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

CO/3206/2020

Royal Courts of Justice

Tuesday, 7 December 2021

Before:

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

B E T W E E N

THE QUEEN
on the application of
FRIENDS OF THE EARTH LIMITED

Claimant

- and -

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

First Defendant

- and -

CHANCELLOR OF THE EXCHEQUER

Second Defendant

- and -

TOTAL E & P MOZAMBIQUE AREA 1 LIMITADA

Interested party 1

- and -

MOZ LNGI FINANCING COMPANY LIMITED

Interested Party 2

P R O C E E D I N G S
(Hybrid hearing via CVP)

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APPEARANCES

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

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

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

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Tuesday, 7 December 2021

(10.34 a.m.)

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

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

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

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

MISS SIMOR: My Lord, my Lady, I appear with Kate Cook and Anita Davies for the claimant, instructed by Rowan Smith of Leigh Day. Sir James Eadie QC, Richard Honey QC, Hollie Higgins and Conor Fegan appear for the defendants, instructed by the Government Legal

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Department. Adam Heppinstall QC with Freya Foster appear for the interested parties, instructed by Latham & Watkins.

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

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

LORD JUSTICE STUART-SMITH: Absolutely fine.

MISS SIMOR: Just to give you some explanation.

LORD JUSTICE STUART-SMITH: Yes.

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

LORD JUSTICE STUART-SMITH: Yes.

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

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

MISS SIMOR: Ah.

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

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

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

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

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

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project, yet the UK being an off-taker marker for the gas that project produces. So, those are two quotes that you will see.

Secondly, early on, in around 2018, UK involvement and potential contracts for UK companies started to be discussed. During 2019, UK's Investment Committee gave the go ahead for UKEF to lend the project and the negotiations developed. Some contracts were plainly entered into before the financing was agreed, although we have not seen their terms. But you will see the contracts at core bundle 2, p.327 and I will take you to that. It appears from several documents that there was concern that saying no to the financing could lead to legal proceedings being brought against UKEF subsequently.

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

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

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final exercise of his delegated power on 30 June was dependent on the Secretary of State's prior agreement, which took place on 10 June.

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

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

The Climate Change Report was not based on any specialist expertise and in that regard it is notable that we have no expert from UKEF, rather, it relied heavily on a short presentation

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type report that Total had asked the lender's market advisor, Wood Mackenzie, to provide. That report, we say, is categorically not a report to assess climate impacts. It was a presentation worked up to enable the lenders to go to their boards and explain how higher emission fuels could be displaced by liquid natural gas so leading to global emission reductions. This is clear from the scope of works that was very belatedly disclosed pursuant to our Part 18 requests. We have set that out in our skeleton at para.93 to 95. But, again, I am going to take you to it.

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

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

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

1. that the project was likely to lead to a net reduction in global emissions and, thus, was in alignment with the low emissions pathway (core bundle 2, p.253, claimant's skeleton, 36(b)(iii));
2. that it was compliant with the UK Paris Agreement obligations globally and its obligations to assist Mozambique to meet its NDC (claimant's skeleton 36(a), 36(c) and the documents at core bundle 2, p.256).

I am going to go to all these documents.

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In the detailed grounds of----

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

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

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

MISS SIMOR: Would assist because-- I will show you the Paris Agreement. The obligation on the United Kingdom and, indeed, they accept this, because this is in the CCR, is to assist

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developing countries, not just to meet their current NDC, but to augment their NDCs into the future, because there is a ratchet effect whereby NDCs obviously need to increase.

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

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

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

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

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

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Then the following page, 13:

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

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

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

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

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

The first point to make is that the defendants reached the decision on the basis that the project and its financing were compatible with the UK’s obligations under the Paris Agreement. We do not need to and do not have to show that the defendants were in any way obliged to proceed on that basis. Our point is that they did proceed on that basis. For that reason, if

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they made a mistake in that respect, then the decision is vitiated by an error of law or fact; in effect, a standard misdirection as to the law.

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

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

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

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

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

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

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

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

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

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

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

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

MISS SIMOR: Exactly.

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

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

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

MISS SIMOR: It is not our case and it would have been perfectly possible, in my understanding of public law, for the defendants to decide to disapply their policy or not to approach it in that way. So had they said, "Well, look, we are not satisfied on the Paris Agreement. That is what we have decided. We are not satisfied it is compatible. We are going to go ahead

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nonetheless.” It would have been much more difficult to argue illegality in relation to that because under public law it is perfectly permissible if there is a reasonable basis for the defendants to decide not to apply that policy.

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

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

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

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

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

“we will comply with all international agreements which apply to the operations of ECAs. These agreements include the OECD Council Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (OECD Common Approaches), which informs the way in which member ECAs should address ESHR due diligence for projects and existing operations they are asked to support and ESHR monitoring after support has been agreed.”

Then after the bullets:

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

Then the next bullet down:

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

identify ESHR risks and carry out due diligence to be satisfied that projects should comply with applicable local and relevant

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international laws, and align with international ESHR standards before support is provided;

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

Then just after, “Pre-issue”, 4.1:

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

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

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

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

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

Then four further down:

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

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

Then further, fourth down:

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

And then to the next page at A:

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

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

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

And then “Objectives”:

“The objectives of this Recommendation are to:

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

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

“For a Category A project [this is a Category A project], Adherents should require an ESIA [Environment Social Impact Assessment] to be undertaken; the applicant is responsible for providing the resulting ESIA report, together with other studies, reports or action plans covering the relevant aspects of the project. An ESIA report and any supporting documents should address the issues set out in the international standards applied to the project in accordance with paragraphs 21-26 of this

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Recommendation: in this context, Annex II contains information on the typical items to be included in an ESIA report [which I am going to take you to]. An ESIA should not be carried out and reviewed by the same party.”

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

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

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

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

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

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

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And then 5:

“Environmental and Social impacts: predicts and assesses the project’s likely positive and negative impacts, in quantitative terms to the extent possible. Identifies mitigation measures and any residual negative impacts that cannot be mitigated. Explores opportunities for enhancement. Identifies and estimates the extent and quality of available data, key data gaps, and uncertainties associated with predictions, and specifies topics that do not require further attention. Evaluates impacts and risks from associated facilities and other third party activities. Examines global, transboundary, and cumulative impacts as appropriate.”

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

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

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

MISS SIMOR: Tab 1, p.14.

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: But it makes statements about public finance.

LORD JUSTICE STUART-SMITH: Thank you.

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

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

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

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

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MISS SIMOR: Well, in a sense it is.

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

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

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

LORD JUSTICE STUART-SMITH: Okay.

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

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

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

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

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

That would have been the Chancellor. Then:

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

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

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

That is in four years’ time.

“Recognising this need for urgent and coordinated action, 195 countries signed the Paris Climate Accord in 2015 which commits signatories to keeping a global temperature rise this century to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C. Signatories of the Paris Agreement also

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committed to making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”

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

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

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

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

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

Third bullet:

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

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And then:

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

Then starting one further paragraph down:

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

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

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

Champion the resilience agenda;

- Drive action through international collaboration;
- Partner with the private sector;

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- Explore initiatives to accelerate alignment to the Paris Agreement;
- and Align the UK's Official Development Assistance (ODA) spending with the Paris Agreement.”

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

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

In practical terms this will include:

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

You will see that that will be relevant.

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- “Ensuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans;
- Implementing a proportionate approach to climate risk assurance;
- and Ensuring that relevant programmes do not undermine the ambition in countries’ Nationally Determined Contributions (NDC) and adaptation plans.”

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Is this September 2021?

MISS SIMOR: Yes, that is right.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So this is post-decision. Actually, I will just take you to one little bit of it. We will return to it. It is policy prior to this decision and as a basis for this decision was aligned with

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Paris. This is its current policy and its current policy is the same. It continues to intend to align with Paris and we find at 225 in the third line:

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

LORD JUSTICE STUART-SMITH: Hold on.

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

LORD JUSTICE STUART-SMITH: “The time to act is now”?

MISS SIMOR: “Context” I have got.

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

MISS SIMOR: Yes. Then the third column:

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

Then “UKEF’s role”:

“As an export credit agency, we are in a unique position to support both domestic and international climate aims; our support realises economic opportunities for the UK and can facilitate our international partners in

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their transitions to lower carbon economies. Our Climate Change Strategy outlines how we will make our support to UK exporters and suppliers consistent with this commitment.”

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

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

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

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

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

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

And then para.3:

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

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

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

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

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

“UKEF underwriting and UKEF clearance documents.”

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Then para.5:

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

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

Then para.6----

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

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

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- at para.5.

LORD JUSTICE STUART-SMITH: Yes.

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

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Then at para.6:

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

And that----

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

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

LORD JUSTICE STUART-SMITH: Six?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

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

And then 9:

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

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

“The CCA considers the note on climate change considerations provided by the lenders’ legal advisers, Wood Mackenzie’s report... and insight from AfDB and US Exim on their approach to climate change issues. The final CCA would be circulated to ERiCC members. Miana Capuano provided some further explanation of the CCA and she took questions from ERiCC attendees.

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

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

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and oil in these markets, which could help their transition to a lower carbon economy.”

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

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

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

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

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

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

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

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

Then 22:

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

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

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

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

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

5. BG stated that the climate change analysis identified that although the project would contribute to greenhouse gas emissions, both in Mozambique (Scope 1 and 2 emissions) and at the point of end use of the LNG (Scope 3 emissions), provided that LNG from the project is used to replace and/or displace the use of more polluting fossil fuels the net effect may be a decrease in future greenhouse gas emissions, given the recognised role gas is expected to play as a transition fuel. This project is expected to align with international standards.”

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

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

MISS SIMOR: Is which?

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

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MISS SIMOR: Maybe it is a person.

SIR JAMES EADIE: Legal and compliance.

MISS SIMOR: Legal and----

SIR JAMES EADIE: Legal and compliance.

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

Then para.13:

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

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

LORD JUSTICE STUART-SMITH: No, no.

SIR JAMES EADIE: No, right tab number.

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

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

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

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

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

MISS SIMOR: Thank you.

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

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

That is what I just showed you.

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

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

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

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

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

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

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

“...No.10...”

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

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

We have not seen anything from the National Security Adviser.

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

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

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

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

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

Then if we go to 8, "Timing - Urgent":

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

If we then go to 14----

LORD JUSTICE STUART-SMITH: In the light of the other information, some of which we have read in advance and some of which you have shown us, delay would be because one of the consequences of approval or not would be contracting-- finalising contractual documentation

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with contractors and so on, which would take time, although the project was already well-advanced. Is that----

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

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

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Fourteen.

“For completeness, and to evidence the rigour with which UKEF has considered the transaction, UKEF’s Business Group and Risk Group Committee papers are appended to this Submission (Annexes A and B), alongside the Environmental, Social and Human Rights (ESHR) and Climate Change Reports (Annexes C and D). I do not believe you need to read all of these, but given concerns raised by colleagues [that is presumably Secretaries of State for DFID and the Foreign Office] you may wish to pay particular attention to the Climate Change Report.”

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

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

LORD JUSTICE STUART-SMITH: Possibly. No admissions.

MISS SIMOR: Paragraph 16:

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

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

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

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

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

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

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

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Then para.23:

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

Then 24:

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

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

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

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

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LORD JUSTICE STUART-SMITH: CB2, 62?

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

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

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

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

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

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

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commitment to promoting non-fossil fuels and reducing carbon emissions globally.

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

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

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

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

Then para.30:

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

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

If we then go to 36----

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

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

LORD JUSTICE STUART-SMITH: Sorry?

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

LORD JUSTICE STUART-SMITH: I do not quite understand. Just showing how little I understand, I thought there was a consistent thread, both from the Government documents and also from other documents, that one of the reasons why Mozambique likes this project is that it will give it access to funds which it would not otherwise have that would enable it to create an infrastructure and have funds which go to improving its debt distress position. I

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must say when I read when para.30 in advance of today, on p.CB2/149, I thought that was likely to be uncontentious, but---

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

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

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

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

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

Then at 37:

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

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

“As of today, UKEF is on cover to support projects in the fossil fuel sector, with the exception of new support to thermal coal projects where government policy on this, as set by the Prime Minister at the African investment Summit in January this year, needs to be taken into account. I am aware that policy development work is taking place across Whitehall in respect of the Government’s future policy on trade and energy, to

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which UKEF is contributing. That work is ongoing, with the evidence base being gathered, including a consideration of how this area of policy might interact with other government priorities, including the levelling up agenda, increasing support for SMEs, strengthening the Union and promoting clean growth capabilities within the supply chain. The expectation is that initial policy options will be put to Ministers over the summer to inform further refinement of that policy ahead of a rescheduled COP26.”

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

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

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

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

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

MR JUSTICE LINDEN: Attributable to the need to compress?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Then 50:

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

We are told that the redaction is legal privilege there.

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

Again, legal privilege.

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

MISS SIMOR: Fifty-two:

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

Then 54, again, the redaction is legal privilege:

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

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

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UNKNOWN SPEAKER: (inaudible)

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

MISS SIMOR:

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

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

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

MISS SIMOR: Yes. Exactly. Then 55:

“Although the NGOs would likely see the decision not to support the Project as a step in the right direction, this may, as we saw following the announcement on support for thermal coal, encourage further campaigning against UKEF and wider HMG support for other strategically important, but also ‘controversial’ areas or sectors, such as civil aerospace and defence.”

So, it might lead to more campaigns.

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

Then we go to d:

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

e. the Climate Change Report setting out the significant impact that the project will have due to increased GHG emissions but also taking account of gas as part of the overall energy mix for the world’s power transition for the foreseeable future and beyond the lifetime of the potential UKEF supported facility;

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

Then if we now to the annexes to these submissions.

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

MISS SIMOR: In the CCR.

LORD JUSTICE STUART-SMITH: In what?

MISS SIMOR: In the Climate Change Report.

LORD JUSTICE STUART-SMITH: Okay.

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

LORD JUSTICE STUART-SMITH: Yes.

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

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

MISS SIMOR: Exactly, yes.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And, indeed, the detailed grounds of defence make it clear that those were the conclusions on which the decision was based. Then if we go just to p.156, we see-- so these are the four annexes to the submissions to the Chancellor and the Secretary of State for Trade. We have been given H to J. So we have not been given G, Environment----

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

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

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

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

LORD JUSTICE STUART-SMITH: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Page?

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

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para.61, it was determined that it was very likely that the project would take place. That is my understanding.

So if you look at para.61:

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

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

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

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

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

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

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Full stop?

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

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: But in terms----

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

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

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

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

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

“... the global demand for energy cannot be met without oil & gas. In particular gas and LNG are fundamental to enabling the energy transition without massive disruption and providing energy security.³⁷ Although

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overall gas demand remains relatively flat to 2040, LNG's share of demand will increase significantly. Additional investments in LNG beyond Mozambique will be required to meet demand."

So it is looking at everything from a demand perspective.

"140. Global demand for LNG is expected to double from 313 million tons per year (mtpy) in 2018 to 631mtpy by 2035 (continuous growth of 4% CAGR) with Asia Pacific being the largest market and driver of future growth accounting for 62% of this demand. Key markets will be China, India etc. whose energy systems still heavily rely on coal and clean air policies mandating coal-to-gas switching."

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

MISS SIMOR: Yes.

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

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

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

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

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

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

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

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

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

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

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Conclusion: RAD considers volume demand risk acceptable.”

But will there be enough demand in the market?

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

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

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

Then 147:

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

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

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

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

MISS SIMOR: Well, others plainly do.

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

MISS SIMOR: Well, we do not actually know the position in relation to their view on this, Mozambique's view. They have-- various documents are set out, but we do not actually have a view specifically on that analysed. It is true that in one of the reports there is a reference to development of gas. We accept that people hold the view that gas can be a transition. Specifically in relation to this project, what is extremely important is the IPCC 1.5 special report and the UNEP Production Gap Report. Because the UNEP Production Gap Report shows the excess of supply over the available budget of carbon that can be used to stay within 1.5 degrees. So, while it may be correct to say that there is this ever-increasing demand, the UNEP Production Gap Report makes clear that if you used all the fossil fuels that are already online being produced, that would exceed the available carbon budget, which

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ultimately determines the temperature increase. So the answer in that respect is that this fossil fuel essentially has to remain in the ground and what Paris requires is that the finance, whether it be 20 billion or 30 billion or whatever, be given to Mozambique to develop renewables for its own use.

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

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

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

LORD JUSTICE STUART-SMITH: Why?

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

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

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

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

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

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

MISS SIMOR: It does.

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

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

LORD JUSTICE STUART-SMITH: Sure.

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

LORD JUSTICE STUART-SMITH: I am holding on.

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Now?

MISS SIMOR: Yes.

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

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

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

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

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

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commitment that is a conditional commitment, so obviously it is conditional. So that is a very different analysis from the perspective of Mozambique.

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

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

MISS SIMOR: Well, of course, there is an injustice. It is intended to be addressed through climate finance, through the separate, you know, giving of finance. Whether it will be is another matter. It is the problem with the fact that there are too much fossil fuels under the ground, if you bring them up climate-- and Mozambique suffers the cyclones and disasters and that is why Article 2 of Paris is very clear that development goes hand in hand with dealing with climate change, because Mozambique will suffer hugely from the climate change that its potential wealth could create. It should be pointed out that we are not talking about enabling

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Mozambique to develop energy sources for its own use because 95 per cent of this LNG is for the global market. So we are talking about revenue and revenue can be provided to Mozambique. You will see that the UKEF policy in relation to fossil fuels now is that if the energy-- the fossil fuels to be developed are for the global market, it is an absolute ban.

LORD JUSTICE STUART-SMITH: It is a what?

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

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

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

LORD JUSTICE STUART-SMITH: Okay.

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

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

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

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

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

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

MISS SIMOR: Well, not necessarily. The original reason by UKEF for not funding renewables is because they said no UK companies had come to them with proposals for renewable projects in Mozambique and therefore that is why they were not funding renewables. We will find you the reference to that.

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

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

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(After a pause) Thank you.

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

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

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

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

Then the top of 165:

“The project has executed eight Offtake Contracts/SPAs with ten LNG buyers.”

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

If we then look for China we find China is 13 per cent. That is CNOOC. It is sixth row down. You will see that underneath you have that you have Indonesia 9 per cent and on the

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next page India 9 per cent. So, essentially, ignoring the global, we have around 22 per cent for Europe, 13 per cent for China and 9 per cent for India.

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

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

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

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

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

Then at 276:

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

Then if we jump to (vi):

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

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country. This project alone will provide the GoM with estimated net total revenues of US\$13bn between 2019-2049.”

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

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

So this is the stranded asset assessment.

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

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

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

So it is para.1:

“...carries out an environmental and social screening and review of potential transactions falling within the scope of the OECD common approaches and the equator principles. UKEF is considering provision of

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support for the development of the offshore facilities for gas receiving and natural gas liquefaction of 12.88 MTPA [that is the two trains] and related infrastructure in Afungi Peninsula.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MISS SIMOR: Yes.

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

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

LORD JUSTICE STUART-SMITH: One three two?

MISS SIMOR: One three two.

LORD JUSTICE STUART-SMITH: Yes.

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

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

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

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

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

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

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

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

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

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This was then produced and then a subsequent Climate Change Report. So I believe it is the beginning of May.

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

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

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

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

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

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

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

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

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

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

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

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

MISS SIMOR: It would be.

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

MISS SIMOR: Yes.

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

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

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

MISS SIMOR: Thank you.

LORD JUSTICE STUART-SMITH: Thank you very much.

(1.02 p.m.)

(Adjourned for a short time)

(2.01 p.m.)

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

MISS SIMOR: My Lady, you asked about the guidance document. We do not know the date of it.

It says May on it. We do not know when it was produced but in supplementary bundle p.1592, para.50, you get the answer to the Part 18 response explaining that it was part of the process.

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

MISS SIMOR: Page 1592, supplementary bundle, para.50. So I was in the climate change report but I am going to deal first with the Mozambique NDC and their assessment as to whether UKEF would be assisting Mozambique in meeting its NDC and increasing ambitions so I am going to actually start with the Mozambique NDC because of the issues raised by my Lord. That is at CB2, p.13----

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LORD JUSTICE STUART-SMITH: Yes.

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

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

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

LORD JUSTICE STUART-SMITH: Yes?

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

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

Then in 11:

“The implementation of the actions referred will limit the GHG emissions by sources and the removals by sinks at the same time as they contribute to the

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increase of the well being of the Mozambicans through the increase of the access to renewable energy sources and to basic sanitation services...”

And then 16:

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

So that 67.5 million tonnes.

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

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

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Where are you?

MISS SIMOR: Box 5.

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LORD JUSTICE STUART-SMITH: Yes.

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

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

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

MRS JUSTICE THORNTON: Yes.

MISS SIMOR: And then-- so, obviously, over the thirty years. That would be 56. No, 180. 150.

Then if we go to 268, if you could side line the points about lock-in, which is the middle paragraph of para.268. UKEF determined that they could not work out the cumulative carbon emissions and they refer to Oxford University calculations, specialist consultants. In fact, we will show you that one of those consultants was their very own Ben Caldecott, which has actually produced a methodology. But, quite apart from that, cumulative carbon emissions are not as complicated as-- not complicated. That is shown in our witness statement from Mr Anderson and Mr Muttitt because, essentially, they are just all the scope 1 and 2 emissions added up together, so to get a rough estimate, you would multiply 6 by 30. But it is slightly-- it is slightly more complicated because of disputes as to exactly what is going up but, certainly, it is not something that is difficult to calculate.

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

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

So we do not know whether they will be utilised for renewables, these funds that-- the 13 billion that I showed you that will be the revenue to the Mozambique government over the 30-year period. So then just the summary, my Lord and my Lady, if you could read the last summary on p.269. So we have the last bit of the paragraph. Mozambique needs financial resources. We know that from its NDC, “Including renewable sources and its limited electricity distribution network.” It, “Considers that the financial outputs of this Project will act as catalyst to enabling the country’s climate change plans to be fulfilled, offering an energy bridge as the nation moves from traditional biomass,” but there is no plan that they have seen. The African Development Bank asked Mozambique for that. Then 270, bottom of 270:

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

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

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

Then in the middle, a bit down:

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

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

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

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Then we go to the conclusion back at 253.

LORD JUSTICE STUART-SMITH: 253?

MISS SIMOR: 25----

LORD JUSTICE STUART-SMITH: 253?

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

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

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

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

So there is a recognition that it will increase there.

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

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

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

And then:

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

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

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

LORD JUSTICE STUART-SMITH: Yes, thank you.

MISS SIMOR: And then:

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

So they cannot--

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

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

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

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And then we rely on this:

“On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the project will at least result in some displacement of more polluting fuels, with a consequence of some net reduction in emissions.”

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

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

MISS SIMOR: Yes.

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

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

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- we conclude that it will lead to a net reduction, presumably on the balance of probabilities. Then-- so we say that there was a high qualitative assessment, no quantification. There was uncertainty which could not be resolved without further due diligence or analysis,

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although that is questionable. On balance, they decide that the consequence will be a net global reduction in emissions so they determine that without determining the overall global emissions. They did not go further and consider by reference, for example, to the most likely locational use. As I have said, for example, 20 percent was Europe, where the prediction is that that would result in an increase, and 13 and 19 was China. Rather, they put a finger in the air and decided that, on balance, it would result in a net reduction in emissions.

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

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

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

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

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

MISS SIMOR: -- does not say that. Their conclusion on which the finance was based was that this project would result in a net global reduction in emissions and they did that on the basis of their three scenarios. That is one place it says it but I have got-- I just took you where? To

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25-- I think it might be at 256 as well. There is another-- there are two places where it is said. 252, 253. Let us go to 272. It may be there. We find a scenario-- 272, so if we go to the top of 272----

LORD JUSTICE STUART-SMITH: 272?

MISS SIMOR: Yes.

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

So scope 1 and 2 emissions are the emissions that come from the project in Mozambique. Scope 3 emissions are from the use of the LNG. But, as I understand it, the 5 percent use in Mozambique is assessed nowhere. The 95 percent of the LNG that is produced globally is assessed here by reference to three scenarios and this is what we are talking about here. The international impact is only scope 3.

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

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

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

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

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

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

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

MISS SIMOR: Then----

LORD JUSTICE STUART-SMITH: -- at slightly cross purposes. I think you are responding to a suggestion I made that there was an acceptance that bringing this project on stream would

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globally lead to an increase in emissions even if that increase might be less than would otherwise be the case if it acted as a transition-- if it acted in place of-- was used in place of more polluting fuels and I thought you were disagreeing with that.

MISS SIMOR: Yes.

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

MISS SIMOR: Exactly. So----

LORD JUSTICE STUART-SMITH: What am I missing?

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

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

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

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

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MISS SIMOR: It has got nothing-- yes.

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

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

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

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

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

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

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

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

So they choose the mid case scenario.

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

Then they say in the next paragraph:

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

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

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

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

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

MISS SIMOR: Page----

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

MISS SIMOR: And then----

LORD JUSTICE STUART-SMITH: Where are you?

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

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

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

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

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And then it says:

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

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

LORD JUSTICE STUART-SMITH: 277?

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

I am now going to go to the Wood Mackenzie report which was relied on in this report we have just seen and also at paras.53 and 56 of the defendants' skeleton. It must be the

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claimant's skeleton. So I just want to make a few remarks. First of all, as you saw from the RAD report and as stated, indeed, by the interested parties in their grounds, Wood Mackenzie was the lenders' market advisor. Its role was to advise the lenders on the commercial viability of the project, essentially to advise them on market demand. Crucially, Wood Mackenzie is not and does not profess to be a climate change advisor. Nor was it appointed by the lenders to carry out a climate impact assessment as the defendants and interested parties have claimed.

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

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

MISS SIMOR: 95. CB2----

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

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

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

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

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

MISS SIMOR: Yes.

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

MISS SIMOR: Yes, please.

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

MISS SIMOR: Not yet, no.

LORD JUSTICE STUART-SMITH: What?

MISS SIMOR: Not yet.

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

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

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

So they are being discussed by Total and WoodMac.

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

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

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

And the date of this is February 2020.

“... to undertake their analysis.”

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

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

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

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

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

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

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

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

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

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

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

And then (d):

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“For the avoidance of doubt...”

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

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

So still not seen the draft scope of works.

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

So lenders have not even seen it now in mid-February. The next day on 13 February 2020 White and Case shares the scope of works and that is on the previous page, 92 to 93, and you will see that the scope of works does not request WoodMac to carry out an emission impact report and this is wholly unsurprising because WoodMac would not be qualified to do such a

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report. It was asked rather to quantify the emissions reduction that could be associated with the project and it is totally-- so let us see the scope of works:

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

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

MISS SIMOR: Sorry, 92. Bottom of 92.

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

MISS SIMOR: Yes, 13 February, 11.31.

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

MISS SIMOR: Yes.

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

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

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

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

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

"Suggested Approach:

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

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

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We would prepare a handful of slides...”

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

“Summarise the objectives with caveats as noted above

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

And compare that with delivering coal and oil.

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

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

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

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

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- (inaudible).

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

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

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absolute. One needs to know for the purposes of looking at carbon budgets and cumulative emissions what are-- what are-- what is the absolute.

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

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

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

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

MISS SIMOR: It is the supplementary bundle.

LORD JUSTICE STUART-SMITH: Supplementary authorities bundle?

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

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

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

MRS JUSTICE THORNTON: (inaudible)?

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

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

MRS JUSTICE THORNTON: Online?

LORD JUSTICE STUART-SMITH: Online.

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

MISS SIMOR: Yes.

MRS JUSTICE THORNTON: Is that it?

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

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LORD JUSTICE STUART-SMITH: Okay.

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

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

MISS SIMOR: Yes, sorry.

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

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

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

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

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

And that was the same as in the ESHR and that sentence I showed you in the CCR. The

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detailed grounds of defence realised that that was a misunderstanding and we now have para.87 of the detailed grounds of defence which is at p.87, apparently. Yes, p.87 of the core bundle and this is a copy/paste of the paragraph.

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

MISS SIMOR: Page 87.

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

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

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

MISS SIMOR: So it is paragraph----

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

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

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

MISS SIMOR: Yes.

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

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

LORD JUSTICE STUART-SMITH: Thank you.

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

LORD JUSTICE STUART-SMITH: Thank you very much.

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

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

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

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

LORD JUSTICE STUART-SMITH: 209?

MISS SIMOR: 289.

LORD JUSTICE STUART-SMITH: 298, thank you.

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

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

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

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

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

“Therefore, the relevant considerations to take into account are:

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

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

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

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

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

And then 13:

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

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

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

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

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

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

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

And then:

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

Then, 21, material commercial risks and then if we go to second supplementary bundle, 1047.

LORD JUSTICE STUART-SMITH: Supplementary bundle, 147?

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

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

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

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

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

"Subsequent to the Ministerial decisions, UKEF confidentially..."

So we had the ministerial decisions of 10 June:

"...indicated to the Project sponsors

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

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

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how much CO2 equivalent that creates?” and they did some calculations so they are a bit nervous of their expertise to do it but then at 69 you get their estimates.

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

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

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

LORD JUSTICE STUART-SMITH: Let us give ourselves thirty seconds of irrelevance. You may well have been and I never studied geography and certainly not as recently as that but the general acceptance of climate change to which you have just referred was longer in coming,

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was not? So among people who you would describe as right-thinking it was accepted and it is the premise on which this treaty is founded.

MISS SIMOR: Yes. It was----

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

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

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

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

LORD JUSTICE STUART-SMITH: Yes.

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

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

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

“Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas...”

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

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

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

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

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

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

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

And then (5):

“The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as

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appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.”

And then (7):

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

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

“In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology,

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to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:

- (a) Small island countries;
- (b) Countries with low-lying coastal areas [Mozambique];
- (c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay;
- (d) Countries with areas prone to natural disasters...”

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

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

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

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

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

LORD JUSTICE STUART-SMITH: Between parties.

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

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

But then:

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

The submission to the ICJ and/or arbitration and, of course, that is the acceptance merely of a continuing, existing dispute resolution mechanism. Of course, one could-- equally, a party

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could accept to resolve a dispute separately through arbitration and I take you to that because-- well, I will just show you that in Paris. It said that there is no mechanism, that, actually, none of these provisions mean anything and no court could actually determine their meaning. That is wrong.

Now if we go to the Paris Agreement, that is in the next tab. Again-- I did not say in Article 24-- it is just relevant for the purposes of treaties. Article 24 of UNFCCC says that you cannot have any reservations so the entirety of the treaty applies or you leave the treaty. Now, the Paris Agreement is at the third tab and the key point we have set out in our summary of facts and grounds from 53 to 57 and 17 to 28 of our skeleton. The UK signed the agreement on 22 April 2016. It was then laid before Parliament in accordance with section 20 of the Constitutional Reform and Governance Act by way of a command paper. We have brought the command paper and we will hand it up to you. It is actually in our skeleton-- referred to in our skeleton. There was no dissent from Parliament. It was ratified on 18 November and came into force on 18 December 2016 and from that date the United Kingdom was bound in international law to comply with its provisions.

It was initiated, the Paris Agreement, in COP 17 in 2011 in which the parties decided to develop another legal instrument with legal force and its aim was to raise the level of ambition

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and we can start with the recitals to the decision that adopted it which is at the front of the tab.

If we start with recitals 5 and 6:

“Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions;

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

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

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

That was because before Paris came into force in the preceding COP decisions, countries were asked to submit INDCs, which is why you get the title “INDC for Mozambique 1”, which

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indicated their intended nationally determined contribution and, by the time it came to adopting Paris, it was seen that those commitments came nowhere close to allowing the temperature goals to be met and that, unfortunately, remains the case today and you see that in the emissions gap report and the IPCC report. If we then go down four more:

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

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

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

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

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

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

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

Then clause 53, Finance, on p.39:

“Decides that, in the implementation of the Agreement, financial resources provided to developing countries should enhance the implementation of their policies, strategies, regulations and action plans and their climate change actions with respect to both mitigation and adaptation to contribute to the achievement of the purpose of the Agreement as defined in Article 2...”

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

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

That is as established in Article 7 of the UNFCCC.

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

“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...”

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

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

Precisely what my Lord referred to.

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

And that is certainly Mozambique.

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

And then:

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

So, again, my Lord’s point.

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

Again, my Lord’s point.

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

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

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

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

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

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

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

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

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

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

“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.”

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

“As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2.”

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

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

“In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”

Then----

LORD JUSTICE STUART-SMITH: Is the reason why it is recognised that peaking will take longer for developing country parties that they do not have the resources to respond to current emission levels in the same way as developed countries have?

MISS SIMOR: My understanding is we had-- we had the UNFCCC and then we had Kyoto. Kyoto involved commitments only by the developing-- developed countries who were listed in an annex, so the United Kingdom and other countries actually started doing things much earlier, so we already started reducing according to Kyoto and the developing world did not have to. I think it is a-- I believe and I will just check with my expert behind me but I believe it is a recognition of where the countries are technologically, so China, obviously, is in a very different position in terms of energy from the United Kingdom, energy level development. So

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I am told that that is not spelled out anywhere but that I am basically right. That is the basic understanding.

LORD JUSTICE STUART-SMITH: But every-- every country is going to be different, is it not? So China may be in one sense developed but it has enormous consumption of and enormous emissions. India is different again. Mozambique is different again because it is an extremely poor country which happens to have an asset which it wishes to develop, so how does that play out with the recognition that global peaking of greenhouse gas emissions will come later for----

MISS SIMOR: Well, it is not global peaking.

LORD JUSTICE STUART-SMITH: -- developing countries?

MISS SIMOR: I think that is the important----

LORD JUSTICE STUART-SMITH: Sorry. I should not have used the word----

MISS SIMOR: Well, it is----

LORD JUSTICE STUART-SMITH: Parties aim to reach global peaking of greenhouse emissions as soon as possible----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- but the recognition is that that will take longer for developing countries.

MISS SIMOR: So that is, in a sense, not very sensible and helpful language because, obviously, a country does not determine global emissions but, yes, essentially, the word "global" is quite

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important because what it is not saying is that countries can-- so Mozambique may be able to peak later in terms of its own use but it is not a permission for developing countries to make revenue to cause global peaking.

LORD JUSTICE STUART-SMITH: Where do we find that?

MISS SIMOR: So it relates to----

LORD JUSTICE STUART-SMITH: Where do we find that?

MISS SIMOR: -- aims to reach-- so, "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking," now, that must be national peaking because it cannot in any sensible sense mean global peaking, so it-- because each nation is only responsible-- so under the Climate Act, under our NDC, although we might buy all our products from China, we are not held responsible for the emissions that are created in the production of those products and when we report our emissions, we do not say, "Well, we bought x number of cars from China and we need to count those emissions." We do not count them. We only count the emissions that come from our land mass and we need to reduce those emissions as swiftly as possible. Equally, China needs to reduce them as quickly as possible. So that is not about allowing other countries to increase their emissions by selling product.

LORD JUSTICE STUART-SMITH: Why not?

MISS SIMOR: Well, my Lord, that is because you do not-- when you look at a country's-- when you look at whether an individual country's emissions----

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LORD JUSTICE STUART-SMITH: You are submitting that it is permissible to adopt exactly the inequity that you were complaining about this morning or perhaps I was complaining about this morning. You are effectively saying no one shall assist a developing country to develop its assets. That seems to me to be quite a bold suggestion.

MISS SIMOR: We ask-- in relation to 2(1)(c) we are saying that finance (inaudible) must be in line with low emissions-- consistent with the lower greenhouse gas emissions.

LORD JUSTICE STUART-SMITH: But I think you are also saying that, properly understood, it means that the United Kingdom could not fund Mozambique's development of its LNG.

MISS SIMOR: We are saying that and that is the UK's policy now.

LORD JUSTICE STUART-SMITH: It may be-- it may be UK policy now not to do it but that is different. What we are concerned with, as I understand it, in these proceedings is that you seek to impose an obligation - I know you have got other arguments - upon the government not-- under 2(1)(c) not to fund Mozambique in its development of this project and are you simply not by a different route imposing precisely the injustice of which we spoke this morning, which is, "We have made full use of our fossil fuels but you may not"?

MISS SIMOR: Well, I did try to explain that this treaty attempts to deal with that inequity which derives from history.

LORD JUSTICE STUART-SMITH: How----

MISS SIMOR: It attempts to deal with it through----

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LORD JUSTICE STUART-SMITH: In that case, I may still-- I may simply not have understood what you say.

MISS SIMOR: Well, it attempts to deal with it through finance flow. So there are two approaches to finance flows in the Paris Agreement. One is the 2(1)(c) overarching obligations, all finance flows, and I will take you to the finance committee that explains that. The other is, actually, specific climate finance, which is like development finance to assist in developing renewables and developing actually adaptation. There is also a damages provisions in relation to-- so there are provisions in this treaty to deal with the fact that Mozambique has suffered vast losses in GDP. You saw 12.6 percent loss in GDP as a result of that cyclone which has effectively been caused by the developed world because we are the ones who put the carbon up there. So there is also a damages mechanism within this treaty whereby money should be going from the developed world to pay Mozambique for those damages. So there are mechanisms to deal with it but, as I said this morning, there is an inherent inequity in the whole problem of climate change and this is an attempt to sort it out. At its heart though, in order to deal with climate change, there is a limited remaining budget of carbon that can be put into the atmosphere if we are to reach 1.5 degrees and it is through these mechanisms that states have agreed to do that and there is an attempt to deal with that inequity, however imperfect. But it is a-- it is a problem. It is a big problem.

MRS JUSTICE THORNTON: Do we get the analysis you have just given us from reading the whole of the climate change treaty or is there another (inaudible) analysis (inaudible)?

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MISS SIMOR: Yes, my Lady. If you read the UNFCCC plus the Paris Agreement you will see that it effectively works to seek to-- to the greatest extent possible, to remove this inequity but that is why you have these battles as we had in Glasgow a few weeks ago where India and China-- these are battles but the battles were resolved in this text and that is what this-- this court is concerned with.

LORD JUSTICE STUART-SMITH: But reading (inaudible) skeleton (inaudible) Vienna Convention----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- to interpret the provisions according to their natural and ordinary meaning, do you say that we get the analysis you have just given us from the natural and ordinary meaning of Article 2 read with the other provisions and the UNFCCC?

MISS SIMOR: Yes, my Lady, and Article 31 of the Vienna Convention says the natural meaning in light of the object and purpose, so it is a purposive interpretation and we say, and I hope I am going to have time to deal with this-- we say that the natural meaning is evident and it is supported by the object and purpose which you find through the provisions that I have been taking you to.

LORD JUSTICE STUART-SMITH: Can I just see how far this goes? I will-- I am sorry to slow you down----

MISS SIMOR: No, no. It is very important.

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LORD JUSTICE STUART-SMITH: -- but this is important. Is it-- is it your submission that the impact of 2(1)(c) read in context is that it is at least a treaty obligation, never mind anything else - it is a treaty obligation - that the United Kingdom should not provide finance to any energy-- any energy project which is not carbon neutral or carbon clean? So, effectively, wind and-- wind, solar and nuclear?

MISS SIMOR: No. It could-- unabated, so if there is no carbon capture and storage, which is why the Prime Minister, no doubt, said, "How much will it cost for us to provide carbon capture and storage?" because if it could produce-- if it was energy that could be produced and the carbon could be captured or there were some other mechanisms or you might, for example, I suppose, have an offsetting mechanism whereby you plant a million hectares of forest and that becomes a sink - carbon sink - so in that sense there is still potential and, indeed, even in the IEA net zero scenario which you have in your supplementary bundle and, in fact, the IPCC scenarios, all assume that there will still be some fossil fuels operating in 2050. We will not be-- as you say, we will be carbon neutral-- we should be carbon neutral by 2050.

LORD JUSTICE STUART-SMITH: We should be?

MISS SIMOR: No.

LORD JUSTICE STUART-SMITH: The United Kingdom?

MISS SIMOR: The world. The world should be carbon neutral.

LORD JUSTICE STUART-SMITH: Well, the United Kingdom has pledged to be carbon neutral by 2050. I am not sure the world has.

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MISS SIMOR: I believe it is-- it is the whole world that needs to be effectively carbon neutral but the-- we will-- that was our understanding. We will check that.

LORD JUSTICE STUART-SMITH: That is to achieve 1.5.

MISS SIMOR: Yes, but that does not mean no fossil fuels. The net zero report for IEA which came out this year is actually a very frightening document but it does posit the continued use of fossil fuels and the IPCC also has many scenarios some of which assume that there will be vast carbon capture and storage so, effectively, we will continue to a large extent with fossil fuels but the technology will deal with it. Other people are more pessimistic about the technology and many argue that on the basis of precautionary principle you cannot plan on the basis of carbon capture and storage, that that is an incorrect way. But, in any event, there is no sort of final number as to how much-- there are predictions. Everything is about prediction. But in terms of actually supporting more fossil fuels, what is fundamental to that is the UNEP production gap report because that shows that there is already far too much fossil fuel online, in train, to meet the temperature goal, so there is already-- in projects that are underway, there is already a massive overproduction of what can be used.

The other point which when I get to the grounds, the key thing is that you have actually got to do an analysis to work out whether you are on the low emissions pathway, so this is apparently something like I think our witness says 7.5 coalmines or something equivalent, but you have got to do a quantitative analysis. That is the process. But I also just quickly will take you to--

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well, I am going to come to it but maybe I should just quickly take you to it now, to our skeleton at para.26.

LORD JUSTICE STUART-SMITH: 76?

MISS SIMOR: 26.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Page 9. I showed you the bit of the Paris Agreement that made the standing committee serve the Paris Agreement-- the standing committee on finance to serve the Paris Agreement. Perhaps I have not taken you to that yet but I will and you will see para.49 of the biannual assessment of the standing committee on finance:

“Climate finance continues to account for just a small proportion of overall finance flows...”

That is-- as I said to you, there are two kinds of finance. One is specific climate finance, so you might have heard of the 100 billion that was pledged and has never actually been produced.

“... the level of climate finance is considerably below what one would expect given the investment opportunities and needs that have been identified. However, although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole (and of capital stock) pursuant to Article 2, paragraph 1(c), of the Paris Agreement. This does not mean that all finance flows have to achieve explicitly

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beneficial climate outcomes, but that they must reduce the likelihood of negative climate outcomes. Although commitments are being made to ensure that finance flows from DFIs are climate consistent, more can be done to understand public finance flows and ensure that they are all consistent with countries' climate change and sustainable development objectives.”

So we got to-- where did we get to?

LORD JUSTICE STUART-SMITH: Article 2.

MISS SIMOR: We got to 4-- we are in Article 2 still. Looking at Article 3-- 4(1), we were discussing 4(1). I will have a further look to see whether I can find any more information in relation to my understanding of 4(1), my Lord.

4(3) and 4(4), these are what is referred to as the ratchet effect. That is effectively that NDCs must ramp up, so your aim must be to reduce more and more and more and that is relevant to the United Kingdom's obligation which is to assist developing countries not just with their predicted current NDC but with their obligation to ratchet up and increase that ambition because, ultimately, all countries need to be carbon zero.

Then if we go to 4(19), that is just the obligation on parties to formulate their plans and it refers to common but differentiated responsibilities and the UK sends biannual reports to the UN telling the UN what it has done to assist other countries to reduce their emissions and it quantifies that effect and I put that report in the supplementary authorities bundle. So the

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common but differentiated responsibilities, developed countries have a responsibility as set out in this treaty to help developing countries and they communicate that assistance, what they have done and how much it is actually worth in terms of data, to the UN.

Then the parts of crucial-- Article 9 that are crucial are set out in para.25 of the skeleton and I will not go through them. They again refer to the obligation to assist, including in finance, and then if I can just take you to Article 24, that is the provision that applies the dispute resolution mechanism to the Paris Agreement, so the ICJ or arbitration can between states interpret the obligations and terms of this treaty.

Now I just want to show you where the IPCC report is so you know. It is in the next tab, I hope. This is the IPCC report that was adopted pursuant to CP21, the COP decision that adopted Paris, and you will see the first line on p.67:

“This Report responds to the invitation for IPCC ‘... to provide a Special Report in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways’...”

So that is the quote I took you to in the COP decision at the front of tab 3. Then the next page you see the UNEP production gap report.

LORD JUSTICE STUART-SMITH: Hold on. Which page of the document are you?

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MISS SIMOR: So it is just the top of p.67, the first line of the introduction.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Then the next tab you have the production gap report and if you go to p.174 of the bundle, you will see a bold title at the top left and the UNEP report in the first paragraph-- the bottom of the first paragraph, it draws on what would be consistent with 1.5 and 2 degree pathways based on scenarios-- sorry, this is p.174 of the bundle.

LORD JUSTICE STUART-SMITH: My p.174 is the last page of the document. Have you got a paragraph number?

MISS SIMOR: No. It is-- have you got-- is it tab 5 you are in?

LORD JUSTICE STUART-SMITH: No.

MISS SIMOR: No. You should-- at the bottom right there should be a "174".

LORD JUSTICE STUART-SMITH: Yes, I am with you.

MISS SIMOR: Right. So in the far left-hand corner you will see that this-- this is the UNEP production gap report and this report, it says it would--

“... and what would be consistent with 1.5°C and 2°C pathways, based on scenarios from the recent... (IPCC) Special Report on Global Warming...”

So what the UNEP did was it took the scenarios that were considered feasible by IPCC so it-- IPCC looked at 84 scenarios and this report looks at 12, taking only the scenarios that the

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IPCC had considered were feasible and rejecting those, for example, that were entirely dependent on CCS or other carbon capture technology.

Right. Now I am going to turn to my grounds.

LORD JUSTICE STUART-SMITH: Okay. Can I-- I do not want you to deal with this now. I do not want to slow you down. But going back to Article 3, these questions: is pathway defined; secondly, low greenhouse gas emissions for whom - global/UK/Mozambique, see Article 2.2; and I would just like possibly on a piece of paper or by email a list of the references where you say that I can find the answers to that but that can wait. I do not ask you to do it now.

MISS SIMOR: Okay. I will answer the first one quickly though.

LORD JUSTICE STUART-SMITH: No, do not.

MISS SIMOR: Do not? Okay, I will not. Right. So, turning to the grounds----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- there are two independent grounds to our challenge as you have seen and I am going to start with the second one, ground 1(b), because fundamental errors of assessment in-- are relevant to the question of whether ground (a) applies. If the defendants fundamentally erred in their assessment, then they could not reach the conclusion that they did as to Paris alignment. Now, we say all the evidence actually points to non-alignment but, certainly, there was no basis for reaching the conclusions that they did.

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Ground 1(b), this is a challenge to the way that the decision-makers went about assessing, first, the climate change impacts of the project, whether or not by reference to the Paris Agreement, so it is a rationality challenge even irrespective of the Paris Agreement, and, secondly, more generally, the question of whether to grant finance having regard to both climate change impacts and the risk of stranded assets. Our submission, which I will make good by reference to the facts, is that the defendants reached conclusions without any rational basis at all. Not only did they leave vital factors out of account, they ignored crucial factors that undermined their own conclusions and they reached conclusions without any evidential basis. We say the decision-making in this case is a paradigm example of arbitrariness. Worse, what appears to have happened here is that conclusions were reached to enable the finance to be granted when those conclusions were unsupported by evidence and that, we say, is irrational decision-making writ large.

Now, there is no dispute as to the relevant legal principles. They can be found in the *Plantagenet* case at authorities bundle 2, tab 30, paras.99 to 100, and that is p.1336, I think. Yes. So my Lord, Lady, you may not need to read this. You may wish just to mark it up. I would just like to draw your attention to subparagraphs (5) and (6), the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which may require him to consult outside bodies with a particular knowledge or involvement in the case but does not spring from a duty of procedural fairness to the applicant but from the

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Secretary of State's duty to inform himself so as to arrive at a rational conclusion. Then (6), and this we rely on:

“The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it.”

Yes, also 141 of the judgment:

“The court engages in a two-stage inquiry. First, the court must establish what material was before the decision-maker [and that is why I have taken you through so much] and what he or she knew when he made the decision. Second, the court must decide whether no reasonable decision-maker, possessed of that material, could have proceeded to make a decision without making further inquiries.”

Of course, that slightly begs the question as to whether the decision-maker himself knew that the enquiries had not been made but I am assuming that it is intended to mean that that also is known so that if the Secretary of State is told that-- told something, she is assumed also to know that that was reached without certain information having been sought.

The claim-- the defendants claim that the court should afford UKEF a substantial margin and they rely on several reasons. Not one of them, we say, is support of such a claim. It is at

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para.55 of their skeleton. First, they say they are entitled to a substantial margin because UKEF was taking a decision in an area that accorded a significant discretion and that is at 55 of the skeleton and 37 to 39 of the detailed grounds. Now, that ignores the point made by Hallett LJ at 106 that I have just shown you in *Plantagenet* that the wider the discretion, the more important it is that the decision-maker have all relevant material before it to enable him or her to properly exercise that discretion. The challenge is to that failure to have the relevant material before them sufficient to enable them to exercise their discretion rationally. Accordingly, as Hallett LJ said, it is all the more important that UKEF had the necessary material before them when exercising their discretion and we say they did not.

Secondly, they claim a substantial margin because they say they were balancing a number of public interest factors at a high strategic level but that, my Lord and my Lady, ignores what we are actually challenging under ground 1(b). Our challenge here is to the failure to have regard to essential relevant considerations and other fundamental errors in the decision-making. It does not matter how high level or strategic the overall decision to finance is if essential elements necessary to reach it are fundamentally flawed or missing. The defendants say that their assessment of climate change impact was inherently predictive and in quotes they say, “Requiring an exercise of judgment as to what might happen having regard to scientific and/or technical material including the advice of independent consultants.” Yes, my Lord, my Lady, we agree but this is precisely why it mattered so much that the necessary scientific and

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technical material was considered. Our criticism is that it was not. Rather, a wholly inadequate, erroneous approach to the predictive exercise was carried out and this is fully explained in the expert witness statements of Mr Muttitt, Mr Anderson and Mr Balcombe.

LORD JUSTICE STUART-SMITH: Can I make a suggestion in relation to particularly Mr Muttitt but I think it applies to the others, picking up a suggestion of Fraser J? To my mind large tracts of Mr Muttitt's statement are advocacy and submission and are not expert evidence. I do not ask you to do this before the end of the hearing but I think, and I have not discussed this with my Lady, but I think it would be appropriate, certainly in the case of Mr Muttitt, if you would indicate which sections you rely upon him for expert evidence.

MISS SIMOR: My Lord, it would be very helpful if you were able to indicate the parts that you consider are opinion because, certainly----

LORD JUSTICE STUART-SMITH: Well, I have not crossed them all out in my copy.

MISS SIMOR: No. Well, it would be very helpful because, certainly, I mean we take that view in relation to a large part of Mr Hawkes' evidence, I should say, for the interested party, but Mr Muttitt gave his evidence very much as a top expert in this field and our understanding and our view, for what it is worth, is that his evidence is certainly all his expert evidence.

LORD JUSTICE STUART-SMITH: I have written "argument" against para.40 and "advocacy" against the end of para.40.

MISS SIMOR: 40? 40?

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LORD JUSTICE STUART-SMITH: 40. I have written “horrid advocacy” against 44, since you ask, and I think I then gave up marking the passages that I particularly did not like. It may be that you think that it is all admissible expert evidence, in which case that is fine, but if there are passages which, on reflection, you think are not necessarily expert evidence but cross the line, then it would help us, I think, if you indicated those passages which you do not really seek to rely on.

MISS SIMOR: Certainly. We will look at it----

LORD JUSTICE STUART-SMITH: And I think the same goes-- the same goes for the other side. If there are passages which on reflection are not relied upon as expert evidence or inadmissible--admissible evidence, then that would be helpful. You are not going to get a decision on Friday so there will be plenty of time for us to sort this out.

MISS SIMOR: All right. Well, we will review it. Certainly, our intention and our understanding was that it was all expert evidence so we will certainly review it. So----

LORD JUSTICE STUART-SMITH: Anyway, your submission which I so rudely interrupted was that your expert evidence demonstrates the deficiencies of the process that was undertaken.

MISS SIMOR: Yes, but my next sentence is, however, it does not require experts to see the flaws which at some points are glaring. So, quite apart from the experts, we say some of this is manifestly irrational. Conclusions are reached for which there is absolutely no evidence and we made a very detailed Part 18 request and we were told that there is no further material or

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methodology so you have what there was. What you see before you is the analysis and the evidence on which it was based.

It is not contentious that there are two aspects to irrationality. One is substantive, is the decision one that was not open to a reasonable decision-maker; and the other is essentially procedural, a demonstrable flaw in the reasoning which led to it, for example, relying significantly on an irrelevant consideration or an essential relevant consideration being left out of account or that there was no evidence to support an important step in the reasoning or that the reasoning involved a serious logical or methodological error and I do not need to give you case law for that. If I do, please indicate and I will bring some.

Our submission is that the substantive decision was vitiated by demonstrable failings in the reasoning process and this was not a question of what weight should be given to any one factor. There was a wholesale failure to consider relevant factors as well as a failure of reasoning, a jumping to conclusions for which there was no evidential support. We say the conclusions reached could not reasonably have been reached having regard to the complete lack of evidence for them.

The defendants' response at para.56 of their skeleton is fourfold. First, they say that that cannot be so because it was informed by expert opinion and extensive discussions. Now, that

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is plainly no answer but it is actually not correct either. UKEF itself said that it did not have the necessary climate expertise. The experts advising UKEF from (inaudible) were of the view that its own CCR was not credible and, as I have already shown you, the Wood Mackenzie report was not a relevant expert and was not giving relevant expert advice.

Secondly, it says that it relied on Wood Mackenzie but did not just accept it but, as I have explained, Wood Mackenzie was not a climate expert report and they were not qualified to give such a report and, on top of that, UKEF went beyond Wood Mackenzie in a way wholly supported (sic) by any evidence in finding that the project would lead to a reduction in emissions. As Mr Muttitt explained, there is no evidence anywhere for that and that is para.42 of his witness statement.

Thirdly, it says that the climate change report was the first time it had ever carried out such an exercise but that, of course, is not a basis for saying that it cannot be unreasonable for very obvious reasons. Fourthly, it says that the African Development Bank and other ECAs did not do any further analysis. Again, we cannot see how this assists. Of course, the United States was outside the Paris Agreement at that time anyway but, in any event, this court is not looking at what other countries did or, indeed, on the rationality laws of other countries. It is-- or the standing laws or anything of the sort. It is notable too that the UK is, of course, on the board of the African Development Bank and had a role in persuading it to fund this project.

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So turning to the fundamental errors, my starting point is scope 3 and that is at 72 to 82 of our skeleton and 112.3 of our grounds.

LORD JUSTICE STUART-SMITH: Just give me the skeleton reference again.

MISS SIMOR: 72 to 82.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So the defendants concluded on the balance of probabilities that the LNG from the project would result in a net reduction in global emissions and that is at CB2/59, last line, 27 February 2020, different letter, and CCR report, CB2/253. I have taken you to that. It was also on that basis that they concluded that its financing aligned with the Paris Agreement low emissions pathway. It is undisputed that this conclusion was reached without any quantification of scope 3 emissions. That is the global emissions from the fuel itself. It also cannot be disputed that the decision-makers were informed that-- decision-makers, that is the ministers, were informed that scope 3 emissions could not be quantified. You saw that in the ESHR and in the CCR and I can give you the references again but perhaps I do not need to. Perhaps I will give you that in a note just to give you all those references because there are quite a number.

In addition, the defendants did not even think about the scope 3 methane emissions from leakage from the energy producing plants, let alone quantify them, and this is fully set out in

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Mr Muttitt's statement at paras.31 to 35. I am not going to go to it because of time. It is at CB1, p.296 and in Mr Balcombe's statement CB1, p.148, paras.9 to 30 and this has nowhere been addressed by the defendants in their case. There are two points to make on this. First, as I have already said, it is simply not true the scope 3 emissions could not have been quantified and statements to that effect in the CCR and the ESHR submissions to ministers were simply wrong. This is explained by Mr Muttitt in paras.46 to 49, core bundle 1, p.301. Again, I was going to take you to it but I do not think I have got time.

The interested parties agree with this. That is Mr Hawkes, CB1, p.274, paras.31 to 34. It is not surprising that they agree to it because Total has to account for its emissions, including scope for emissions-- 3 emissions and does so annually and we have put those emission reports into the supplementary bundle. It is in fact an obligation, I believe, that derives from French law but also from EU law and from also their decision to comply with the TCFD which includes an obligation to monitor and account. There is no question it is possible.

The second point I want to make is that the consequence of not quantifying scope 3 emissions was to render any conclusion as to the climate change impacts of the project wholly arbitrary. Such conclusions simply lack a vital element, and I emphasise "vital", for any meaningful analysis. The claimant's case on this is simple. It is not possible to reach a reasoning conclusion that LNG from this project would lead to a reduction of global emissions and from

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that then to conclude that it would be in alignment with the Paris Agreement low emissions pathway without quantifying those emissions. Put another way, no decision-maker properly directing himself could conclude that the LNG would have a net impact of displacing higher emitting fuels without estimating the quantities of emissions from the fuel that the project will produce and this is fully explained in Mr Muttitt's statement at paras.4(a) and (b), paras.37(a), 38(a), 39 and 45 and I already pointed you to 46 to 49. Without that vital initial step of quantifying scope 3 emissions of the project, no reasonable conclusion as to whether the project could lead to a net reduction and was therefore Paris Agreement aligned could be reached.

So the defendants' response to those points. The defendants accept that in order to assess climate change impact it had to consider the emissions from fuel produced by the project. What it says, however, is that in relation to scopes 1 and 2, the quantities of these emissions were worked out and that, in relation to scope 3, it could reasonably assess climate impact without actually working out what they would be. In relation to scope 3, which it accepts (inaudible) scope 1 and 2, it carried out what it calls a qualitative analysis of quantities. So a qualitative analysis of quantities was good enough. It decided, therefore, in determining quantity, to take what it called a high level qualitative approach and that is at CB2, tab 21, p.253.

LORD JUSTICE STUART-SMITH: CB2, tab 21?

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MISS SIMOR: 253. That is the CCR. We have been there.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Now, this makes no sense to us and is frankly absurd. It is plain common sense that before you can start thinking about how the project will impact on the climate, you have to have an estimate of how much CO2 equivalent will be produced as a result of the project in terms of both scope 1, 2 and 3 and the government clearly agrees with that in principle. It considered scope 1 and 2 and quantified it.

LORD JUSTICE STUART-SMITH: Can I just-- because I may be in danger of losing it again. If your-- if it were the case that the decision-maker concluded that there would overall be a reduction if this project came on stream, you say that is impossible for them to have assessed without a baseline figure and I can see the substance of that argument. If the correct interpretation of what they found was that there was going to be a net positive-- plus contribution of greenhouse gas emissions if the project went on stream, forget all the stuff I have been taxing you with before about whose world is it anyway, but if they had found that the project would lead to an overall increase, notwithstanding the fact that there might be some net reductions because of displacing other fuels, why could that not be the basis for a conclusion that even so this was a project that they were going to support?

MISS SIMOR: So this is a question that is extremely difficult to deal with because there is obviously a disconnect between----

LORD JUSTICE STUART-SMITH: Well, I am sorry to ask difficult questions at 4.21 p.m. but----

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MISS SIMOR: No. It is a fundamental question----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- because, obviously, one has the global emission-- global carbon budget that remains for us to use up before hitting the temperature target and it is not very much. When you look at each project, you could say, well, that is okay because, in this case, I believe Mr Anderson considers it is about 0.85 percent of the remaining entire carbon budget left for the world, this project, which he considers to be enormous. Someone else might say, well, that is nothing else.

LORD JUSTICE STUART-SMITH: Yes. Depending on which side you are on, you can use whatever adjectives you like.

MISS SIMOR: Yes. So that is a subjective view. If the project was smaller, it would be smaller and so you could say, well, with each project you cannot really say it is not on a low emissions pathway because you need to put all the projects together to make that assessment and that in itself is also very difficult because you do not know what all the projects are and you are not all sitting down and discussing who gets to use this budget up. So it is a very difficult question to answer and a very difficult question to answer for any analyst and something that people are struggling with but there is-- this is where, in a sense, the production gap is so important, the production gap report, because there is no suggestion that if you put up these emissions, there are going to be other fossil fuel plants that will close down and, therefore, you will necessarily add and contribute to the increase. So, essentially, the modelling should have considered the

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other projects and this is set out in Mr Muttitt. We will find it overnight, the relevant bit. He does not set it out in quite as much detail as I would have liked but it is modelling that needs to be done to determine whether this project can come on stream.

What you cannot do is for every single project to say, “Well, we are only sending up a little bit,” and you see that, actually, in the *Gloucester Resources* case, everyone saying, “Well, we are not contributing that much so it does not really matter.” So it is a difficult question that Paris does not answer and deal with in a technical way. But it is something that had to be grappled with.

LORD JUSTICE STUART-SMITH: But it would in principle be possible to have a rational decision that, given the particular circumstances of Mozambique, and this is a 0 point whatever percent, that in-- that is tolerable, which is a different-- I am not disagreeing with your suggestion that in one sense you cannot deal with it without knowing what the whole production is going to be.

MISS SIMOR: Well, it is an analysis that would have to have been done because, of course, you would have to put the counterfactual which also comes in in these assessments and I believe the OECD common approaches annex showed this, is that the counterfactual should have been developing renewables in Mozambique. My junior is mentioning the additional complication of the fact that it is a thirty-year project---

LORD JUSTICE STUART-SMITH: Yes.

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MISS SIMOR: -- and so it overshoots in terms of even the timescales----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- for the emissions pathways.

LORD JUSTICE STUART-SMITH: Fiendishly complicated.

MISS SIMOR: Which is why you need to apply your mind. If the defendants had determined that, “Well, looking at this, we think we cannot decide whether it is going to increase or decrease emissions. It might increase them. Let us look at it in terms of increase,” precautionary principle, whatever, it would have to have done that analysis and it has not done that analysis and we say it is telling that the conclusions reached were a net reduction because the thinking is that projects should not come on stream if they are going to increase the emission levels, that projects should only come on stream if they are going to reduce the emissions levels, and that, presumably, is why the CCR concluded, ultimately, a net reduction, rather than saying, “We really do not know.” In relation to that, I should point out that it is interesting-- perhaps-- it is interesting that UKEF considered that it was too uncertain to determine what scope 3 emissions would be but it was sufficiently certain for the balance of probabilities to conclude that there would be a reduction in emissions.

LORD JUSTICE STUART-SMITH: Okay. I just want to make sure I have understood your submission correctly. I have written down, “It is a consequence of Paris that projects should only be funded if they are going to reduce the aggregate global emissions level.” Is that right?

MISS SIMOR: Yes, my Lord, that is our submission.

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LORD JUSTICE STUART-SMITH: Good. I have now put that in highlight because I think that is a clear statement. Thank you.

MISS SIMOR: And that, we say, aligns with 2(1)(c) and, indeed, the way things are going in terms of what the EBRD, the-- we put that in our skeleton, UKEF etc. That aligns with policies being adopted by banking-- international banking institutions----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- and national ones. So it considered scope 1 and 2 have to be quantified. It considered scope 3 had to be assessed. It tried to get Wood Mackenzie to do that, apparently, although we have not got that in the documents, but it is said in the evidence and in the CCR. Now, the obvious response by the defendants to that position would have been either to obtain a quantification from a qualified expert or to decide that no conclusions could be reached as to climate impact and then to decide what to do on that basis. If it wanted to comply with the Paris Agreement obligations applying the precautionary principle at least it would have refused financing. If it did not want to comply with the Paris Agreement obligations, it would have had to have explained that decision and the Chancellor of the Exchequer would have had to have agreed to that and the Secretary of State for Trade and perhaps neither would have been willing to do so. What it could not do, however, was ignore this vital element and simply go ahead claiming that the project and its financing would result in a net reduction in emissions and thus be aligned with Paris. To do so was to reach a conclusion that was necessarily arbitrary and to draw conclusions as to the net impact on global emissions without an estimate

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of quantity to be produced is unreasonable however you look at it. It is unreasonable if you apply what we say is the proper approach, which is to look at the cumulative additional emissions - for that you obviously need to know the quantity - and it is unreasonable if you pursue the defendants' what we say is improper approach, which is to ask yourself about displacement, whether it will displace higher emitting fuels, rather than simply calculate the emissions. As I have said, you cannot work out the extent to which that is likely without estimating the quantities produced, the other markets and the relevant-- relative emissions in those other markets including their likely trajectories in terms of energy use. For example, Japan has a net zero pledge 2050. Europe has very stringent pledges. And, thirdly, the SPA markets were also ignored in this analysis so they ignored these markets in preference for the assumption that the LNG would go to India and China when, in fact, the SPAs only show 13 percent for China and 9 percent for India and 22 percent to Europe and some global and the government has provided no answer to this point.

All the defendants can say in response is that there is no law or policy that mandates that they must quantify scope 3 emissions and it was reasonable for it to make a judgment on this and decide not to do so considering what Wood Mackenzie had told them and it says this in many places. I will just give you some references: detailed grounds of defence, paras.53 to 58; paras.115.3 to 115.4; 117.1 to 117.3; and if I can take you just to two, core bundle 1, p.78,

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para.53 says, well, it was not required by any specific standard to quantify them and, therefore, it did not do it. But, in fact, that was not the reasoning----

LORD JUSTICE STUART-SMITH: Could you just hold on a second?

MISS SIMOR: Sorry. It is p.78 of core bundle 1.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: Paragraph 53. The question is not whether they were required to quantify it. It was whether they would reach a conclusion without doing so, which is a totally different question, and then if we go to p.96, 117.1 to 3 and point 5-- and then 117.5 and then at 117.7 it was an exercise for them to decide. It was an exercise of judgment. Well, we say it was an irrational exercise of judgment and, in that regard, the GHG protocol was a well established way of quantifying scope 3 emissions and we have set that out in para.76 of our skeleton and we have also set out in our skeleton the fact that the environmental audit committee in 2019 told UKEF that it had to use the GHG protocol to estimate scope 3 emissions and that it did have to or should estimate scope 3 emissions.

But we say all of these arguments miss the point. Without a quantification, the decision-makers simply could not reach a rational conclusion on reduction of emissions globally and, unsurprisingly, previous attempts to avoid quantification of scope 3 have been deprecated as quashed as arbitrary in other cases and a number of cases are referred to by Preston CJ in his judgment in the *Gloucester Resources* case and if I can just give you the reference, perhaps

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you can have a look at those paragraphs. It is authorities bundle, tab 4, (sic) p.54, paras.507 to 512 and 515. Indeed, UKEF's experts themselves were advised that such an approach could not reasonably be adopted. EGAC experts said that this was not a credible approach and that quantification was a vital first step in the analysis and I do not know, my Lord, whether we need to stop in terms of ushers.

LORD JUSTICE STUART-SMITH: Well, I think you should be looking for a convenient moment in the next half hour or so but probably rather sooner than that.

MISS SIMOR: Well, it is entirely-- I am entirely in your hands.

LORD JUSTICE STUART-SMITH: If you are coming to the end of a point in the next five minutes or so then finish it. Otherwise, I think we need----

MISS SIMOR: Well, I think it may-- it may be better just to-- well, perhaps I will just take you to the notes from Ben Caldecott of EGAC and then we can stop after that.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: So these are the internal notes of the expert. If we go to CB2, 105, this is an email that was sent on 14 April to UKEF and EGAC is the UKEF's own expert. Ben Caldecott is founding director of the Oxford Sustainable Finance Group at the University of Oxford Smith School. He is associate professor. He is principal investigator of the UK Centre for Greening Finance and has numerous other titles and since 2019 he is seconded in the Cabinet Office for the strategy for finance for COP 26 so he is about as senior as you can get and has, indeed,

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been working on these finance methodologies. Now, you will want to read the whole document itself but if you could go to 107 you will see in comment box BC7:

“Carbon lock-in of the assets (Cumulative Committed Carbon Emissions) is how we should assess whether projects are (in)compatible with Paris or not. %age reductions relative to other fossil fuels is actually not very important. Future CCCE is the key metric and of course that is influenced by carbon intensity, but also by usage and remaining carbon budgets.”

And then if we go to 112, we see his comments. So we-- this is an email to people in UKEF Finance from UKEF Finance:

“Overall, Ben has summarised his thoughts below:

I'd just say that this didn't seem to me like a 'framework'. A framework would have more clarity on what was and what was acceptable (and why), how outcomes of the analysis... The template doc and pro forma... I would also provide a clearer structure: climate risks and impacts followed my mitigation...

The assessment of macro and long term costs/benefits to the Mozambique economy seemed quite rough and ready... What are the underlying studies and literature...”

That is actually not the one I wanted. Then if we go to 102----

LORD JUSTICE STUART-SMITH: 1 what?

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MISS SIMOR: 102.

LORD JUSTICE STUART-SMITH: That is in the previous tab.

MISS SIMOR: You could-- yes, could be. Sorry, p.102, (ii) in 1, "Draft framework is too lite on climate," comments from counsel were noted, then scope 1:

"Alistair posited that the current information on Moz LNG's scope 3 emissions was insufficient."

And then I am going to stop there because I actually wanted to take you to the one bit where they say they need to quantify scope 3 and that is not there.

LORD JUSTICE STUART-SMITH: Okay. Thank you very much and does anybody find ten o'clock more objectionable than usual? All right. In that case, because you have all been so polite, we will start at ten o'clock tomorrow morning. Thank you very much.

(4.42 p.m.)

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