermine these objectives.*”⁷⁸ As the Independent Association of Latin America and the Caribbean (AILAC) succinctly expressed in a submission to the SCF on Article 2.1(c): “*all parties are obliged to promote finance flows to be consistent with decarbonization and resilience.*”⁷⁹ To that end, a number of State submissions support the shift away from investing in fossil fuels.⁸⁰

⁷⁴ SCF, *Fourth (2020) BA*, p. 155 at para. 476.

⁷⁵ Green Climate Fund (GCF), *Governing Instrument*, at para. 2 (2011) (approved by the UNFCCC Conference of the Parties, see UNFCCC COP, *Decision 3/CP.17 FCCC/CP/2011/9/Add.1*, para. 2 (Dec. 11, 2011)).

⁷⁶ GCF, *Initial Investment Framework: activity-specific sub-criteria and indicative assessment factors* (Mar. 26, 2015) (adopted by *Decision B.09/05*).

⁷⁷ *Ibid.*, Table 1.

⁷⁸ Norway, *9.5 Communication*, p. 10; see also LDCs, *2.1(c) Submission*, at para. 6; EU, *9.5 Communication*, p. 14; Switzerland on behalf of the Environmental Integrity Group (EIG) (comprising Georgia, Liechtenstein, Mexico, Monaco, the Republic of Korea and Switzerland), *EIG Submission on views regarding ways to achieve Article 2, paragraph 1(c)*, p. 1 (June 16, 2022) [hereinafter “EIG, 2.1(c) Submission”]; AILAC, *2.1(c) Submission*, p. 2; cf. Canada, *9.5 Communication*, p. 8 (describing GCF’s mandate “to promote the paradigm shift towards low-emission and climate-resilient development pathways [as] providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change.”); Australia, *Article 9.5 Biennial Communication*, p. 12 (Dec. 22, 2020) [hereinafter “Australia, 9.5 Communication”] (providing “support [for] low-emissions development pathways through financial advisory to enhance the uptake of renewable energy investments.”).

⁷⁹ AILAC, *2.1(c) Submission*, p. 1.

⁸⁰ United States of America, *Article 9.5 Biennial Communication*, p. 9 (Nov. 3, 2021) [hereinafter “U.S., 9.5 Communication”] (“shifting investment from those that support fossil use, or other high emissions activities, towards lower-emission alternatives remains a priority”); U.S., *GST Submission*, p. 13 (discussing “ending international investments in and support for carbon-intensive fossil fuel based energy projects”); LDCs, *2.1(c) Submission*, at para. 6 (implementation of Article 2.1(c) requires “shift[ing] finance away from brown

22. Human rights law also requires States to phase out fossil fuels and promote renewable energy.

Human rights treaty bodies and experts have explained that the measures States must take to avoid accelerating climate change and to prevent this foreseeable threat to human rights include “adopt[ing] and implement[ing] policies aimed at reducing emissions.”⁸¹ Those policies “should contribute effectively to phasing out fossil fuels [and] promoting renewable energy”⁸² and “discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure....”⁸³ U.N. human rights bodies and experts have identified States’ exploitation, export, and continued reliance on fossil fuels, and increase in

investments”); Canada, *2.1(c) Submission*, p. 4 (“phasing out direct finance to the fossil fuel sector can be a way to shift support to decarbonization and clean technologies needed to transition the sector into alignment with Paris goals.”); AILAC, *2.1(c) Submission*, pp. 2-6 (categorizing fossil fuel investment as “activities that are high in emissions and/or undermine resilience” and describing investment in exploration for oil and gas as not consistent with trajectories or low-emissions); EU, *9.5 Communication*, pp. 11 (EIB policy phasing out support for energy projects reliant on unabated fossil fuels), 14 (examples of EU supported measures that related to Article 2.1(c) includes “moving away from brown investments”), 16 (Netherlands is phasing out public-funded granted for exploration and development of new oil and gas reserves in developing countries by 2020), 62 (Denmark is engaged with multilateral development banks to stop new investments in fossil fuel based systems), 153 (Netherlands advocating that multilateral banks phase out financing for fossil fuel projects), 177 (Slovenia banned financing of projects that promote the use of fossil fuels), 186 (Spanish Development Finance Institution development of climate change action plan will consider exclusion of fossil fuels).

⁸¹ CEDAW et al, *Statement on human rights and climate change*, at para 11.

⁸² CEDAW et al, *Statement on human rights and climate change*, at para. 12; see also Olivier De Schutter (Special Rapporteur on Extreme Poverty and Human Rights), *The “Just Transition” in the Economic Recovery: Eradicating Poverty within Planetary Boundaries*, U.N. Doc. A/75/282/Rev.1, at para. 23-24 (Oct. 7, 2020) [hereinafter “Special Rapporteur on Extreme Poverty and Human Rights, *Just Transition Report*”]; CESCR, *Concluding observations on the fourth periodic report of Ecuador*, U.N. Doc. E/C.12/ECU/CO/4 at para. 12 (Nov. 14, 2019) [hereinafter “CESCR, *Concluding observations on Ecuador*”] (“the Committee recommends that the State party reconsider the increase in oil development ... in light of its commitments under the Paris Agreement,” and encourages the State to “promote alternative and renewable energy sources, reduce greenhouse gas emissions ...”); CESCR, *Concluding observations on the fourth periodic report of Argentina*, U.N. Doc. E/C.12/ARG/CO/4 at para. 13-14 (Nov. 1, 2018) [hereinafter “CESCR, *Concluding observations on Argentina*”]; CRC, *List of issues prior to submission of the combined third to sixth periodic reports of South Africa*, U.N. Doc. CRC/C/ZAF/QPR/3-6 at para. 23 (Mar. 4, 2021) [hereinafter “CRC, *List of issues on South Africa*”]; John Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Report on his mission to Uruguay*, U.N. Doc. A/HRC/37/58/Add.1, at para. 30 (Feb. 7, 2018).

⁸³ CEDAW et al, *Statement on human rights and climate change*, at para. 12. See also CRC, *Concluding observations on the combined fifth and sixth periodic reports of Switzerland*, U.N. Doc. CRC/C/CHE/CO/5-6, at para. 37 (Oct. 22, 2021) [hereinafter “CRC, *Concluding observations on Switzerland*”] (expressing concern about “the disproportionately high carbon footprint of the State party, in particular through investments made in fossil fuels by its financial institutions...”); David Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, U.N. Doc. A/77/284, at para. 58, 82(a) (Aug. 10, 2022) [hereinafter “Special Rapporteur on Human Rights and the Environment, *Sustainable Development Goals Report*”]; cf Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, at para. 79; Saad Alfaragi (Special Rapporteur on the Right to Development), *Right to Development*, U.N. Doc. A/76/154, para. 74 (July 15, 2021) [hereinafter “Special Rapporteur on the Right to Development, *Right to Development Report*”]

extractive activities, as contrary to their commitment under the Paris Agreement to limit global warming in line with a 1.5°C pathway and at odds with their human rights obligations.⁸⁴

23. Financing expanded fossil fuel supply, with the knowledge that fossil fuels are a primary driver of anthropogenic climate change, may breach a State's obligation not to cause or contribute to human rights violations. Opening up untapped reserves of oil, gas, or coal, as the Mozambique LNG project does, only prolongs reliance on the primary driver of climate change, inevitably generates additional GHG emissions, and thus contributes to a foreseeable risk to human rights.
24. It follows from the above that financing a new fossil fuel supply project is on its face inconsistent with a 1.5°C pathway, and thus not in alignment with the Paris Agreement. This was as true when UKEF made its decision as it is today. The best available science shows that a phaseout of fossil fuels, the primary driver of climate change, is urgently needed to align with a 1.5°C pathway, that global emissions must peak no later than 2025, and that the committed emissions from existing fossil-fuel infrastructure may consume all the remaining carbon budget in the 1.5°C scenario, leaving no room for new fossil fuel investments. A new gas production project like that in Mozambique will produce well beyond 2025, when global emissions should have peaked and be declining, and long after developed country emissions should have peaked and be declining, given their responsibility to curb their emissions faster.⁸⁵ The generation of significant new emissions for years into the future is presumptively inconsistent with the 1.5°C pathway, the temperature target in Article 2.1(a), and thus not compliant with Article 2.1(c).

⁸⁴ CESCR, *Concluding observations on Ecuador*, at paras. 11-12; CESCR, *Concluding observations on Argentina*, at paras. 13-14 (“The Committee recommends that the State party reconsider the large-scale exploitation of unconventional fossil fuels ... in order to ensure compliance with its obligations under the Covenant, in the light of the Paris Agreement commitments.”); CRC, *List of issues on South Africa*, at para. 23; CEDAW, *Concluding Observations on the Ninth Periodic Report of Guyana*, U.N. Doc. CEDAW/C/GUY/CO/9, at para. 41 (July 30, 2019) (“the continuing and expanding extraction of oil and gas in the State party and the resulting greenhouse gas emissions could undermine its obligations to women’s empowerment and gender equality”); cf CRC, *List of issues prior to submission of the combined sixth and seventh periodic reports of Bulgaria*, U.N. Doc. CRC/C/BGR/QPR/6-7, at para. 22 (Jul. 9, 2021); Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, at para. 73-75.

⁸⁵ Paris Agreement, arts. 2.2, 4.1.

Stuart-Smith LJ's finding of compatibility is based on a misreading of the treaty

25. Financing a project that is incompatible with the temperature target does not, as Stuart-Smith LJ held, become Paris-compliant because it *may* provide revenue that *could* be used to advance poverty eradication or to invest in renewable energy or other climate-resilient development in the future.⁸⁶ By that logic any project or financing flow, regardless of its climate impact, could be Paris-compliant if it generated revenues that could later be invested in climate action. Such a reading would sanction conduct that hinders the global response to climate change, defeating the Agreement's object and purpose⁸⁷ and depriving it of its core climate nature. But that is precisely the upshot of Stuart-Smith LJ's judgment.
26. Stuart-Smith LJ's reasoning, that it was tenable for the UK to find financing the Mozambique gas project compatible with the Paris Agreement, rests on a misconstruction of the aims of the Paris Agreement and their perceived irreconcilability.
27. Stuart-Smith LJ viewed poverty eradication as one of the Agreement's objectives, or aims, finding that "*the relief of poverty is a compelling counterweight*" to a finding that the Mozambique gas project and its financing by UKEF are contrary to Article 2.1(c).⁸⁸ However, like sustainable development, efforts toward poverty eradication are "*the context*" in which the global response to the threat of climate change takes place.⁸⁹ They are not a stand-alone objective of the Agreement⁹⁰—let alone one that can supersede or justify conduct contrary to the goal of stabilizing greenhouse gas emissions by keeping warming within the long-term temperature target. In treating poverty eradication as an independent objective, Stuart-Smith LJ's judgment changed the character of the Paris Agreement.
28. Having isolated poverty reduction as an "aim" of the Agreement, Stuart-Smith LJ found it was "*in tension or frankly irreconcilable*"⁹¹ with the Agreement's mitigation aims such that it was

⁸⁶ Judgment, paras. 122, 227, 229, 233.

⁸⁷ Treaties should not be interpreted to defeat the object and purpose. States good faith obligation includes a duty not to defeat the object and purpose of the treaty. *See* Vienna Convention on the Law of Treaties, art. 26; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, Judgment, 1986 I.C.J. 14, paras. 275-76, 280, 292 (10) (June 27) (Court found that the United States was in breach of a duty not to deprive the treaty under consideration of its object and purpose); *cf* VCLT, arts. 18, 19.

⁸⁸ Judgment, para. 232 (allowing for the sake of argument, without deciding, that the Project and financing "offend against the principle of Article 2(1)(c)").

⁸⁹ Paris Agreement, art. 2.1.

⁹⁰ Paris Agreement, art. 2.1.

⁹¹ Judgment, para. 231.

“too simple to assert that a course of action is contrary to the Paris Agreement.”⁹² Reading irreconcilability into a treaty, and then holding that no conduct can be deemed contrary to the Agreement, jettisons well-established principles of treaty interpretation and renders the Agreement dead letter. The principles of good faith and effectiveness “oblige[] ... Parties to apply [treaties] in a reasonable way and in such a manner that [their] purpose can be realized,”⁹³ and that gives effect to the treaty and its provisions.⁹⁴ Courts should reject interpretations that render provisions “devoid of purport or effect.”⁹⁵ When faced with multiple objectives, Courts should interpret treaty provisions harmoniously—not irreconcilably.⁹⁶ Moreover, Stuart-Smith LJ’s interpretation of the Agreement is an outlier. Courts around the world have not found the Paris Agreement to contain irreconcilable aims and have relied on it to interpret legislation and treaties and guide their review of government conduct.⁹⁷ In reducing Article 2 and the Paris Agreement to an inutility,⁹⁸ Stuart-Smith LJ’s interpretation sets “a

⁹² Judgment, para. 122.

⁹³ *Gabčíkovo-Nagymaros Project*, at para. 142; see also *La Grand Case (Germany v. U.S.)*, Judgment, 2001 I.C.J. 466, at para. 102 (June 27).

⁹⁴ See *Territorial Dispute (Libya v. Chad)*, Judgment, 1994, I.C.J. 7, at para. 51 (Feb. 3, 1994) (gathering cases and noting about its interpretation of a provision, “any other construction would be contrary to one of the most fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness”); *Corfu Channel Case*, Judgment, 1949 I.C.J. 4, p. 24 (Apr. 9, 1949); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep 174, p. 179 (Apr. 11, 1949); *Urgenda*, at para. 5.4.1 (“According to established ECtHR case law, the provisions of the ECHR must be interpreted and applied so as to make its safeguards practical and effective.”); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, p. 23 (adopted May 20, 1996) [hereinafter “*United States – Gasoline*”].

⁹⁵ *Corfu Channel Case*, p. 24; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, 2011 I.C.J. 70, at paras. 133–34 (Apr. 1, 2011) (rejecting an interpretation that would mean “a key phrase of this provision would become devoid of any effect”).

⁹⁶ See *Gabčíkovo-Nagymaros Project*, at paras. 139, 141; Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, WTO Doc. WT/DS121/AB/R, at para. 81 (circ. Dec. 14, 1999) (“[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.”).

⁹⁷ E.g. *Gloucester Resources Ltd. v. Minister for Planning* [2019] NSWLEC 7, at paras. 697-699 (Feb. 8, 2019) (Australia) (upholding a denial of a permit for a coal mine, in part, because the project would increase total global greenhouse gas concentrations and not assist in meeting the Paris Agreement’s long-term temperature goals); *Urgenda*, at paras. 5.6.2, 5.7.1-5.8 (relying on the UNFCCC and Paris Agreement in interpreting provisions in the ECHR); see also *ibid.* at paras. 4.1-4.8, 7.2.1-7.2.11, 7.3.2-7.3.3, 7.5.1 (relying on the UNFCCC, Paris Agreement, IPCC and United Nations Environment Programme (UNEP) reports to understand the threat of dangerous climate change and what is needed to respond to it, particularly the emissions reduction target); *Neubauer*, at para. 208; see also *ibid.* at paras. 1, 9, 206, 207-209, 225, 255 (holding that the Paris Agreement’s temperature target, which was incorporated in domestic legislation, was the standard to guide its review); cf. *Shrestha v. Office of the Prime Minister et al.*, Nepal Supreme Court, Decision no. 10210, NKP Part 61, Vol. 3, pp. 5, 11-14 (2018) (Nepal) (ordering the State to draft and implement a new law addressing climate change mitigation and adaptation which would “effectuat[e]” the commitments under the Paris Agreement).

⁹⁸ *United States – Gasoline*, p.23 (“[A]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”).

precedent with disturbing implications for treaty relations and the integrity of the rule of pacta sunt servanda.”⁹⁹

29. Moreover, poverty eradication, sustainable development, and climate action—as set out in the Paris Agreement—are not irreconcilable. A proper interpretation of the Agreement understands that achieving its mitigation and adaptation goals is intrinsically related to and beneficial for poverty eradication and sustainable development.¹⁰⁰ The text of the Paris Agreement¹⁰¹ reflects a clear understanding by the Parties that strengthened climate action is necessary to achieve sustainable development and poverty eradication. So, too, do other sources, including the UNFCCC,¹⁰² States parties’ statements,¹⁰³ IPCC reports,¹⁰⁴ and the Sustainable Development Goals,¹⁰⁵ as well as international human rights bodies and experts.¹⁰⁶
30. Poverty eradication and sustainable development cannot be achieved without ambitious climate action, because climate change itself exacerbates poverty and inequality. Statements by U.N. human rights experts encapsulate this intertwined relationship. As the U.N. Special Rapporteur on Extreme Poverty explained in his report on climate change and poverty: “*There*

⁹⁹ See *Gabčíkovo-Nagymaros Project*, at para. 114. On the principle of *pacta sunt servanda*, see VCLT, art. 26.

¹⁰⁰ Paris Agreement, pmb.

¹⁰¹ Paris Agreement, pmb. (recognising the intrinsic relationship between climate action and sustainable development and poverty eradication; calling for the respect and promotion of human rights in climate action and for safeguarding food security; and recognizing the “imperatives of a just transition”); arts. 2.1, 4.1, 6.8 (setting out sustainable development and poverty eradication as the “context” for action); arts. 7.1, 8.1, 10.5 (recognizing the positive relationship between adaptation, mitigation, and sustainable development).

¹⁰² UNFCCC, art. 2 (“[The] level that would prevent dangerous anthropogenic interference with the climate system, ... should be achieved within a time-frame sufficient to ... ensure food production is not threatened and to enable economic development to proceed in a sustainable manner.”).

¹⁰³ E.g. AOSIS, *GST Submission*, p. 7, 10; Canada, *9.5 Communication*, p. 4; Norway, *9.5 Communication*, p. 2, 5; EU, *9.5 Communication*, p. 13, 23, 57; Australia, *9.5 Communication*, p. 2; Japan, *Article 9.5 Biennial Communication*, p. 3 (Jan. 21, 2021); New Zealand, *Article 9.5 Biennial Communication*, p. 5 (Dec. 22, 2020); Republic of Senegal on behalf of the Least Developed Countries (LDCs) Group (representing 46 countries), *Submission to the first Global Stocktake*, p. 3 (May 9, 2022); UNFCCC Secretariat, *LT-LEDS Synthesis Report*, paras. 57 (“Parties identified various synergies between socioeconomic development objectives and transition to a low-emission economy.”), 58 (“the synergies described ..., correspond to many elements of the SDGs.”).

¹⁰⁴ E.g. IPCC, *AR5*, pp. 17 (“limiting the effects of climate change is necessary to achieve sustainable development and equity, including poverty eradication”), 90; IPCC, *AR6 WGIII*, 6-126.

¹⁰⁵ U.N. General Assembly (UNGA), *Transforming our World: the 2030 Agenda for Sustainable Development (Sustainable Development Goals)*, U.N. Doc. A/RES/70/1, goals 1, 2, 7, 11, 13 (Oct. 21, 2015) (many goals include sub-goals that involve climate mitigation and/or adaptation, and there is a specific goal on climate change). See also *Milieudefensie*, at para 4.4.42 (holding that sustainable development cannot be a justification for failing to take action to lower greenhouse gas emissions).

¹⁰⁶ e.g. Special Rapporteur on the Right to Development, *Right to Development Report*, at para. 71; Special Rapporteur on Extreme Poverty and Human Rights, *Just Transition Report*, at para. 17; Special Rapporteur on Human Rights and the Environment, *Sustainable Development Goals Report*, at para. 58. CEDAW, *Concluding Observations on Guyana*, at para. 41.

is no trade-off between poverty eradication and accelerating the transformation towards low-carbon and biodiverse societies: it is by combining the two that we can maximize our chances of achieving both.”¹⁰⁷ Continuing with “*unsustainable resource extraction and exploitation ... will not preserve growth in the long term, but will be disastrous for the global economy and pull hundreds of millions into poverty*”¹⁰⁸ rather than provide them with a pathway out of it. Similarly, the U.N. Special Rapporteur on the Issue of Human Rights Obligations Relating to the enjoyment of a safe, clean, healthy and sustainable environment has explained that “*effective climate actions will propel progress towards achieving multiple Sustainable Development Goals, including ... decreased inequality and poverty. Meeting the Paris Agreement target of 1.5°C could save millions of lives every year ... Replacing fossil fuels with renewable energy ... would create unprecedented economic opportunities.*”¹⁰⁹

31. The cohesion between the Paris Agreement’s purpose and goals, and sustainable development and poverty eradication, should be viewed in light of the Agreement as a whole. The Paris Agreement reflects the Parties’ understanding that an effective global response to climate action requires support to be provided by developed countries to developing countries to achieve the Agreement’s objectives.¹¹⁰ That support must come in the form of technology transfer (Article 10), capacity-building (Article 11), and finance for mitigation, adaptation, and loss and damage (Articles 8 and 9¹¹¹). These provisions, in line with equity, recognize that developed countries, as those most responsible for the climate crisis and most capable of

¹⁰⁷ Special Rapporteur on Extreme Poverty and Human Rights, *Just Transition Report*, at para. 5; *see also* para. 10.

¹⁰⁸ Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Climate Change and Poverty*, at para. 54, U.N. Doc. A/HRC/41/39 (June 25, 2019) [hereinafter “Special Rapporteur on Extreme Poverty and Human Rights, *Climate Change and Poverty Report*”].

¹⁰⁹ Special Rapporteur on a Human Rights and the Environment, *Safe Climate Report*, at para. 95; *See also* Special Rapporteur on Human Rights and the Environment, *Sustainable Development Goals Report*, at para. 78; Special Rapporteur on Extreme Poverty and Human Rights, *Climate Change and Poverty Report*, at para. 59 (“[d]eveloping countries [should] skip fossil fuel-driven growth and leapfrog into decentralized, renewable energy.”); *cf* IPCC, AR6 WGIII, 15-42 (“[Africa] currently contributes very little to global emissions, but its rapidly rising energy demands and renewable energy potential versus its growing reliance on fossil fuels ... makes it imperative that institutional investors and policy-makers recognise the very large ‘leap-frog’ potential for the renewable energy transition as well as risks of lock-in effects in infrastructure more general in Africa that is critical to hold the global temperatures rise to well below 2°C in the longer-term (2020–2050). Overlooking this transition opportunity, rivalling China, India, US and Europe, would be costly.”).

¹¹⁰ Paris Agreement, art. 4.5.

¹¹¹ Article 2.1(c) is broader than the climate finance provisions set forth in Article 9, which require developing country Parties to provide “financial resources to assist developing country Parties with respect to both mitigation and adaptation.” Article 2.1(c) pertains to all financial flows and not exclusively the provision of finance from developed to developing countries to assist the latter in implementing climate action.

addressing it, have a duty to support developing countries to take climate action in line with common, but differentiated responsibilities. As a developed country Party to the Paris Agreement, the UK thus has obligations not only to align its finance flows, such as UK Export Finance, with a low-emissions pathway, per Article 2.1(c), but also to provide developing countries with climate finance, technology transfer, and capacity building to support their realization of the Agreement’s long-term temperature target.¹¹² In this case, the absence of such climate finance for renewables in Mozambique led Stuart-Smith LJ to validate UKEF’s conclusions.

32. Stuart-Smith LJ upheld the UK’s analysis of the financing for Mozambique gas in part because “*the Project provided the only available pathway to a low carbon economy based on renewable energy or to lifting millions out of poverty*”¹¹³ through the generation of revenues. In essence, he reasoned that the dearth of financing for an alternative revenue-generating, low- or no-greenhouse gas emitting project in Mozambique makes financing a new fossil fuel supply project—even one intended chiefly for export¹¹⁴—Paris-compliant simply because it is the only revenue-generating opportunity on offer. But the effect of that analysis is to reward the UK for failing to satisfy its affirmative climate finance duties under the Paris Agreement by deeming “*compliant*” conduct that is inconsistent with Article 2.1(c). Not providing sufficient climate finance in line with Article 9 does not justify financing fossil fuel production because it may generate revenues that could be used for adaptation, sustainable development, or poverty eradication in the future, as claimed in this instance.

IV. Assessing whether a financial flow is consistent with a 1.5°C, low-emissions pathway requires calculation of Scope 3 emissions

33. It follows from the above analysis that certain activities should be categorically excluded from financing because of their known incompatibility with a 1.5° pathway. UKEF could have foregone the need to calculate the Mozambique gas project’s foreseeable emissions had it decided on the basis of such a categorical exclusion that financing new fossil fuel supply is

¹¹² The UK knew that renewable energy was a cheaper than fossil fuels and would encourage growth in developing countries. *See* UK, *7th National Communication*, p. 370 (discussing “Climatescope – Clean Energy Investment Index,” meant to “increase private investment in renewable energy project in poorer countries” and stating, “[r]enewable energy is a cheaper solution than fossil fuels in many developing countries and by increasing the amount of renewable energy in developing countries this will encourage growth and allowing business to prosper.”).

¹¹³ Judgment, para. 229.

¹¹⁴ *See* Judgment, para. 38.

contrary to Article 2.1(c) of the Paris Agreement.¹¹⁵ Indeed, the UK enacted such a fossil fuel finance exclusion shortly after making its decision in this case.¹¹⁶ Having chosen, however, to consider the project, UKEF could not assess its consistency with a 1.5°-aligned pathway without quantifying its full emissions.

34. The plain text of Article 2.1(c) supports quantification of emissions. In calling on Parties to make financial flows consistent with a pathway toward low greenhouse gas emissions, the plain text of Article 2.1(c) directs Parties to assess the greenhouse gas impacts of their financing. Such an assessment is not possible without quantifying all foreseeable emissions—Scopes 1, 2 and 3. All emissions contribute to climate change. Moreover, this interpretation is reinforced when read in light of the Paris Agreement’s object and purpose to stabilize greenhouse gas concentrations in the atmosphere to prevent dangerous anthropogenic interference with the climate system. This objective does not carve out Scope 3 emissions—it is about *all* emissions.
35. Determining whether financed emissions are consistent with a low emissions pathway and the Paris Agreement’s 1.5°C temperature goal depends on a quantitative analysis. Assessing consistency with 1.5°C requires assessing the project’s emissions in light of the IPCC’s modelled 1.5°C pathways (see above, para. 15).¹¹⁷ Because the pathways are connected to the carbon budget and the rate of decline of global emissions—numerical concepts—assessing how a financed activity relates to them requires calculating its foreseeable emissions.¹¹⁸ By definition, a quantitative analysis must be based on numbers, not non-numeric assumptions.
36. No single project will make or break the overall global carbon budget, as global emissions are cumulative and the result of myriad policy choices and activities across the world. But to assess

¹¹⁵ SCF, *Fourth (2020) BA*, para. 127 (SCF has recognized that classification lists of eligible and ineligible activities have been used by actors to assess consistency.).

¹¹⁶ Appellant’s Skeleton, at paras. 32-33. The timing of that announcement makes clear that the UK government knew when it approved the financing for Mozambique LNG the science showing that new fossil fuel supply was incompatible with 1.5°C.

¹¹⁷ See *Neubauer*, para. 229 (stating, “In view of the risk of irreversible climate change, the law must therefore take into account the IPCC’s estimates on the size of the remaining global CO2 budget and its consequences for remaining national emissions budgets—estimates produced via a quality assurance process—if these point to a possibility of exceeding the constitutionally relevant temperature limit.”).

¹¹⁸ See, e.g., *Gloucester Resources Ltd.*, paras. 441 (discussing an expert’s view of the carbon budget approach); 444 (describing the relationship between carbon budgets and rates of emission decline); and 447 (on the need to leave most of the world’s existing fossil fuel reserves in the ground).

the prospects of a given project increasing overall global emissions, contrary to the emissions trajectory required to keep warming to 1.5°C, it is critical to know the magnitude and timescale of its foreseeable emissions.¹¹⁹ Those quantities can then be plugged into scenarios that model 1.5°C-aligned pathways. Some projects, like opening up large new reserves of fossil fuels to be extracted over decades, presumptively increase overall global emissions by increasing the stock of hydrocarbons to be burned when there is already more fossil fuel under development than can be combusted while staying within the carbon budget for a 1.5°C world, and when global emissions need to be declining.¹²⁰

37. The failure to include total emissions—Scopes 1-3—leads to a flawed analysis that will permit activity inconsistent with a 1.5°C pathway, hindering efforts to keep warming within the temperature target. As Mrs Justice Thornton rightly concluded, UKEF’s “*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 [Mozambique gas] Project is consistent with Article 2(1)(c) of the Paris Agreement on Climate Change and a pathway to low greenhouse gas emissions.*”¹²¹ Courts have recognized the importance of considering the Scope 3 emissions of a particular project.¹²² Moreover, as the SCF Fourth (2020) Biennial Assessment states, “... *not including Scope 3 can result in pathways not being met at a collective global level, as can be seen in transition commitments made by fossil fuel companies, for example.*”¹²³ It is impossible to fully assess the consistency of a financed activity within the overall carbon budget without calculating its Scope 3 emissions, as they often constitute

¹¹⁹ See *Gloucester Resources Ltd.*, at paras. 514 (“All of the direct and indirect GHG emissions of the Rocky Hill Coal Project will impact on the environment. All anthropogenic GHG emissions contribute to climate change.”); 515 (“It matters not that this aggregate of the Project’s GHG emissions may represent a small fraction of the global total of GHG emissions ... All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate.” (internal quotations omitted)).

¹²⁰ See paras. 15 and 16 and sources cited therein.

¹²¹ Judgment, at para. 335.

¹²² See, e.g., *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21 p. 13 (D. Mont. March 26, 2018) (holding that the lack of analysis of downstream emissions “fails to foster informed decisionmaking as required”) (internal quotation and citation omitted); *San Juan Citizens Alliance v. Bureau of Land Management*, 326 F. Supp. 3d 1227, p.1244, 1250, 1256 (D. N.M. 2018); *Gray v. The Minister for Planning and Ors* [2006] NSWLEC 720, paras. 97, 100 (Australia); *Gloucester Resources Ltd.*, paras. 487, 499 - 513.

¹²³ SCF, *Fourth (2020) BA*, p. 51 at para. 138; see also p. 50 at para. 237 (noting that participants in the Science-Based Targets Initiative (SBTI), apply scope 1-3 if it is 40% of the overall carbon footprint, and “given their enable role in the broader economy, financial institutions must include scope 3 activities related to their investment and lending portfolios in their SBTi targets.”)

the vast majority of a project's emissions.¹²⁴ UKEF acknowledges that its “*biggest greenhouse gas emissions impact is from [its] scope 3 emissions.*”¹²⁵

38. This is especially true for fossil fuel production projects. The vast majority of emissions from the extraction of oil, gas, or coal, are downstream emissions from the use of those products. Combustion is the principal intended use of oil and gas. Experts have estimated that more than 98% of natural gas produced will be foreseeably combusted.¹²⁶ The emission of carbon dioxide and other greenhouse gases is not unpredictable, but the inescapable consequence of using oil and gas as intended. As this Court recognized in *Finch v. Surrey County Council*, downstream emissions are not just ‘likely’, ‘possible’, or foreseeable, but a certain result of the extraction and production of fossil fuels.¹²⁷
39. Calculating Scope 3 emissions is also critical to elucidate where the bulk of a project's emissions occur, which has bearing on its compatibility with the Paris Agreement. In the present case, as UKEF and the court below acknowledged, “*the majority of Scope 3 GHG emissions relate to international emissions,*” and end uses of the gas are likely to be spread across a range of countries including developed countries.¹²⁸ Thus, Mozambique's entitlement for its own emissions to “peak later,”¹²⁹ has no bearing on whether emissions from exported fossil gas are Paris-aligned. If high Scope 3 emissions could be deemed Paris-compatible merely because they stem from production in a developing country, developed countries would have every incentive to outsource their fossil fuel production and little incentive to curtail it.
40. Calculating Scope 3 emissions is not only necessary, but also imminently feasible. There are well-established methods for calculation, as Appellants' experts have made clear,¹³⁰ as the UK

¹²⁴ Global Compact Network UK, [Scope 3 Emissions](#) (last visited Oct. 18, 2022) (“Scope 3 emissions usually account for more than 70 percent of a business' carbon footprint [so] it is crucial that companies tackle Scope 3 emissions to meet the aims of the Paris Agreement and limit global warming to 1.5°C.”).

¹²⁵ UKEF, [Climate Change Strategy 2021 to 2024](#) (Sept. 22, 2021).

¹²⁶ Heede, *Tracing Anthropogenic Emissions*, p. 232; *see also* Second Witness Statement of Kevin Anderson, para. 35 (citing UKEF's acknowledgment in its Scope 3 scenarios, DB/76-77, that the overwhelming majority of gas extracted and shipped will be used in centralised power generation).

¹²⁷ *R (Finch) v. Surrey County Council* [2022] EWCA Civ. 187, paras. 42, 60 (acknowledging that the scope 3 emissions of fossil fuel extraction are inevitable, but holding that inevitability alone does not mean they are “effects of the proposed development” for the purposes of the Environmental Impact Assessment regime that must legally be assessed prior to approval because that is a factual determination to be made by the decisionmaker).

¹²⁸ Judgment, paras. 200 and 192.

¹²⁹ Paris Agreement, art. 4.1.

¹³⁰ Appellants' Witness Statement of Greg Muttitt, paras. 45-49; Witness Statement of Kevin Anderson, paras. 18-22; Second Witness Statement of Kevin Anderson, paras. 36-37.

House of Commons Environmental Audit Committee has acknowledged,¹³¹ and as courts have recognized, including this Court in the matter of *Finch v. Surrey County Council*,¹³² and the court of first instance in this case.¹³³ The failure to quantify Scope 3 emissions here stemmed both from the mistaken view that doing so was not feasible,¹³⁴ and from the erroneous conflation of the concepts of Scope 3 and “avoided emissions.”

41. As this Court recognized in *Finch*, Scope 3 emissions and avoided emissions are distinct concepts.¹³⁵ They must be calculated and reported separately, if avoided emissions are calculated at all.¹³⁶ Thornton J summarized the difference clearly: Scope 3 emissions are “*an estimate of the gross emissions from a Project,*” whereas the concept of avoided emissions “*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 proceeding (thereby arriving an assessment of the emissions ‘avoided’ by the project).*”¹³⁷ If an analysis of consistency with a 1.5°C pathway considers avoided emissions—and it need not, and arguably should not¹³⁸—the estimate of such emissions must be weighed against an estimate of the project’s total emissions. At minimum, both estimates must be quantified to comparable degrees of certainty. Otherwise, comparing them to one another is tantamount to doing maths without numbers. But that is precisely what UKEF did.

¹³¹ See Judgment, paras. 34, 37-38 (Stuart-Smith LJ), para. 304 (Thornton J.).

¹³² *R (Finch)*, para. 71; *Gloucester Resources Limited*, para. 489; *Gray*, paras. 34, 96, 138.; *San Juan Citizens Alliance*, p. 1244.

¹³³ Judgment, para 37.

¹³⁴ See, e.g., Judgment, paras. 68 (conveying Defendants’ understanding that “there was no clear or comprehensive methodology that could be followed to assess Scope 3 emissions impacts”); 174; 223 (“UKEF’s decision not to attempt quantification of Scope 3 emissions was founded on evidence from [WoodMackenzie] that this calculation would involve so many variables as to make accurate quantification impossible.”).

¹³⁵ *R (Finch)*, para 71 (noting that whether the oil produced will be responsible for a net increase in global greenhouse gas emissions is a separate question from the quantity of emissions foreseeable from the combustion of the produced oil).

¹³⁶ See Greenhouse Gas Protocol, Technical Guidance for Calculating Scope 3 Emissions, Version 1.0, p. 114 (2013) (“Any claims of avoided emissions related to a company’s sold products must be reported separately from the company’s...scope 3 inventories.”); see also Greenhouse Gas Protocol, Scope 3 Frequently Asked Questions, p. 19 (June 2022). UKEF staff also expressed this understanding. See Judgment, para. 65 (describing an email from Ms. Miana Capuano stating that whether Mozambique gas would displace other fuels, would not change the Project’s Scope 3 emissions).

¹³⁷ Judgment, para. 306.

¹³⁸ See Witness Statement of Greg Muttitt, paras. 16-22 (explaining why assessing ‘avoided emissions’ is a methodologically flawed approach).

42. The inability to put a figure on “*avoided emissions*” does not make it impossible to calculate Scope 3 emissions;¹³⁹ rather it makes it impossible to count them against one another. Uncertainties as to where and how the gas would be delivered and used in a given year—namely whether it would replace other more carbon-intensive fuels in existing facilities, meet additional gas demand, or displace other lower emission sources of energy¹⁴⁰—go to the question of displacement and avoided emissions. They have no bearing on the foreseeable, gross emissions generated when the gas is used as intended, for combustion—that is, the project’s Scope 3 emissions. Regardless of where or exactly how the gas will be utilized, it is destined to be burned,¹⁴¹ and the emissions from that combustion are readily calculable.
43. Having failed to quantify either the Scope 3 emissions or assumed “avoided emissions,” UKEF could not reasonably weigh them against one another. Foreseeable and readily calculable Scope 3 emissions of the financed activity cannot be counterbalanced against speculative or hopeful avoided emissions. But that is what occurred here. As Stuart-Smith LJ acknowledged “*the actual extent to which LNG might act as a displacement was uncertain.*”¹⁴² UKEF also acknowledged that some portion of the gas produced could supply additional energy consumption, and to the extent that it substitutes for other energy sources, at least some of those displaced sources could be lower-emission or no-emission renewables.¹⁴³ This latter scenario will only be more likely in the future, as renewable energy has become increasingly competitive¹⁴⁴ and is today the most affordable power source in the majority of the world.¹⁴⁵

¹³⁹ Judgment, para. 223 (explaining “UKEF’s decision not to attempt quantification of Scope 3 emissions based on evidence from WM that this calculation would involve so many variables as to make accurate quantification impossible”).

¹⁴⁰ WoodMackenzie (“WM”), the consultant that provided a climate change report to UKEF, relied on these uncertainties to claim it was impossible to accurately quantify the emissions impact of the Mozambique. Judgment, paras. 51, 53. UKEF acknowledged that it “cannot be stated with certainty exactly where or how the gas will be utilized.” Judgment, para 192 (quoting the CCR “Summary”).

¹⁴¹ See note 126 (citing Heede and Witness Statement of Kevin Anderson); see also Witness Statement of Greg Muttitt, para 46.

¹⁴² Judgment, para 206.

¹⁴³ See Judgment, paras. 55 (discussing WM report); 75 (describing guiding questions for CCR); 77 (presenting relevant excerpts from the CCR); 169 (“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.”).

¹⁴⁴ IPCC, AR6 WG III, SPM-14, TS-25, TS-53 (describing cost competitiveness of renewables).

¹⁴⁵ IRENA, Press Release, “[Renewable Power Remains Cost-Competitive amid Fossil Fuel Crisis](#)” (July 13, 2022).

44. Nonetheless, to rebut the presumed inconsistency of financing significant emissions with Article 2.1(c), UKEF relied on mere speculation that some of the gas might replace or displace more polluting energy sources.¹⁴⁶ UKEF acknowledged that the Mozambique gas project's Scope 3 emissions would be high and significantly exceed emissions from Scopes 1 and 2.¹⁴⁷ It concluded 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 fuels.*"¹⁴⁸ But by that circular logic, a hypothetical eventuality, out of the control of project developers, was made central to the project's approval. UKEF effectively weighed significant foreseeable Scope 3 emissions, which are inevitable and quantifiable, against "*avoided emissions,*" which are uncertain and incalculable. An assessment of compatibility with the Paris Agreement's temperature target, and whether the activity will increase overall global emissions, cannot rely on unsupported, unquantified assumptions about avoided emissions.
45. Calculating Scope 3 emissions from the proposed financed activity is also necessary for the UK to satisfy its obligations under international human rights law. As part of their duty to respect and protect human rights, States must undertake, and ensure private actors undertake, due diligence to assess whether their conduct (including financing) will foreseeably cause or contribute to human rights harms, including harms due to climate change.¹⁴⁹ That assessment must encompass *all* available information regarding the impact of the financed activity, including Scope 3 emissions.¹⁵⁰ Without that information, the assessment will be incomplete and inadequate, allowing States to violate their duties. The duty of States to exercise due

¹⁴⁶ Judgment, para. 206.

¹⁴⁷ Judgment, para. 200 (quoting CCR).

¹⁴⁸ Judgment, para. 77 (quoting Conclusion of the Summary of the CCR) (emphasis added).

¹⁴⁹ See HRC., General Comment No. 36, paras. 7, 21; CRC, General Comment No. 16, para. 45; Comm. On Eco. Social and Cultural Rights, General Comment No. 24, U.N. Doc. E/C.12/FC/24, paras. 16, 32 (Aug. 10, 2017); Advisory Opinion OC-23/17, paras. 123, 126 ("international obligation to exercise due diligence so as not to cause or permit damage to other States"); *cf.* paras. 164-165 (discussing what must be included in an environmental impact assessment. "...it must take into account the impact that the project may have on its human rights obligations." And noting that "the environmental impact assessment must examine the cumulative impact of existing projects and proposed projects.")

¹⁵⁰ *cf. Milieudefensie*, paras. 4.4.20 ("Companies may be expected [as part of its responsibility to respect human rights] to identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. ... RDS may be expected to identify and assess the adverse effects of its Scope 1 through to 3 emissions."). Foreseeability is based on information the State knew or should have known. See HRC, General Comment No. 36, at para. 27; *Opuz v Turkey*, Judgement, ECtHR Application No. 33401/02, para. 129 (June 9, 2009).

diligence is also firmly established in many areas of international law, including international environmental law, as a core aspect of the duty to avoid transboundary harm.¹⁵¹

V. Conclusion

46. These written submissions have sought to assist the Court with the proper interpretation and application of the Paris Agreement. It is respectfully submitted that the financing of the LNG project in Mozambique is not and cannot be compliant with the UK's obligations under the Paris Agreement. As set out above, the obligations related to finance flows in Article 2.1(c) must be read with the hard-edged temperature-limiting obligations in Article 2.1(a). In short, financial flows must be compatible with a 1.5°C pathway. New fossil fuel production cannot be consistent with this pathway, and by extension with Article 2.1(c). The incompatibility of new fossil fuel production with the 1.5°C pathway was well-established in the best available science at the time UKEF made its decision. On this alone, UKEF could have refused financing. However, having chosen to consider the project, UKEF was required to quantify the total foreseeable emissions of the financed project, including Scope 3 emissions, to properly assess its consistency with a 1.5°C-aligned pathway. As set out above, those emissions are inevitable and calculable. They could not be counterbalanced by speculative assumptions about the potential displacement of other energy sources and uncertain avoided emissions.

RUTH KENNEDY

10 November 2022

¹⁵¹ *E.g. Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Reports 14, para. 197 (Apr. 20); *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 2015 I.C.J. 665, para. 104 (Dec. 16); Advisory Opinion OC-23/17, para. 123 (gathering cases).