No. CO/3206/2020

Royal Courts of Justice

Wednesday, 8 December 2021

Before:

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

B E T W E E N :

THE QUEEN
on the application of
FRIENDS OF THE EARTH LIMITED — Claimant

- and -

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

- and -

CHANCELLOR OF THE EXCHEQUER
Second Defendant

- and -

TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA
Interested party 1

- and -

MOZ LNGI FINANCING COMPANY LIMITED
Interested Party 2

P R O C E E D I N G S

(Hybrid hearing via CVP)

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A P P E A R A N C E S

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

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

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

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I N D E X

(Transcribed from a poor quality recording of Mrs Justice Thornton)

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Wednesday, 8 December 2021

(10.03 P.M.)

LORD JUSTICE STUART-SMITH: Miss Simor, I am going to take about five minutes of your time, but you can push into the luncheon adjournment, if you will forgive me.

Sir James, I wonder if I could just raise something with you which I do not necessarily want an answer to now, but, as you can imagine, we have nothing better to do than to think about your case overnight. In the defendant's detailed grounds, CB/184, para.75.3, which I am sure you will know by heart, after 75.1 which is the reference to "UKEF overall conclusion", you see in 75.1 "Concluded, in essence, that the project would have a significant impact" but go on about, two lines down,

> "There was scope for the project to replace or displace more polluting hydrocarbons … which would result in lower net emissions than using other energy sources".

And at 75.3 you say,

> "UKEF concluded that it was more likely than not that, over its operational life, the Project would at least result in some displacement of more polluting fuels, with a consequence of some reduction in GHG emissions. On the

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> basis that the Project LNG would replace or displace the use of more polluting fossil fuels – as was judged most likely – it was concluded that the net effect would be a decrease in future GHG emissions."

That has an air of clarity and certainty about it and, at least on one reading, which is why I am raising it, it appears to be suggesting that the view was taken that the effect, certainly in relation to scope 3 emissions, was that the project scope 3 emissions would lead to an overall global reduction in emissions. But we then look at your skeleton, in para.4.2 or 4.3 to 4.5, where you add absolutely what seems to us to be critical words at the end of 4.5,

> "It was more likely than not that, over its operational life, the Project would at least result in some displacement of more polluting fossil fuels, leading to an overall net reduction in GHG emissions when compared with a counter-factual scenario.!

SIR JAMES EADIE: Yes, I think you get the same point in about 22(4) and (5) of the skeleton as well.

LORD JUSTICE STUART-SMITH: Yes. And we understand the case - or I understand the case - I think we understand the case - that your skeleton is running to be that, to the extent that the project LNG caused replacement or displacement, that would effect a net -- to that extent would effect a net production.

SIR JAMES EADIE: That is exactly the case we are running.

LORD JUSTICE STUART-SMITH: That is the case you are running.

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SIR JAMES EADIE: It is. And apologies if the detailed grounds were in truncated form and gave that impression, but you will have seen I am going to outline----

LORD JUSTICE STUART-SMITH: Do not worry how we got there, but you will understand why----

SIR JAMES EADIE: I understand entirely.

LORD JUSTICE STUART-SMITH: -- we feel the need to have absolute clarity.

SIR JAMES EADIE: That is the case we are running.

LORD JUSTICE STUART-SMITH: That is the case.

SIR JAMES EADIE: And it is based on, as you will appreciate, the climate change report on which I am going to make submissions----

LORD JUSTICE STUART-SMITH: We have looked in great detail. Now, the other thing, could I just before we go back to Miss Simor, in our essential reading bundle we were given the climate change report, we were also given the submission to the minister, which is at CB/2145.

SIR JAMES EADIE: Yes. I have got it in two places.

LORD JUSTICE STUART-SMITH: I am sure that you do not need to look at it. We were also given the ESHR report. Am I right in understanding that those are, if I can put it in a construction phrase, the critical path documents which show the decision-making process?

SIR JAMES EADIE: Yes.

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LORD JUSTICE STUART-SMITH: And then Mr Taylor gives his evidence to which we give such weight as we think appropriate about what he thought he was doing.

SIR JAMES EADIE: Yes. We know about the case law that deals with that, if it is genuinely exercised (inaudible), if it is explanatory, it is not acceptable, as it were.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: But yes, is the answer to the question.

LORD JUSTICE STUART-SMITH: Thank you very much. So, if the detailed grounds appear to be saying something absolutist, that is no longer the case.

SIR JAMES EADIE: That is no longer the case.

LORD JUSTICE STUART-SMITH: But, if you were not intending to say that, it is still your case that it is a net reduction----

SIR JAMES EADIE: To the extent that.

LORD JUSTICE STUART-SMITH: -- to the extent that.

SIR JAMES EADIE: Exactly so.

LORD JUSTICE STUART-SMITH: Right, thank you very much. Unfortunately, my computer has switched off so I cannot see what the time is. Miss Simor, it is about seven minutes past. Do you want to push in to about five-past one by all means do?

MISS SIMOR: Thank you. Obviously, that interaction between your Lordship and my learned friend is of some relevance to us.

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LORD JUSTICE STUART-SMITH: I thought that it might be. That is rather why we decided to raise it now rather than when you sat down at one o'clock.

MISS SIMOR: Well, quite. This case has proceeded on the basis that the position of the defendants is that this project will lead to a net reduction in global emissions.

LORD JUSTICE STUART-SMITH: And that is aggregate overall global reduction of scope 3.

MISS SIMOR: Yes. Now, if their case at this stage is now "No, no, it was only going to lead to 1 kilogram of CO2 deduction in emissions compared with some alternative -- what was the word?

LORD JUSTICE STUART-SMITH: Counterfactual.

MISS SIMOR: Counterfactual, the counterfactual. Obviously, we are in slightly different territory but I need to think about the implications of that. If it is simply being said, "Well, there will be an increase of emissions of 360 million kilogrammes of carbon dioxide over the 30 years of the project, but compared with the counterfactual of everyone using coal or China using coal, it will result in 359 million kilogrammes of CO2 rather than 360, we are in very different territory.

LORD JUSTICE STUART-SMITH: I am not sure that it is helpful if I make any observations at all but I am going to make one, which is that certainly to my eyes, although we have been discussing it, neither of us has come to a concluded view, to my eyes, the case that I have clarified with Sir James Eadie this morning is - I am going to put it completely neutrally - at

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least more consistent with the climate change report, which we have studied with as much care as we can muster. Do you want to take a minute or two?

SIR JAMES EADIE: Whilst my learned friend is considering that question, can I just remind the court, I hope the court got a timetable from both of us.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And you will have seen from the timetable the expectation that we were going from 10.30 onwards.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: My learned friend was going to sit down at 12.30.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Obviously, we have gained an extra half hour because we sat early.

LORD JUSTICE STUART-SMITH: Yes, all right.

SIR JAMES EADIE: And I said to her yesterday I am not going die on the pitch over any of this, because she can take the time it takes. If she goes to lunchtime, I am content.

LORD JUSTICE STUART-SMITH: All right. We will make a condition. Do you want a minute?

MISS SIMOR: I do not think it is going to help us. Our submission on the climate change report is consistent with the summary grounds and the detailed grounds, so our interpretation was the defendant's interpretation in the summary grounds and the detailed grounds. It may be that it has now changed. We were proceeding on the basis of the summary and detailed grounds.

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LORD JUSTICE STUART-SMITH: Yes, okay. I mean, you will appreciate that one of the reasons why we have raised it this morning, from my interaction with your yesterday, is that I was troubled about exactly where we were going, so that is why we have dealt with----

MISS SIMOR: Yes, well, I mean, it is obviously important and that way that this case developed, also, of course, in terms of disclosure, was complex. So we only got the climate change report before our amended statement of facts and grounds. We wanted the Wood MacKenzie report. We went and sought specific disclosure of it. We were refused the specific disclosure of it and, therefore, we only got the Wood MacKenzie report after the detailed grounds, so, when we came for permission, all we had was the climate change report. With that absolute finding, there will, in international terms, be a net reduction. Of course, when you look at it in the light of Wood MacKenzie, you see it potentially slightly differently, but that did not then lead to the detailed grounds being amended compared with the summary grounds. But, actually, I am not going to take any more time. I think that I need to really press on, but I do think that this is something pretty significant that needs consideration.

LORD JUSTICE STUART-SMITH: Yes. I think that the only assurance that I can give you is that this court has, as an absolute determination, to reach the right result on the real issues and not to be diverted by who said what, when, where.

MISS SIMOR: Completely. What is crucially important is that you reach the right conclusion on the basis of what the ministers understood. The Chancellor of the Exchequer and the

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Secretary of State for Trade, in light of the fact that the Foreign Secretary, the Prime Minister, Secretary of State for BEIS and the Secretary of State for DFID were against this project.

LORD JUSTICE STUART-SMITH: Okay, thank you very much.

MISS SIMOR: Now, my Lord and my Lady, you have on your desk the CV of Ben Caldecott, who is the EGAC specialist, who advised UKEF. You also have a couple of excerpts from his reports. They are dated 2018. This man is a pre-eminent specialist in this particular area, finance transition, gas, etc. I will not spend time on them, but you will see the first one carbon lock-in curves in South-East Asia. If you turn to the first page of that, the third bullet, that talks about an -- I am dealing here, really, my Lord, with a response to some of the issues you raised yesterday in relation to the gas as transition. If you could just highlight that third bullet and then the other page is the first page, p.17, but it is for your background information. Obviously, there is a lot to take in in this area.

But I am going to start with his comments, and that is why it is an appropriate moment really to give you his CV. I am going to go back to his comments on the first draft framework document which is at CB/2, p.105.

Now, you will recall that this is a document that he sent to -- it was sent to him and he sent it back on 14 April, just before a meeting, the minutes of which I am going to take you to, and I think that it is convenient just actually to look specifically at what he says here. First of all,

please note that this is the original framework and you will see the questions in it in the left-hand column are relatively slim, so there is no detailed consideration at this stage of Paris obligations.

So there is a credit risk review first. Then he says in the second column - there is an exception there highlighted in pink about the extent to which gas is going -- fossil fuels are going to provide energy and he puts next to that "potentially strong claim". Then the claim about gas growing, so this is just the demand -- you will remember the reports about the growth in gas demand, which obviously is not determinative of what can be used, and he says, "Lots of other claims reasonable people in the energy industry could debate"

Then on the next page----

LORD JUSTICE STUART-SMITH: Do I understand that "potentially strong claim" relates to current long-term industry projections and he is saying that that is potentially a strong claim?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: By that, does he mean it is too strong or a good strong?

MISS SIMOR: Too strong, because the SDS -- no, it is not the SDS this. This is a -- you will recall in the RAD it said that gas is going to grow by 4 per cent and that is a strong claim in the light of the need to move to net zero and the possibility of gas continuing in that scenario.

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Then, if we go to 107, I have already taken you to comment BC7, carbon lock-in and the need to actually work out the actual amount of carbon which is going to go up, which rather goes to the earlier discussion we had. You actually need to know how much is going to go up there.

Then, interestingly, he says,

> "However, current demands for energy cannot be met for the foreseeable future without oil and gas. Gas is, therefore, fundamental in enabling the energy transition without massive disruption."

He says, "Highly debatable, so, taking this as a given could be problematic". Then the next box,

> "Mozambique is currently a low-carbon economy that is considered particularly vulnerable to climate change impacts. This Project cannot be viewed as mode for fossil fuels transition for Mozambique as it will significantly increase its emissions and support the development of fossil fuel infrastructure within the country."

That is lock-in. That is called lock-in. Then,

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> "However, globally, the Project can be viewed as contributing to fossil-fuel transition/ lowering of carbon emissions"

Which is the ultimate -- we say, the ultimate conclusion in the report, that, actually, globally it results in reduction. Interestingly, the prior sentence just goes, although there is no evidence as to explain why it just disappears and suddenly----

LORD JUSTICE STUART-SMITH: The conclusion that is reached is that it will to some extent act as a transition material because it will take the place of biomass and oil.

MISS SIMOR: Exactly. But there is no evidential change between the 14 April and 29 May. We have asked for everything and we have not had anything.

LORD JUSTICE STUART-SMITH: Does there have to be?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I mean, people can change their minds.

MISS SIMOR: Not without evidence.

LORD JUSTICE STUART-SMITH: Well, do you need specific new evidence to change your mind and conclude that there is going to be displacement of biomass and oil?

MISS SIMOR: Yes, my Lord. I am not saying that this is necessarily right, but whatever you say has to be founded in evidence. So you cannot, as a decision maker, simply stick your finger up in the air and say, "We think this might happen". That is not good enough. That is fundamental, we say.

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Now, if the position at this stage was that it cannot be viewed as a transition fuel in Mozambique - and that makes sense - because Mozambique is currently a very, very low consumption economy. So per capita the carbon used by each person is so low that gas in such an economy will not lead to transition, it will lead to an increase in energy use by gas. Now, that is economic development. It is the point you raised.

LORD JUSTICE STUART-SMITH: Well, that was accepted, was it not, in the ultimate report?

MISS SIMOR: That?

LORD JUSTICE STUART-SMITH: The ultimate view was that what you have just said is right, albeit that there would be a degree of displacement or there might be a degree of displacement of biomass and oil.

MISS SIMOR: Well, the forensic analysis is important: what actually was decided? And at this stage they are saying categorically that it cannot be viewed as a mode of transition. Now, at that stage that was their view. All I am saying is that what we need to see, and we have asked for it - we have been told it does not exist - is some kind of basis for these views.

If we go then to the next bit of pink,

> "It is expected that a significant quantum of the gas commercialised by this Project will, therefore, help reduce reliance on coal-based power generation, i.e. China and India."

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Then Ben Caldecott comments, "Based on what third party analysis and are there countervailing views?" He is asking for analysis.

Then the next page,

> "Mozambique is one of the poorest countries in the world. Revenues from this Project are expected to significantly increase Mozambique's investment in climate resilient infrastructure".

And he says,

> "How? And, again, big assumption about tax take and then future fiscal policy of a third country."

Now, I took you to the evidence that said, "This will gain Mozambique 13 billion", but I also took you to the evidence that may actually be in the CCR, which says that there is no evidence in relation to the policy or plans to use that 13 billion.

LORD JUSTICE STUART-SMITH: We will check that, but I think that I have seen it overnight, but I may be wrong.

MISS SIMOR: I believe that I came up in the CCR, I think. Then the next bit,

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> "Strategy envisages using gas-to-power as baseload power to make viable investments in fluctuating solar and wind energy."

And he says, "And is this likely given changes in the economics of other technologies?"

What he is talking about there is the fall in price in renewables.

Then we go to the last pink,

> "They also considered the contents of the World Energy Outlook 2018 Report, which also posits gas as a transition fuel".

And he says, "which is seriously out of date".

Then the next page, "Summary",

> "The Project will significantly increase Mozambique's carbon emissions which may also be projected to grow."

Comment:

> "Can you include growth relative to current emissions as well as absolute numbers?"

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So what he is saying there is that they use 5 to 10 per cent but, because of moving to a gas-based economy, that may well grow, as the economy grows, and, therefore, it might actually be much more than that. He is asking for some numbers.

Then the next page, "Lost UK contracts and jobs":

> "Is the UK input really 100% dependent on UKEF support? How substitutable is the UK share of the work and would it be substituted?"

Well, we know it is probably not.

LORD JUSTICE STUART-SMITH: Can I just ask where this is going? As I understand it, this report or this draft has gone to someone who is very eminent for comments and he has come back with comments.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: What does that mean? What does the Government have to do then? What is the court going to say the Government has to do in response to this? Does it have to then deal with every point in this----

MISS SIMOR: No, no, no, my Lord.

LORD JUSTICE STUART-SMITH: I am just not quite clear where we are going.

MISS SIMOR: It is important because the defendants -- the crux of the defendants' defence in the witness statements and the grounds is that "We did what we had to do. We relied on experts,

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internal expertise, you cannot question it. It is a matter for us. It is our judgment." And our case is, yes, fine, but you have to do the analysis, you have to have a rational basis for your decision and, if, in fact, the reality is that internally they were being told, not that everything was fine, but that actually they had failed in their analysis and that their analysis did not stack up, then that supports our argument that this conclusion -- the conclusions reached were arbitrary and unreasonable.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And then we get the biodiversity point, that was ground 2: we did not get permission on that. Then the marine exclusion zone saying that that was a biodiversity argument.

If we go now to p.102, we get the minutes of the meeting that followed in submitting that. It is the same day. So he sent that at 8.30 in the morning.

LORD JUSTICE STUART-SMITH: We looked at this yesterday.

MISS SIMOR: Yes, but I was I think just too tired and I was very unclear. So, if you do not mind, I would like to go back to it.

LORD JUSTICE STUART-SMITH: Well, it did not occur to me that you were being unclear, but I will take your word for it.

MISS SIMOR: So, if we just go to the middle of 102, we get the point by Alistair Clark. He is chair of EGAC. He is actually more of a sustainability person. He says,

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> "Alistair expressed his view that the latest draft framework is too lite on climate change and too focused on E&S and other considerations. Additions to the framework suggested by Alistair, Ben and Counsel ere noted and are now being implemented."

LORD JUSTICE STEWART-SMITH: That bit is Caldecott's, is it?

MISS SIMOR: Yes. And that -- well, I will take you to that next. Okay, the next one,

> "Scope 3 emissions.
>
> > "Alistair posited that the current information on … scope 3 emissions was insufficient [and that did not change from this point]. As such, Alistair asked the group whether we could capture, i) what markets the gas will be exported to" -

something that I raised yesterday -

> > "ii) what energy sources it will replace."

something I also raised -

> > "Without hard data, Alistair suggested we pursue a 'What if' modelling approach based on rational assumptions."

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For example, you might take each of those jurisdiction, like India, China, Europe, and you might say what are their trajectories? So Japan has a net zero target. Is Japan really going to -- are emissions really going to reduce if Japan purchases this gas, etc.?

It is obvious how you would do it. You would need someone who was good at maths and analysis.

> "II, in response, Joe explained that this would be difficult to achieve and that Wood MacKenzie [a specialist consultant] was unable to answer these questions despite being hired to do so. As a result, WoodMac is now looking at how this project will contribute to overall world climate change (2C) instead."

And we have been told there is nothing else. This is 14 April and the WoodMac report is 27 February. So I am not sure what WoodMac was doing now, but certainly either nothing was produced or nothing that it produced was actually used.

Then the next page "Benchmarking".

> "Louis highlighted two critical questions for the group to consider: 1) what information are we gathering for assessment and 2)what are we benchmarking this information against to reach a decision?"

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That is something again that I emphasised yesterday. You have got to benchmark information and our little exchange this morning illustrated why. A difference between 59 and 60 is totally different to a difference between zero and 60. You need to know what you are talking about.

Then,

> "On the second point, Esi explained that it difficult to determine appropriate benchmarking … there is no clear internal/external guidance to follow and we do not have in-house expertise related to climate change."

So all the witness evidence claiming expertise is here undermined entirely.

LORD JUSTICE STUART-SMITH: Who is "we"?

MISS SIMOR: "We", UKEF. You will see the discussion on the left.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR:

> "This point was echoed by Gordon.
>
> III In lieu of clear guidance on benchmarking or an accepted threshold on fossil fuel emissions, Alistair explained that we will need to balance that

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> climate change impact of the project on the geographic area, the scope 3 emissions, the relevant NDCs. Etc,"

You have got to do the work. Then para.4,

> "… Alistair suggested that we should not discuss weightings about -- [you know, how much weighting the climate change assessment has in the decision at this point]. But what is important at this stage is that we can show we have fully acknowledged the climate change risk of this project."

And then 6,

> "Alistair noted that there are specialist climate change assessment companies now opening that can model lots of different climate change considerations to understand the impacts of a project. This would help the decision making for Mozambique LNG. However, it was accepted there is not enough time left to engage consultants for this project."

Well, you will remember that the CCR says, and the ESHR, "no further due diligence will help".

LORD JUSTICE STUART-SMITH: It says, "no further", what?

MISS SIMOR: No due diligence will assist. Now, following this, we got the bigger framework draft that I took you to and my Lady asked me the date of it? I believe that that was developed, according to the beginning of these minutes, that was developed in response to

counsel and Ben Caldecott's comments. That framework includes all the bits about Paris and one and a half degrees and NDCs, etc. You find that at CB2, p.132 and I do not need to take you to that.

Then on 2 May we get an email with further track changes by Ben Caldecott and that is at 117. And you see the first page.

LORD JUSTICE STUART-SMITH: Hold on, I am behind again. CB2/117?

MISS SIMOR: Yes, this is version six. The one that we looked at before was version two and this one we know, version six, was given to the ERICC Committee when the ERICC committee when the ERICC committee decided to go ahead, it had draft and it had draft V6.

LORD JUSTICE STUART-SMITH: Where do you want us to go?

MISS SIMOR: 117. So there is the draft climate change assessment framework. This is the new framework and BC2, Ben Caldecott says, "I'd expect that this" - delivering against the framework of the taskforce - "would be an annex available for review."

You will remember that I took you to the annex to the common approaches that said that there should be an annex with all the data in it. That was right at the beginning of my submission. Especially if it was used to inform the framework, you have would expect some kind of databased annex.

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> "I'd also expect to be able to see which [financial institutions[FIs were reviewed and how were they engaged systematically."

i.e. what did you do to discuss this with other financial institutions? Because you will see at the beginning of our skeleton, and there is also a report in the supplementary bundle by E3G, at tab 12 of the supplementary bundle at the back, you will see a table with what the financial institutions' approach is to these issues.

Then, if we go to the next page, 118, looking at the NDC, Ben Caldecott says,

> "Supplementary questions for the UK: is their NDC good enough? Does the project help support NDC ambition and ratchet?"

i.e. specifically the questions they should be asking under Paris as we are submitting.

BC4. This is crucial. They say that they cannot estimate scope 3 emissions. Ben Caldecott says, "I think this is a big gap in the analysis."

I should emphasise that all of this came in response to our specific disclosure, so what we are now finding is that our grounds are backed up by the pre-eminent expert in this field.

Then his comments about oil price --

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> "The impact of oil price crashes has been considered in Wood MacKenzie's analysis". He said,
>
> "Oh yeah. Would like to see it! I doubt anyone has done a downside risk analysis of the kind generated by Covid".

And then, "Does the project contribute to fossil fuel transition?"

> "At the Mozambique level, the Project does not lead to fossil-fuel transition nor does it lead to a reduction in carbon emissions. At the global level, it cannot be concluded with any certainty whether it does or does not contribute to a fossil fuel transition or a reduction in carbon emissions. This is due to the flexibility..."

Then there is nothing more on that.

LORD JUSTICE STUART-SMITH: What do you take from his comment "that is quite a statement"?

MISS SIMOR: "That is quite a statement"----

LORD JUSTICE STUART-SMITH: If you apply the same sort of forensic approach as you have been applying so far, that suggests that he doubts that statement.

MISS SIMOR: Yes. He does not accept----

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LORD JUSTICE STUART-SMITH: So what do we take from that, that he doubts whether the project does not lead to fossil-fuel transition at a global level or that he doubts that it cannot be concluded with any certainty whether it does or does not contribute to a fossil-fuel transition or a reduction?

MISS SIMOR: Well, where the line is I would say that it is probably the latter.

> "At the global level, it cannot be concluded with any certainty whether it does or does not contribute to a fossil fuel transition or a reduction in carbon emissions. This is due to the flexibility of the SPAs."

He could well be doubting that it is not possible to reach a conclusion on that, if you apply the proper analysis.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Now, I am not making any assumptions as to what conclusions he says would be likely reached.

Then, if we go to -- I just want to go quickly back. We asked why there was not enough time to consult the climate consultants in response to those minutes. If you go to the supplementary bundle 1592, you get the answers to our Part 18. It is 1592, it is the question above 50.

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"Please explain why it was too late to engage consultants for this project"

we asked, and it says,

> "This was largely because signing of the project was expected imminently and the due diligence work was already well progressed. UKEF was not aware of any other consultant that could have been procured and would have been capable of producing an analysis in the period of time …"

So they did not think that they could find somebody quickly enough. Then, if you turn to the next page, on 1594, "lack of benchmarking".

> "Why on 14 April was it already considered too late to seek external expertise? We note that on 27 February signing was expected in April. We also know that the CCR was not completed until 29 May".

That is six weeks later. And the answer is given that they would have had to use public procurement rules so they could not do it. It would have taken too long.

If we go then to 115, CB2/115----

LORD JUSTICE STUART-SMITH: Forgive me, I am so sorry. I am so engrossed in your last submission that I did not get the reference for this one.

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MISS SIMOR: Well, I am hoping that it is the right reference. No, it was actually not the right reference. it is 114.

LORD JUSTICE STUART-SMITH: CB2/114?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Actually, it is not, it is 115. I was right. So it is 115. It is an email from Ben Caldecott and he says - this is May, 1 May -

> "I sense that the LNG project is driving the creation of the climate change assessment. Ideally, the framework would be developed first through an appropriate robust and comprehensive process and then we'd apply it to this project (and other projects) systematically.
>
> "As it stands (unless there are further materials I'm not seeing) the 'framework' is really just some questions. I'm not sure these questions are the right questions or that all the issues we'd want to cover are covered."

I am not going to read the red because that is UKEF's intervention.

> "I'd also like to understand the [finance institution] peer analysis that is meant to be benchmarking this".

Then at the end he says,

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> "I haven't been close to the process, so apols if there is a framework doc separate to what I have seen, it would be good to see if so."

Then on p.114 you get the response from Helen Meekings, who is UKEF and she is sending to her team for a meeting.

> "Generally I suggest that we focus the conversation firstly on the CCA framework itself and the issues that we should be considering and currently don't (also clarifying we're working at pace hence the overlap of framework development closely followed by the Moz LNG assessment) – It's a fair point from Ben's side that it doesn't set out to 'assessment' the climate impact of a project in the traditional sense of an environmental impact assessment – what would be the baseline for example. But the impact would essentially be the result of all the GHG emissions expected from the project, hence Ben's point around Scope 3. I know this is something that has been discussed as a group before and the emissions are what they are and their impact is global, which is why this is such a difficult thing to look at. Would be really interested to get Ben and also Alastair Clarke's thoughts on how to do."

Then we have 5 May. It is at p.121. We then get the updated version of the climate change assessment. Then we get a statement there from Miana Capuano.

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> "I have added additional text that (hopefully) makes the complexities in accurately calculating scope 3 emissions clearer. Scope 3 calculations are dependent on a number of variables, [etc.]".

Now, that we know is incorrect at a basic level. The carbon will always be the same, subject to situations where it is actually used, for example, to create chemicals. Then she recognises below that

> "It is a separate issue whether the project displaces more polluting fossil fuels is considered under the transition fuel argument section. It is not considered in the calculation of scope 3 emissions as it will not change the scope 3 emissions."

Exactly our point. Then we get the response about----

LORD JUSTICE STUART-SMITH: Your point is that, subject to any displacement - subject only to any displacement - scope 3 emissions are going to be very high.

MISS SIMOR: They are going to be calculably high, yes.

LORD JUSTICE STUART-SMITH: You say they are going to be calculably, but you say they are going to be very high and that should be taken into account.

MISS SIMOR: Yes, and the defendant now neither deny that they will be high, they have never denied that - but nor do they deny that they could easily be quantified. In fact, they did it in 24 hours for the Prime Minister.

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LORD JUSTICE STUART-SMITH: I am just wondering about the impact on a ministerial decision. Is it realistic to say, for example, that a minister should have presented to them the million tonnage or is it sufficient to say to a minister, "The impact will be -- or the scope 3 emissions will be very high"?

MISS SIMOR: In this context, what mattered, I would say, and it is dependent and there is case law, there is some case law on that, but in this context what we are crucially concerned with, which is why it is so important how this court views the CCR, are the conclusions in the CCR and you will recall that the conclusions, as we understand from the CCR, that there will be net global reductions, there are comments in documents that I have shown you saying that the Foreign Secretary or whatever had not seen that climate change report. So, for our purposes, what matters is that we say that the decision makers were informed of that net reduction in emissions. Therefore, the alignment with Paris.

Now, whether they needed to know that it was x million tonnes. They might have needed to know what that actually meant, so, if they were told that that means a reduction in the likelihood of meeting net zero by x per cent or that means that the United Kingdom is arguably not acting in good faith, in terms of meeting its obligations under the Paris Agreement or this does not establish that there will be a reduction in emissions in line with the pathway under Article 2(1)(a) -- if they had been told something meaningful, that is what

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I am saying, and I understand your Lordship's question because what your Lordship is saying is, it may not be meaningful for a minister to be told how many kilogrammes.

LORD JUSTICE STUART-SMITH: I have one other point sort of in the back of my mind at the same time, which is that the one thing that I think is probably common ground is that it was impossible to predict the extent to which, if at all, Mozambique's liquid natural gas would displace more polluting fossil fuels.

MISS SIMOR: It was impossible they say to accurately conclude.

LORD JUSTICE STUART-SMITH: To predict the extent -- they make the assumption that there might be some displacement and will argue -- and we have the arguments about what the climate change report actually says about that. But I thought that the one thing that would be or was common ground that you would not be able to predict with any degree of accuracy the extent to which Mozambique's liquid natural gas would displace more polluting fossil fuels. Is that not right?

MISS SIMOR: That you could not predict it.

LORD JUSTICE STUART-SMITH: Yes, you could not predict it.

MISS SIMOR: You could not predict it but----

LORD JUSTICE STUART-SMITH: Your case is that you could predict the emissions because that is the carbon content of the fuel, but you could not predict the extent to which, if at all, there would be an offset if you can put it in that sense -----

MISS SIMOR: Yes.

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LORD JUSTICE STUART-SMITH: -- because of displacement of more polluting fossil fuel.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Have I understood the position correctly?

MISS SIMOR: Yes. That, I understand, is their position.

LORD JUSTICE STUART-SMITH: What is your position?

MISS SIMOR: Well, our position is that you had to do some kind of analysis, so you could not----

LORD JUSTICE STUART-SMITH: No, can you just answer me this? Is it your position that you could accurately predict the extent to which Mozambique LNG would displace more polluting fossil fuels?

MISS SIMOR: Our primary position as set out in Mr Muttitt's expert evidence is that that is the wrong approach in Paris - in the context of Paris - to looking at climate change. Our second point is -- sorry, it is not a direct answer to your question, I appreciate that.

LORD JUSTICE STUART-SMITH: All right, I am sitting tight.

MISS SIMOR: So, if you are going to talk about it in the context of Paris, you have to address it on the basis that you do not know. So, yes, we can accept that, of course, if gas goes on to a global market -- even if gas goes on to the Chinese market, we actually do not know what the Chinese are going to do in 20 years. We do not know whether China -- China has now committed, I believe, to net zero in 2060. Yes, China has now committed to net zero in 2060, so it is trajectory in terms of moving to renewables may be such that it actually does not use

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gas at all, in which case gas goes where in the market? It is obviously predicted. You obviously cannot do it accurately.

LORD JUSTICE STUART-SMITH: You know I like to try and get things firm in my mind, sort of anchor points that I can hang on to. I have written down "claimant accepts that you cannot predict the extent to which, if at all, Mozambique LNG will displace more polluting fossil fuels, but, if you do not know, you should say so".

MISS SIMOR: And proceed on the basis that you do not know. So you cannot proceed on the scenario that it is more likely than not that it will. And certainly not proceed on the basis -- so you cannot say under Paris, "Well, we do not know but, you know what, we think it is more likely so we are going to proceed on that basis." That is not good enough for Paris. And of the three scenarios, if we look at the three scenarios, in the climate change report, I made this point yesterday, they say it is too uncertain to estimate the quantity of scope 3 and yet it is certain enough to choose the mid-case scenario.

MRS JUSTICE THORNTON: I have not gone back to the ministerial submission, but, if there is a disconnect in this respect between what is in the CCR and the ministerial submission - in other words, the ministerial submission is more vague, it just says "We looked extensively at climate issues", what should we draw from that?

MISS SIMOR: Well, the ministerial submission to both the Chancellor and the Secretary of State for Trade specifically, at least the submission of Mr Taylor, which I believe was put in front of the Chancellor, specifically said to them that they should pay special attention to the CCR.

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LORD JUSTICE STUART-SMITH: Yes. So they ducked the issue in that respect.

MISS SIMOR: There is no clear----

LORD JUSTICE STUART-SMITH: They said, "Here is the report, read it".

MRS JUSTICE THORNTON: And what do you say about that in terms of (inaudible)?

MISS SIMOR: Well, we say that the ministers reading it, thinking in terms of alignment to Paris, saying themselves that, perhaps, if the DIFID minister saw this, they would change their mind and, in light of the position of the Treasury on finance, etc., read that believing that global emissions overall would be reduced. Therefore, it was in alignment with Paris and, on that basis, they agreed to fund it. That was the position inside Government. If it was not the position, it should have been stated clearly, because at the moment we do not even know what is said. And I obviously use the ridiculous example of one kilogramme. But we really do not know even from this morning what actually is being said.

LORD JUSTICE STUART-SMITH: So the ministerial submissions said "Read the report" and your submission is that the ministers would have read the report as meaning that, overall, Mozambique LNG would reduce aggregate local emissions.

MISS SIMOR: Now, if we had a witness statement from anybody on the other side saying what the position was, what the Secretary of State understood, if we had a witness statement from someone in the Treasury, the permanent secretary to the Chancellor or permanent secretary to the Secretary of State saying, "Yes, she understood that we did not really know what effect this would have. It would likely increase emissions overall, but that it could displace a bit",

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so it would cause 250 million tonnes of carbon, but 40 might be -- so it might be 210 if 40 is displaced. Well, we would need a witness statement from the -- I do not know, permanent secretary or Mr Taylor saying that she understood that, in fact, this would cause a global increase in the carbon emissions.

LORD JUSTICE STUART-SMITH: So as things stand, this submission depends upon our interpretation of what the CCR is saying.

MISS SIMOR: It also depends on -- I am sorry to say this, but the summary grounds and the detailed grounds. These are also -- I do not know whether defences are sworn by statements of truth, but certainly claims are.

Now, I am moving far too slowly. I am getting very anxious. Okay, I am going to quickly go to the meeting of the whole team and Ben Caldecott on 7 May 2020. No, that apparently led to further track changes, there were no minutes. There was then apparently another meeting: CB2/123. These are short-form minutes of 7 May meeting. This is about cumulative emissions. "Is an asset compatible with a given carbon budget?" I am going to come to that argument. "You take an asset" -- this is really important, this is what I tried to explain, my Lord, to you yesterday,

> "You take an asset in a sector, you estimate its current and future emissions (to do that you have to make a bunch of assumptions around future operations and efficiency) (should get this from the project), figure out remaining carbon budget for the sector

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[the global carbon budget] in which the asset is operating. A lot of this has been piloted in the power sector, different sectors have different pathways and allocations.

What's the size of the overall remaining carbon budget (which one are you using)? And what is allocated to…

This is a sensitivity analysis… if the carbon budget is bigger, It's more likely the asset will be covered."

So, if you can fit within it, you are probably all right.

"This can done fairly easily for the power sector.

For the LNG project, can't do this work, although he's sure people could do the work."

So he is saying that he cannot do it.

"Compatibility with carbon budgets is complex".

You need to pay someone to do the work. If you want to do a proper analysis, for a sector where this hasn't been done before, this is a substantial piece of work. HM: is it our responsibility to do this …"

Then, if we go to p.315----

SIR JAMES EADIE: Can I just invite you to read the bottom of p.123, whilst you are there, under the bold bit?

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LORD JUSTICE STUART-SMITH: Thank you. What the last two paragraphs?

SIR JAMES EADIE: The last three, really, the last two full ones and then the final one. It is really the last two.

LORD JUSTICE STUART-SMITH: (pause) Thank you. You wanted us to go to where?

MISS SIMOR: 315. Now, this was when they did a rapid calculation of scope 3 for the Prime Minister and you will see at the bottom it is an email from the FCO to someone at the private office in BEIS. So Kwasi Kwarteng is the minister for BEIS, a special advisor, and the FCO person says,

> "In case the Secretary of State asks about the Scope 3 emissions, I've just received a helpful extract from the Climate Change Report…"

And then it says that famous bit from Box 13. Then we get the response from Julian Critchlow, who is DG for energy transformation and clean growth in BEIS. I have looked up his CV as well and he knows a lot about climate change. You will see at the top of p.315, he says,

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

I realise that I forgot to tell you something about 123. So those minutes that we were at at 123. What I forgot to mention to you was the explanation given by either Ben Caldecott or

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Alistair Clarke, probably Ben Caldecott, in the first paragraph - I am sorry to go back - as to how you do that, how you do the assessment, the pathways. That first paragraph is effectively what Mr Muttitt says at para.37 of his statement which is core bundle 1, p.297.

LORD JUSTICE STUART-SMITH: What is the reference to Mr Muttitt, which paragraphs of his statement?

MISS SIMOR: Paragraph 37 of his statement.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So we agree that the CCR is not credible. The claimant's experts agree. Mr Muttitt and Mr Anderson agree. The reality here is that the internal advice was that quantification of scope 3 was vital and that lack of such quantification undermines the credibility of the report. I want to make perhaps an obvious point on this. The excuse that they did not have time to do so is not a good one. Firstly, it cannot justify a baseless conclusion. They had to proceed on the basis of effectively the precautionary approach, best available science. They could not just jump to the conclusion because they did not have time. We say there is no evidential basis for the change in the CCR from the position in Wood MacKenzie. Secondly, the whole thing was, in any event, spurious because a quantified assessment of scope 3 could have been done very quickly. Transition is obviously a much more complicated exercise, as is mapping against the pathway which is what you just saw in the minutes of 7 May. Those are two more difficult exercises but the quantification is a simple one and a simple way to do it is by reference to the greenhouse gas protocol which is exactly what they used for scopes 1 and 2.

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I should also note that Parliament was told, and it is stated in the defendant's pre-action response letter, that scope 3 emissions could not be quantified and the reference for that is SB1, p.20, para.54 and I will not take you to it now.

I am going to move now to the second part of ground 1B, the fundamental failures in the assessment which led to the conclusion that the project was aligned with the low emissions pathway, such that financing could be granted. Now, as explained by Mr Anderson and Mr Muttitt, there is one central point that matters in mitigating climate change and that is the cumulative amount of carbon that is allowed to enter the atmosphere. It is the cumulative amount of carbon dioxide equivalent in the atmosphere that determines how much temperatures will rise by and you can find that at Mr Anderson 1, CB1, p.30, para.10. Indeed, Mr Caldecott himself advised UKEP that that was the case in his comments at CB2, p.107. This is well established and incontrovertible and you can find the summary of the position in the *Urgenda* case.

LORD JUSTICE STUART-SMITH: Could you give me the reference to Caldecott that you have just done?

MISS SIMOR: CB2, p.107.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And you find this incontrovertible principle in the Supreme Court case in The Netherlands. I do not have time to read it, but I would like to take you to it so that you can

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sideline it, if I may. It is in AB/4, tab 55 and if you go to para.4.5 -- well, perhaps, while I am here I will just tell you the bits that you will want to look at. If you start at p.2760, if you just mark up along the Paris Agreement and then UNEP reports and then, if we go to paras.4.5, 4.6 and 4.8, which are at p.2768, if you mark up 4.5 and 4.6 and then 4.8. Then could you also sideline 5.7.2. It is on p.2773, 5.7.1 through to 5.7.5 and then 5.7.8. I just want to emphasise 5.7.4,

> "At the annual climate change conferences held on the basis of the UNFCCC since 1992, the provisions mentioned above in 5.7.3 have been further developed in various COP decisions. In each case these are based first and foremost on an acknowledgement of the above understanding: all countries will have to do the necessary. Articles 3 et seq. of the 2015 Paris Agreement reiterates this in so many words."

Then 5.7.8,

> "Also important in this context is that, as has been considered in 4.6 above about the carbon budget, each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible."

And the reverse applies equally. Every increase is significant.

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LORD JUSTICE STUART-SMITH: You refer to this authority from the Supreme Court in The Netherlands as reflecting a common understanding.

MISS SIMOR: Yes. There is not a lot of authority. There are a lot of databases that give you the global authorities on the Paris Agreement. There are a large number of cases but this is the first case on this point, where this point has ever been considered, as far as we are aware, in the world. So we are pulling what we can to try and help you.

I should have also asked you to mark-up para.7.

> "It follows that you cannot determine alignment with Paris Agreement compatible with low emission pathways without considering carbon budgets"

LORD JUSTICE STUART-SMITH: 7?

MISS SIMOR: 7.

LORD JUSTICE STUART-SMITH: 7.1?

MISS SIMOR: I have just written 7 in my note. I do not know whether it is a long section, perhaps, on Paris. I have now closed my bundle.

LORD JUSTICE STUART-SMITH: If you want us to read the whole of s.7, then----

MRS JUSTICE THORNTON: You have taken us through the main paragraphs.

MISS SIMOR: The important point for the court's understanding is that carbon budgets are at the heart of the entire system. In fact, they are one of two elements in low emission pathways.

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Low emission pathways are made up of two elements: carbon budgets and time. Different pathways exist because each one makes different assumptions about Government and human behaviour and technological developments. With that in mind, emissions pathways are carbon budgets by reference to time having regard to assumed scenarios of behaviour.

So it really is as simple as saying that, in a context such as this, a potentially massive source of GHG emissions, if you do not consider carbon budgets, you cannot assess alignment with a low emissions pathway. Essentially, it is necessary to quantify the emissions from the project - scopes 1 to 3 - assess these by reference to the sector and the relevant available carbon budgets in the sector. And we saw that explained by Mr Caldecott in the rough minutes of 7 May at CB2/123. Mr Muttitt explains it at 4(c) of his statement and also Mr Anderson explains it at 23 to 26. There is nothing new about it. The IPCC reports, for example, the previous assessment report AR5 set out carbon budgets by reference to time and the IPCC report gives those in relation to 1.5.

Currently, the most important report is that IPCC 1.5, which was commissioned by the decision adopted in the Paris Agreement. I will take you to it. Then there is the UNEP production gap report which took 18 actually of the 80 scenarios in the IPCC report.

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These are essential relevant considerations that had to be looked at to assess the project and we find that also in the *Gloucester Resources* case which is a New Zealand case, which is at authorities bundle 4, tab 54. I am afraid I am going to ask you also to mark this up. Paragraph 439, if you could mark----

LORD JUSTICE STUART-SMITH: I am sorry, this is an Australian report.

MISS SIMOR: Yes. Is it -- oh! Yes, New South Wales. 439, p.2679, and this explains in quite a lot of helpful detail carbon budgets and if you read right through to 450. The Paris Agreement budgets and related emissions pathways----

LORD JUSTICE STUART-SMITH: Hang on. You are wanting us to sideline this and read it?

MISS SIMOR: Please, I am sorry.

LORD JUSTICE STUART-SMITH: So 439 to what?

MISS SIMOR: To 450.

LORD JUSTICE STUART-SMITH: Thank you, we will.

MISS SIMOR: So these budgets, these budgets by reference to time are set out in the IPCC special report which is in the first authorities bundle. If you can go to tab 4, please. If you just look on the first page, I think that I may have taken you to this already, p.67, you will see the point that I have made, that this is connected directly to the Paris Agreement.

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Then, if you go to p.88, you will see the title "Mitigation Pathways" in the context of sustainable development. That is what we are looking at in 2.1(c). Then, if we could just read the top right-hand corner,

> "Limiting warming to 1.5°C depends on greenhouse gas emissions over the next decades, where lower GHG emissions in 2020 lead to a higher chance [that is the point I made, if you move faster, you have a greater chance of hitting 1.5] … Available pathways that aim for no or limited (less than 0.1° overshoot) keep GHG emissions in 2030 to 25-30 gigatonnes of CO2 equivalent per year in 2030 (interquartile range). This contrasts with median estimates for current unconditional NDCs of 52-58 … in 2030. Pathways that aim for limiting warming to 1.5°C by 2100 after a temporary temperature overshoot [so you would overshoot early and then you would come back to 1.5] rely on large-scale deployment of carbon dioxide removal -

So the idea would be that you would overshoot your temperature goal, but then you would suck the carbon out of the atmosphere with CDR measures -

> "which are uncertain and entail clear risks. In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO2 emissions decline by about 45% from 2010 levels … [etc.]"

I will not read the result of that, but the next thing, "Limiting warming" , and this answers my Lord's question of yesterday,

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> "Limiting warming to 1.5°C implies reaching net zero CO2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO2 forcers, particularly methane (*high confidence*). Such mitigation pathways are characterized by energy demand reductions …"

LORD JUSTICE STUART-SMITH: Forgive me, the high confidence, is a reference to the statement before, is it?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: That is a statement that is made with high confidence.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: And I think that it is above 66 per cent to be high confidence. I believe that that is the case. Some of this is very difficult, because it involves complex----

LORD JUSTICE STUART-SMITH: Do not get distracted by that.

MISS SIMOR: I think 66 per cent is considered high confidence. We will check that.

LORD JUSTICE STUART-SMITH: That is an interesting point in the context of this case. When I say "do not worry about that", I meant implicitly saying the qualitative assessment of high confidence is more important to me than the 66 per cent. But you should not read anything into that at all.

MISS SIMOR: This is not at all qualitative, because what the IPCC did was it took 80 scenarios. Some of those scenarios included scenarios where basically you could pretty much carry on

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using fossil fuels, because technology has developed so much that you could get the carbon out. It is very complicated. I have spent too much time trying to understand it and I am not very good at maths and I have not succeeded, but this is scientific. This is accepted science.

LORD JUSTICE STUART-SMITH: Well, you know that we will come back to this when you have departed for other things and we are trying to put a judgment together.

MISS SIMOR: So we have the emissions and other fuels, electrification -- That is all I wanted to go to on that. Then 91, the top three, just the three bolds, under Future Emissions in 1.5°C Pathways. Mitigation requirements" - mitigation means reduction, effectively.

> "Mitigation requirements can be quantified using carbon budget approaches that relate cumulative CO2 emissions to global mean temperature increases."

So there is a strong understanding that there is a direct correlation that the causative -- it is not even corelation, it is causation.

> "Cumulative CO2 emissions are kept within a budget by reducing global annual CO2 emissions to net zero. This assessment suggests a remaining budget of about 420 GtCO2 for a two thirds [66%: oh, it is medium confidence] chance of limiting warming to 1.5°C and of about 580 GtCO2 for an even chance …"

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So 66 seems to be high confidence and then, if you have 580 gigatonnes of CO2, you get an even chance and that is medium confidence, 50:50.

Then the next one,

> "Staying within a remaining carbon budget of 580 GtCO2 implies that CO2 emissions reach carbon neutrality in about 30 years, reduced to 20 years for a 420 GtCO2 remaining carbon budget …"

So, if you narrow the budget, you reach net zero more quickly, which I suppose is obvious.

Then, pp.94 to 95, this is what I tried to explain to you. In the second column, starting with "a large number of scenarios", just under the bullet,

> "A large number of these scenarios were collected in a scenario database established for the assessment of this Special Report …. Mitigation pathways were classified by four factors: consistency with a temperature increase limit (as defined by Chapter 1), whether they temporarily overshoot that limit [so the idea of bringing back the carbon] the extent of this potential overshoot, and the likelihood of falling within these bounds."

So they took those 80 scenarios and they put them into four classifications.

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Then at the bottom of that column,

> "The comparison of these lines of evidence shows high agreement in the relative temperature response of pathways, with medium agreement on the precise absolute magnitude of warming, introducing a level of imprecision in these attributes. Consideration of the combined evidence here leads to medium confidence in the overall geophysical characteristics of the pathways reported here.
>
> In addition to the characteristics of the above-mentioned classes, four illustrative pathway archetypes have been selected and are used throughout this chapter to highlight specific features of and variations across 1.5°C pathways ..."

LORD JUSTICE STUART-SMITH: Forgive me, where are you now?

MISS SIMOR: I am sorry, I am at the bottom of 94, the last two lines,

> " These are chosen in particular to illustrate the spectrum of CO2 emissions reduction patterns consistent with 1.5°C …"

And then the next page,

> "ranging from very rapid and deep near-term decreases, facilitated by efficiency and demand-side measures that lead to limited CDR [that is carbon dioxide removals] requirements, to relatively slower but still rapid

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> emissions reductions that lead to a temperature overshoot and necessitate large CDR deployment later …"

Then you see in the box above the scenarios they considered. And the middle one, "OS" means low overshoot.

> "Pathways limiting median warming to below 1.5°C in 2100 and with a greater than 67% probability of temporarily overshooting …"

So these pathways have -- if we now go to 99, we just read under the title "Remaining 1.5 ° carbon budget", at 2.2.2.1, "Since AR5" -- I have mentioned AR5, that was the 2014 assessment, so it proceeded Paris and led to Paris or was connected with Paris.

> "Since the AR5, several approaches have been proposed to estimate carbon budgets compatible with 1.5°C or 2°C. Most of these approaches indirectly rely on the approximate linear relationship between peak global mean temperature and cumulative emissions of carbon (the transient climate response to cumulative emissions …"

And I think that I said that at the beginning of my submissions, that there is a direct or approximate linear relationship between how much carbon you put up and how much temperature rises. I am not going to say much more on this, save that the pathways are here in this report and then developed in the UNEP report. Obviously, it is a technical field to

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assess against those pathways and we were shown how it should be done, albeit that there are many methodologies. We are not saying there is a specific methodology.

LORD JUSTICE STUART-SMITH: When you refer to "UNEP report", are you referring to tab 5 or tab 6?

MISS SIMOR: I am. I will come to it as well. So the defendants' case, I am going to turn to, we say that none of this should be in the slightly bit contentious, but, extraordinarily, in the detailed grounds of defence, the defendants say there are no published budgets for the Paris Agreement and that is core bundle 1, tab 2, p.88. That is continued in the skeleton at para.69 of the skeleton and para.67, as well. They do not even try to show that this project falls within the carbon budget. They deny the existence of any budget at all.

As to the UNEP and IPCC reports, in 71 to 72 of the skeleton, they say that neither of those reports were so obviously material that it would have been irrational not to have taken them into account. We disagree. Indeed, it is surprising that they should say this when that document itself is referred to in -- at least the IPCC report is referred to in their draft framework as one of the documents.

These were crucial documents without which no relevant assessment could have taken place. You could not have analysed pathways without considering them. And, interestingly -- well, I have already shown you that the UNEP report is referred to also in *Urgenda* and I think that

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I asked you to sideline that. But it is also referred to in the UK Government's document on climate finance. I am just going to give you the reference at supplementary authorities bundle tab 7, p.159, and then in its CBC document, and the CBC you will recall ended funding for unavailable fossil fuels on 1 July 2020. That is the day after this decision. That is at supplementary authorities bundle tab 10.

LORD JUSTICE STUART-SMITH: Do you want us to go there?

MISS SIMOR: Yes, please. It is p.186. You will read on p.184, "The carbon budget". Then 186, "Overview".

> "Since the Paris Agreement came into force, extensive work has been undertaken by the Intergovernmental Panel on Climate Change and others to set out the types of global GHG emissions pathways required to achieve the Paris temperature goals. This evidence provides a critical basis for considering whether, and in what circumstances, infrastructure such as natural gas power plants can be considered consistent with global temperature goals."

LORD JUSTICE STUART-SMITH: So this is December 2020?

MISS SIMOR: Yes. The law did not change. Then we have consideration of the IPCC's special report on the rest of that page. I do not have time to read it. Then, if we go to 190 -- perhaps actually 188. You will see at 2 and 3,

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> "the small remaining global carbon budget and rapid reduction in global emissions required for 1.5°C implies a globally limited role for new gas plants over the next two decades, with gas plants transitioning over time from providing baseload and mid-merit power to providing peaking capacity and system services. The timing of the transition depends on the individual starting point and the broader potential of each individual country. This, in turn, suggests gas plants without CCS can only be considered as 'Paris-aligned' if they are the only viable option for providing essential supply and system services in a context where low carbon technologies are being pursued alongside a clear shift away from higher carbon fossil fuels [and they are talking about specific countries] …
>
> Transition risk – … transition risk must be considered .. [etc.]"

So we are not saying that a particular methodology had to be adopted -- I have not gone to 190, sorry. I need your Lordship to go to 190. There you see it set out, "Compatibility with Paris-aligned decarbonisation pathways". But you will no doubt want to look at that document in some more detail.

There is no climate science that does not use carbon budgets. It is notable indeed that the CDC, and if we can go to tab 5, p.144 and 145.

LORD JUSTICE STUART-SMITH: Mr O'Donohoe?

MISS SIMOR: Yes. And you will see there in the second column last line -- well, the second column, second paragraph:

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> "So what does that mean in practice? [This is alignment with Paris] Like any investor, we need to operate within the remaining global carbon budget to limit …

So the CDC recognised that, the middle column, second paragraph. Then the last paragraph,

> "Crucially, we will not make new investments – either directly or through a fund – in fossil fuel sub-sectors that we have classified as misaligned with the Paris Agreement."

LORD JUSTICE STUART-SMITH: What relevance to your submissions is there if we were to accept that the project is going to go ahead anyway and, therefore, the decision at best makes no difference to emissions?

MISS SIMOR: We say that that is incompatible with the United Kingdom's obligation under 2(1)(c) and its duty of good faith and its duties to developing countries in relation to Articles 4, 3 to 5 and 9(1) of the Paris Agreement.

LORD JUSTICE STUART-SMITH: Shall I take the answer to my question as you say that it makes no difference?

MISS SIMOR: It makes no difference.

LORD JUSTICE STUART-SMITH: That is quite a surprising proposition in the context of this sort of decision.

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MISS SIMOR: No, my Lord, it is not, because the requirements and needs of Paris are that Government -- the entire financial system changes. It is one of the core parts of Paris and it is one of the changes from Paris as compared with UNFCC and Kyoto. It is the realignment of the whole financial system so that it does not go into developments that increase emissions or are in misalignment, I should say, with the low emissions pathway. It does not fit either with the Government's view of the law, because the Government itself, and I am going to take you to that, now, in the context of UKEF, is talking about decarbonising its portfolio and what it explains in its document is that it is effectively going to disinvest so that its portfolio becomes net zero and, therefore, it is going to look at the scope 3 emissions of its investment which is also what banks are doing more and more, but, of course, only the state is directly bound by the Paris Agreement. So we are talking about legality here rather than would it practically make a difference? And that legality is specifically recognised by the Government in terms of its accounting for scope 3 emissions of its investments.

LORD JUSTICE STUART-SMITH: Yes. I may not have needed to ask that question, because I think that your answer is consistent with the answer that you gave yesterday afternoon.

MISS SIMOR: I hope so.

MRS JUSTICE THORNTON: And is that analysis of Paris, in terms of the realigned to finance, do you say that that is on any interpretation of Paris a tenable or a correct interpretation?

MISS SIMOR: Our interpretation we say is correct. We do not know what the----

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LORD JUSTICE STUART-SMITH: It is standard. If this court is going to interpret Paris, do you say the way in which we should look at Paris is whether the defendant's interpretation is tenable or we must arrive at our own interpretation or are you going to come to that?

MISS SIMOR: I will hopefully have time. We say that for the purposes of our succeeding in this case, it does not matter, because their interpretation is not tenable, but we say in law the correct approach is for you decide what the law is, not whether -- "They might be wrong, but we think that it could be right". We say that your role and function under the case law is that you determine the law. But we also say in relation to that that we have still not had any interpretation by the defendant. The only interpretation that we have had - and I was going to take you to all the references - is Paris does not really mean anything. It is a political declaration with people sort of getting together to discuss things, its aspirational, it is vague. Now, we say that is not tenable. I opened that and I did not actually go further.

LORD JUSTICE STUART-SMITH: We looked at p.144.

MISS SIMOR: I am terribly sorry to take you back to it, tab 5 -- but this is important because this is the Government's understanding of the Paris Agreement. It is all very well the defendant saying things in front of this court, but in the end this is what the Government says that the Paris Agreement means.

LORD JUSTICE STUART-SMITH: And the date of this?

MISS SIMOR: This is also December -- it may not be December, it may be a little earlier. Sometimes these documents are not dated. It is quite irritating.

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LORD JUSTICE STUART-SMITH: Okay. Well, leave it for now.

MISS SIMOR: Anyway, on 1 July the CDC stopped funding fossil fuels, so the day after the decision. Then 149 -- so 146, "We will operate within the remaining carbon budget". That is the second heading. Then 149, we get the point, "Decarbonising our portfolio". So accepting responsibility under Paris for the emissions of projects they invest in and what does this mean in practice? That is on the next page, 150.

> "We are currently baselining our portfolio emissions this year and will use this to develop a carbon budget and roadmap to net zero emissions …"

Now, this is the CDC. It is still UK financing under Paris and, of course, the Paris Agreement does not care whether it is CDC, ODA or UKEF. It is all UK financing. It is July 2020. So this perhaps was released on 1 July, the decision was finally made on 13 June in our case.

Then p.155 in the next tab, "***Gas:*** standalone upstream gas exploration and Production" - misaligned with Paris.

LORD JUSTICE STUART-SMITH: Where are you?

MISS SIMOR: It is p.155 and it is the far left column, the bright red, traffic light red, "standalone upstream gas exploration and Production" - misaligned. Then you will see in the middle column some more conditional points about gas. "… we will only pursue investments in gas-

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fired power stations and gas midstream projects". So that is power stations rather than actually taking more gas out of the earth and they are going to apply a particular tool to assess whether that can be done. So that is the use of gas rather than an exploration and development of gas fields.

The same applies in the clean-growth strategy which actually makes clear that the UK invented carbon budgets. We should also say that it is for the United Kingdom or the defendants to show that the emissions from this project would not exceed the global budget and, if I can take you to the *Sharma* case, that is in authorities bundle 4, tab 56, p.2825.

LORD JUSTICE STUART-SMITH: That is another nice short Australian authority.

MISS SIMOR: Sorry.

LORD JUSTICE STUART-SMITH: Another nice short Australian authority.

MISS SIMOR: Yes, very diligent.

LORD JUSTICE STUART-SMITH: It is a national characteristic.

MISS SIMOR: Then, if you could just mark 83 right through to 88, and I just want to go to 85 to 87,

> "The Minister sought to challenge that submission in a number of ways. First, the Minister characterised the applicants' case as dependent upon demonstrating that the 100 Mt of CO2 from the Extension Project would be emitted outside the available budget of emissions necessary to meet a 2°C target. The Minister contended that it is likely that the 100 Mt of CO2

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> would be emitted compliantly with the Paris Agreement and thus within a lower than 2°C target.
>
> 86 Putting aside … [etc.] … The Minister called no evidence. The Minister essentially contended that the Court should infer that the 100 Mt of CO2 would likely be emitted in accordance with the Paris Agreement. There is no sufficient basis for that inference. The Minister relied upon little else than speculation, in circumstances where the evidence showed that at least one of the potential consumers of the coal is not a signatory to the Paris Agreement.
>
> 87 Further and in any event, there is evidence before me which tends to support the proposition that the 100 Mt of CO2 will not be emitted as part of the available carbon budget necessary to achieve a 2°C target. Professor Steffen's opinion was that it was 'obvious' from the carbon budget analysis, that "no new coal mines, or extensions to existing coal mines, can be allowed.There can be no doubt that in making that statement Professor Steffen had the Extension Project in mind."

LORD JUSTICE STUART-SMITH: Professor Steffen, did we not see his name in the last Australian case? He clearly has a sort of presence in this.

MISS SIMOR: Yes. Well, he is a world-leading expert. We, in fact, have the witness statement that he produced for this case. We did get a copy of it, but we do not know -- we have been trying to find out whether we are allowed to adduce it in this court, not because of this court,

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but because of that court. So far we have not had an indication as to whether we are allowed so. So it has been shared with us, but we cannot, I am afraid, at this stage give it to you.

LORD JUSTICE STUART-SMITH: Which I think adds up to the fact that he is an extremely "expert expert", but we do not have any evidence from him.

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: My point in relation to this is that it is for the Government to show, not to speculate, but at least to apply some methodology to actually show that this LNG will be emitted within the remaining global budget that I have shown you, as assessed in the IPCC report. And it has not done anything close to that. Indeed, it denies the existence of budgets.

So I am going to wrap up grounds (c) and (d) of 1B in our skeleton as quickly as I can to try and move on to the other ground. They are 92 to 107 of our skeleton. But I think that I do need to deal with it briefly.

SIR JAMES EADIE: I am sorry, just before my learned friend moves on, can I just invite you to note the context and the nature of the claim that was being made in relation to that Australian case you have just seen?

LORD JUSTICE STUART-SMITH: All right.

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SIR JAMES EADIE: As you may have picked up from the judgment, it was a negligence claim. There was a great long section about whether a duty----

LORD JUSTICE STUART-SMITH: We will come back to that. Thank you.

MISS SIMOR: Yes, that is important. The *Sharma* case concerned a claim that harm was being done to people in Australia, I think it was, as a result of these global emissions, and one of the big questions was causation, that, if you chuck something -- it was quite similar to *Urgenda* in that way. If you put it up into the world and it causes harm locally, how can you even connect it?

LORD JUSTICE STUART-SMITH: That is fascinating. Fortunately, I do not think that we have to deal with it.

MISS SIMOR: It is very difficult, but now established in Holland as something you can do, although done through human rights rather than directly, so it is indirectly in relation to Paris.

LORD JUSTICE STUART-SMITH: Right. Now you want to go back to round off your submissions on ground 1, do you?

MISS SIMOR: Yes. I want to go to (c) and (d) of my skeleton, 92 to 107 of the skeleton. I do just want to remind myself of it. (pause) This really is about the analysis or the findings in the climate change report regarding emissions. I want to make three points. First of all, Wood MacKenzie, as I have already said, did not carry out a climate assessment report and you will have read the criticisms of that report in Mr Muttitt's 37 to 38. It looked at potential

displacement of greenhouse gases and I showed you the scope of works. However, I actually have not shown you Wood MacKenzie.

LORD JUSTICE STUART-SMITH: Well, I think you can take it that we have read it.

MISS SIMOR: Good, and you will have read it in the context that it effectively slides -- it says 2°. You will read all the detail of exactly what it says that it is doing. Certainly, it provided no basis for the conclusion reached in the CCR that the mid-case scenario was most likely. In fact, we say that it did precisely the opposite. We say that Wood MacKenzie said that you cannot reach any conclusion, and those are the terms of its report. It is a conditional report. It says that it could potentially displace carbon in China. It takes the highest-emitting scenario and a lower-emitting coal plant. And that is what it does. But it absolutely does not conclude that there was any evidence or basis for taking the mid-case scenario taken by the defendants.

Now, quite apart from the fact that the concept was methodologically flawed, in terms of looking at displacement, we have seen that from Ben Caldecott and Mr Muttitt that the SDS was very out of date. What we say is extraordinary is that the climate change report effectively rejected Wood MacKenzie. It did not state that "Wood MacKenzie has told us we cannot take a view", it, instead, took a view - and we say that it concluded - that there would be a net reduction. Obviously, we discussed that this morning.

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Now, Mr Griffin in his statement at para.44, p.211, state that,

> "Whilst the Wood Mackenzie Report was a useful input for UKEF's consideration of climate change in its decision making relating to the Project, it did not cover all matters we thought relevant and so we decided it was most useful for UKEF to prepare dedicated climate change report that could be submitted to the Accounting Officer as part of the due diligence process, mirroring the practice of the ESHR reviews. The information provided by the Wood Mackenzie Report was fed into the CCR together with information gleaned from the other lines of enquiry ..."

And that information is set out in para.55 of his statement. We say that not one of those pieces of information provides any evidence that there would not be a net increase in emissions or that it would be within the global budget or that there would be an overall net reduction. We can start with the US EXIM where we can find the relevant emails and that is in supplementary bundle p.624. They are asked for help on due diligence and that starts at 624 and feeds back to 623. Eventually it is provided, but it is explained that there was not effectively a climate change due diligence and, of course, the US was outside Paris at this time. It is very difficult to read. I do not know whether your is better than mine.

LORD JUSTICE STUART-SMITH: I am looking at p.623?

MISS SIMOR: Sorry, 621, this is the final response. You will probably want to read back in the thread before.

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LORD JUSTICE STUART-SMITH: Are we looking at the email staring, "My apologies for the delay"?

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR:

> "To be upfront we did not produce a separate document regarding CO2 emissions. Our work product consists of technical and E&S Board Memos, which are presented to our Board with the rest of the EXIM staff document packages. So our documentary CO2 analysis is found in them. We also answer questions and do further research as requested by our Board members during the pre-board briefing process, and CO2/coal was one of the requests. We used two methods to determine Project CO2 equivalent emissions in tonnes CO2eq/year. This is a mandated calculation in accordance with EXIM's Charter and Policies."

So they did actually work out scope 3.

> "First we compared this project to historical and concurrent projects in our portfolio with similar technologies, and scaled against LNG output. The second method used the IFC Carbon Emissions Estimation Tool … This was the last edition of this tool, and, whilst outdated, still provides a conservative estimate. Both agreed reasonably well.

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> The second analysis we performed was focused on coal displacement as a proxy for CO2 emissions. The initial ask [the Board] was an analysis of how many coal plants would be closed and replaced with LNG plants fuelled by this project, and the net reduction in CO2."

So how are we actually reducing emissions globally?

> "We used China as a proxy for the region into which the gas will be delivered. We quickly realised, given the growth of that market, it is unlikely that coal plants would shut down simply to replace them with LNG fired plants. As such we focused on future coal use. We used data from the US Energy Information Agency International Energy Outlook 2017 … "

The 2019 was released too late to include the Board approval process, so they used the old one. "This report projects energy production …" Then you get some figures. So they did not actually -- they did it in terms of forward use not actually reduction. And they made the assumption that all growth energy would be coal. So they assumed that, instead of coal being developed, albeit an increase in energy, LNG would be used (i.e. there would be no net reduction).

We then turn to the AfDB's approach which is another thing that Mr Griffin says they relied on. You can find this at p.625 of this document. If you just go to 625, first you will see they rely on the 2018 World Energy Outlook Report.

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LORD JUSTICE STUART-SMITH: Forgive me, think that I must have misheard, supplementary bundle----

MISS SIMOR: 626.

LORD JUSTICE STUART-SMITH: Which starts with a nice redaction.

MISS SIMOR: Yes. So this is the other thing that Mr Griffin says is relied on, although, oddly enough -- well, I suppose it does not really matter. But, anyway, it refers to the World Energy Outlook. You will recall that Mr Caldecott put a comment next to that saying "Seriously out of date" in reference to this. Then the next page, 627, the third bullet,

> "The SPAs signed in this operation suggest that most of the cargos will be directed at the Asian market, where a number of governments are currently undertaking active decarbonization efforts. It is expected that a significant quantum of the gas commercialized by this Project will help reduce reliance on coal-based power generation (i.e. China, India) and serve to support the process of substitution away from coal. As a point of reference, given that an estimated one-third of all CO2 emissions today result from coal-based energy, and given (i) above, if we were to substitute all coal-based generation by natural gas, we would achieve a global net reduction of CO2 of about 20%."

I mean, that is not a basis for making any assessment at all, if we were to substitute all coal-based generation by natural gas. Then, just to turn over to 628 for the two trains point, the last bullet down,

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> "The Project will initially construct 2 LNG trains aiming to be operational from the 2024-2025 period; but has potential to expand to 6 trains. The ESIA studies provide an estimate of the potential annual emissions for 1, 2 and 6 LNG trains."

Then the other document referred to you will find at 658, para.3.33. If you can just sideline that. It does not have anything to do with this, because it is about the effect on the project.

LORD JUSTICE STUART-SMITH: What is 658?

MISS SIMOR: It was referred by Mr Griffin, it is part of the AfDB documents, I believe.

LORD JUSTICE STUART-SMITH: And the relevant paragraph is 3.33?

MISS SIMOR: Yes, and then again at 689 -- no, these are the RINA documents. They are another document set out by Mr Griffin in that paragraph and 689 is climate change, but, again, it has nothing to do with scope 3 emissions. It is all about scope 1 emissions.

LORD JUSTICE STUART-SMITH: Okay. Do you want us to read those references in what is sometimes called "our leisure"?

MISS SIMOR: Well, they are referred to, so, insofar as they are referred to -- 766 is the next one.

LORD JUSTICE STUART-SMITH: And your point on 698 is that that is talking about scope 1 and not scope 3, is it?

MISS SIMOR: And 766 is actually the RINA document. That is at para.3.53 and that has nothing to do with it either.

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I took you to the clear warning by Mr Murton -- did I, COP? No, perhaps I have not actually taken you to that. This is at CB2, p.293. This is a warning from John Murton, who is export promotion in Africa and energy, now co-ordinator in diplomacy, COP26. As we understand it, it is a record of a phone call with, I believe, Joe Shephard of UKEF. It may not have been. It is certainly somebody in UKEF. I take you to this because it shows that internally even as at 10 June it was not -- the analysis that had been done was not accepted.

This is just a note of the call, there is nothing --

> "main areas - inconsistency in the business model used and the climate matters a lot of modelling out there that the levels of price are not consistent with Paris only so much Co2 can [I suppose to be sold at that price] … more oil will be exploited than keep below 2C not doing enough … [etc.]
>
> have taken huge accounting knock downs to take account of Paris - taking account but all the assumptions in the business plan are not aligned with Paris modelling not correctly the likely markets for gas - got to have likely trajectory of carbon pricing & related, good accurate modelling on pricing for renewable energy [this is all transistional lock-in, stranded assets stuff] - solar & wind costs going down rapidly - really powerful now renewables … battery storage … [etc.] gas to displace coal - but is in fact renewables [so that is the undercutting the Paris objective] - … displace up-take of renewables [so it stops the uptake of renewables gas, it is no longer considered a transition fuel]. … - UKEF is current business model

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> prejudice against renewables … [and then further down] renewable projects tend to be smaller - disaggregated model - smaller units … [etc.]
>
> UKEF role in putting finance in where other finance is hard to come by…"

That is also a point, my Lord, in relation to the question of, well, does it make a difference anyway? And that is the whole point in Paris, that private banks are less and less willing to fund this stuff, because of the transition and stranded assets risk. It is the countries that step in and that is why EBRD, World Bank, CDC and now UKEF and many others - the Scandinavians - had already removed this funding. Then

> "Stock models … can check if the financial modelling and see if Paris has been taken into account."

So he is obviously not convinced. Unfortunately, it is not a very good note. At the bottom, "can help with TCFD and be a bit more rigorous and COP unit can help." Unfortunately, it was a little bit late, but not too late for the final decision. It was just by then the Secretary of State for Trade had not made any decision. I suppose she could have revoked it, potentially. There were plenty of warnings internally that this had not been done properly.

Now, in light of the fact that it is 12, I am going to just going to skip over the two trains point, the stranded assets point and the transitional risk point.

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LORD JUSTICE STUART-SMITH: Well, you have covered them in your skeleton.

MISS SIMOR: The skeleton is pretty detailed. If there are additional references, we have not put in there, perhaps we will hand up just a note with references and nothing more. I know that you have got a lot to deal with.

I am going to then go to ground 1A. I am going to deal first with the error of law challenge. Under this ground, we say that the defendants erred in considering that the granting of finance to this project was consistent with the United Kingdom's obligations under the Paris Agreement to align all financial flows with a low-emissions pathway and to assist Mozambique in achieving and augmenting its commitments under the Paris Agreement. You find that ground set out at core bundle 1, p.23, 76 to 106 of our grounds, and para.38 onwards of our skeleton.

Now, the crucial starting point for this ground is that the defendants took their decision on the basis that the project was consistent with the low-emissions pathway and sustainable development in Article 2(1)(c) and that, accordingly, UKEF financing was in accordance with the United Kingdom's obligations under the Paris Agreement.

Secondly, that the provision of finance to Mozambique would assist Mozambique to meet its commitments under the Paris Agreement and to augment those commitments such that it was

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compatible with the UK's obligations to assist developing countries to meet and augment their NDCs.

I put references to the defendants' statements to that effect. They are basically paras.75 of the detailed grounds of defence and we set them out in para.43 of our skeleton. You have also seen the conclusions in relation to the Paris Agreement that are set out in the CCR. I have taken you through that.

We say that the conclusions in that report were first that it was consistent with the UK's obligation under the Paris Agreement to assist developing countries meet their NDCs because it would help Mozambique since, one, it would provide for energy transition - gas as a transition fuel in line with NDC - and I note that that is not what the climate change report said in its first two drafts. Two, later peaking of global emissions in developing countries are allowed. That is core bundle 2, p.56.

And, three, without finance from fossil fuels it is unlikely that Mozambique will have the money to pay for renewables and that is core bundle 2, p.269.

Secondly, that it was also consistent with the UK's obligation to make all finance flows consistent with a low-emissions pathway, as provided in 2(1)(c). That is core bundle 2, p.275

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to 277. We say that -- it says that it was done on the basis that there was some net reduction in emissions and, therefore, alignment with the 1.5° pathway.

Now, it may be that the position either was not that or -- well, that the position was misunderstood in relation to that. In which case we need to understand how it was in alignment with the low-emissions pathway, because, of course, it is easy to understand why a net reduction in global emissions is in alignment with the low-emissions pathway, but it is much more difficult and complex to understand why an increase in global emissions, albeit a potential net displacement of future growth, is also in alignment with the low-emissions pathway.

LORD JUSTICE STUART-SMITH: Your submission I think is that, in order to determine whether something is in alignment with the global emissions pathway, one needs to take a global view and understand exactly how this particular project fits into the global pathway.

MISS SIMOR: You will have seen at the top of the minutes of 7 May, when Ben Caldecott was explaining -- unfortunately, it is very crunched the explanation, but he explained that you take the project, you look at the budget for that sector, you look at the pathway for that sector and you consider whether you can fit within that.

Now, I cannot explain that to you because that is something that is done by experts. But what I did understand, originally, from the detailed grounds and the climate change report, I did

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understand that the argument was being made that, overall, this will result in a net reduction. Therefore, it is in alignment. Now, that I can get my head around. What I cannot get my head around is it was still in alignment even though it will result in an increase in global emissions.

LORD JUSTICE STUART-SMITH: Okay. But, in principle, the recognition that developing countries are going to peak later and the recognition of the potential inequities that arise must allow for the possibility that an individual country's global emissions will increase.

MISS SIMOR: My Lord, we say "no".

LORD JUSTICE STUART-SMITH: You say "no".

MISS SIMOR: We say "no".

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: We say in relation to 4.1 that the peaking of emissions in that context relates to national emissions. So the United Kingdom when it accounts for its emissions does not account for the emissions of its sold North Sea oil or gas. That is not part of its nationally - as far as I understand, I will be corrected if I am wrong - but, as far as I understand, when the United Kingdom accounts to the UN for its emissions, it does not put in that account the scope 3 emissions from fuel it has sold to other countries.

MRS JUSTICE THORNTON: So how does that help us in this context?

MISS SIMOR: Because, I believe that my Lord's point was that poorer countries are allowed to peak later under Article 4.1 of Paris and, therefore, they must be allowed to take stuff out of

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the ground and sell it: that must be included in what is meant by peaking in 4.1. And we say that that is not what is included in peaking in 4.1. What is included in 4.1 peaking is national emissions, so what----

LORD JUSTICE STUART-SMITH: Scopes 1 and 2?

MISS SIMOR: Yes, so what you are allowed to do is you might -- so in countries that are very undeveloped, like Mozambique, where-----

LORD JUSTICE STUART-SMITH: So where -- I am so sorry, I interrupted you.

MISS SIMOR: No, no, I am going on. I mean, countries that have very low energy use, like Mozambique or India. People who do not actually have electricity. What it is accepting is that those countries are entitled to develop in terms of energy. What it is not accepting is that a country that finds vast reserves can take those reserves up.

LORD JUSTICE STUART-SMITH: So where are scope 3 emissions covered in the Paris Agreement?

MISS SIMOR: Scope 3 emissions are not covered in NDCs and I believe we agree on that.

LORD JUSTICE STUART-SMITH: But does that mean that----

MISS SIMOR: Sorry. What I said was wrong. It is not that they are not covered. Scope 3 emissions are emissions that are not directly from your product, so they are covered. In fact, I found the 2009 DEFRA report for accounting for scope 3 emissions. So, if you are a farmer and you sell some product, you still have to account for the use of that product. So there is accounting but, when it comes to the -- The issue here is exports, essentially.

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MRS JUSTICE THORNTON: Sorry, just to get this in context, and I understand where this debate is going, is your point that, when Lord Justice Stuart-Smith said that it is okay for emissions to go up, they can still be aligned with Paris (i.e. this project) even if the emissions went up, you were saying, "no", because this is a global project and Mozambique is only allowed to increase its emissions nationally not in respect of a project of which 95 per cent is going to be sold globally. Is that the context of the debate?

MISS SIMOR: Sort of yes, sort of. It is not that Mozambique is not allowed to. It is not that Mozambique is not allowed to do this. Mozambique has its NDC. It should comply with its NDC but, actually, it is a conditional NDC, so it is not -- we are not really concerned with Mozambique. Let us take the United Kingdom. It develops another oil field in the North Sea. Insofar as it exported that oil, the emissions from that exported oil would be accounted for by the country that uses that oil. The United Kingdom would not account for them. So Mozambique does not account for the LNG that it exports. It is not part of its peaking. It only accounts for the LNG that it uses.

LORD JUSTICE STUART-SMITH: So scopes 1 and 2.

MISS SIMOR: Yes, except it is using 5 per cent.

LORD JUSTICE STUART-SMITH: So your submission is that----

MISS SIMOR: Yes, but it is not just scopes 1 and 2, because scopes 1 and 2 are the infrastructure that brings the stuff up. It is the factory. It is the LNG plant. Scope 3 are the boilers in the Mozambiquans' houses.

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LORD JUSTICE STUART-SMITH: So, to the 5 per cent that is kept in Mozambique----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- those scope 3 emissions you say are - are they covered by the peaking later?

MISS SIMOR: Yes. And that is the whole point.

LORD JUSTICE STUART-SMITH: Okay. So the 95 per cent, what you are actually saying is in circumstances where you do not know, because of the nature of these framework contracts -- because you do not know where the -- or despite the fact that you do not know where the gas is going to go and where it is going to be used, you have to assume that it is going to lead to an increase in overall global emissions or what?

MISS SIMOR: So what they have to do -- the UK under 2(1)(c) is doing two things. It is looking both at global emissions, under 2(1)(c), which is the emissions pathway, which is the point in *Sharma*, *Gloucester Resources* and *Urgenda*, but you cannot just say, "Oh, it is only a bit". You have got to look at the entirety of the emissions and you have got to determine whether those emissions will fall within the remaining global budget and the low-emissions pathway, for the purposes of finance flows.

Then the second point is Mozambique. So Mozambique has its own NDC and what it does is bore it, essentially, but what the United Kingdom has to do it has to consider Mozambique's NDC and consider what its NDCs would want to be in five years and ten years and 15 years,

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according to the ratchet effect, so how it is going to increase its commitments to reduce emissions. And it has to ask itself whether financing this project will assist Mozambique to both meet its NDCs and augment them. The answer to that is obviously "no", because the answer to that is that what this will do is lock Mozambique into fossil fuels and that the way to assist Mozambique to meet its commitments and augment them is to finance renewables or give technology.

LORD JUSTICE STUART-SMITH: Would a fairer way of putting that be to say that it runs the risk of lock-in while, from what we understand from Mozambique, providing them with the finance to transition to greener energy?

MISS SIMOR: I would say that it would be fairer on our evidence -- our evidence is that it is not a sensible way and that it will cause lock-in, but I would certainly say that there is a high risk of lock-in. So I do not think -- it is an evidence-based discussion and, unfortunately, we do not have the evidence. We simply have the criticism of the lack of evidence, including by the internal expert for UKEF, who says, "Where is the evidence? Where is the plan?" Then we have John Murton, the diplomat that I just showed you, talking about all the transaction risks and the lower costs of renewables.

LORD JUSTICE STUART-SMITH: Speaking entirely for myself, I think that I would find it helpful, because I do not want you to feel pressure by time more than is necessary, I think that I would find it helpful if you, the claimant, could say by fairly early tomorrow morning, by which I do not mean outrageous, but before start of play -- could put onto a sheet of paper

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your explanation of how scopes 1 and 2 and -- scopes 1 and 2 and domestic, what I am going to call domestic scope 3, on the one hand, and what I am going to call international scope 3 are affected by Paris.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I think that I understand -- at the moment, I am hanging on by my fingernails, but I think that I understand your submissions on scopes 1 and 2 and domestic scope 3. That is caught by 2(1)(c) or its governed by 2(1)(c). The area which in my mind is a complete fog, and it is probably my fault, is how one looks at the acknowledgement that different countries will peak at different times and what you have called the potential injustice, and how that works for the different scopes, dividing the scopes as I think we now have.

MISS SIMOR: I fear that it is actually me who has caused the confusion. I should not really have -- there is a much simpler way of looking at this.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: And that is, internal use, national use, and exports.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: NDCs cover national use.

LORD JUSTICE STUART-SMITH: Internal use?

MISS SIMOR: Yes. So they measure what a country uses, scopes 1, 2 and 3.

LORD JUSTICE STUART-SMITH: Yes.

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MISS SIMOR: Exports are not part of national use.

LORD JUSTICE STUART-SMITH: No, so, if they sell some liquid natural gas to us and we burn it, then it comes into our projections and so on.

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: All right.

MISS SIMOR: So the 25 per cent of this LNG, which is coming to Europe, will form part of European countries' NDCs. So it will be accounted for in that way.

LORD JUSTICE STUART-SMITH: And will be subject to the downward pressures of which those countries use.

MISS SIMOR: Exactly. And that is why there are things like -- that is why there is a risk of stranded assets because, as countries push down the entitlement to burn gas and push down their emissions, there will be an increasing excess -- there is already an excess, we know from the UNEP production gap, but there will be an increasing excess and stranded assets will derive from the fact that that excess becomes unassailable and the assets become stranded and Mozambique potentially is in debt distress.

LORD JUSTICE STUART-SMITH: I think we understand the sort of concepts of lock-in (inaudible) debtors.

MISS SIMOR: But I need to make very clear that 2(1)(c) is aimed at global emissions. So what 2(1)(c) is concerned with is the entirety of this gas, both the gas produced by the plant, the methane leakage, which is nowhere accounted for or even considered by the defendants, and

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the scope 3 use of the gas. So that is the cumulative impact of this project over 30 years on the remaining carbon budget that we have before we hit 1.5°.

LORD JUSTICE STUART-SMITH: So, although we are now helpfully dividing between let's call it domestic and international, you say that 2(1)(c) applies to both.

MISS SIMOR: 2(1)(c) is how are changing our financing so that you do not finance projects that increase emissions, they must now be on a downward trajectory, according to the paths set out in the IPCC, in order to hit net zero in 2050, which is the global aim? It has been suggested that you go to our skeleton, p.11, p.4 of the quote. I believe that is from our witness statement, is it? It is about the emissions and production excess.

LORD JUSTICE STUART-SMITH: Could you give me that paragraph reference?

MISS SIMOR: It is para.31 of our skeleton, where we have set out a chunk of the production gap report that I had hoped to be able to take you to.

LORD JUSTICE STUART-SMITH: Para.31 of your skeleton starts, "UNEP".

MISS SIMOR: Yes, "UNEP". It is the production gap report.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: So this is my point about how production is already in excess of what can be used globally. If everything that is being produced now is used, temperature will be exceeded by whatever.

MRS JUSTICE THORNTON: And is the UNEP report an interpretative aid to Article 2(1)(c)? In other words, do we interpret Article 2(1)(c) (inaudible), the analysis there?

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MISS SIMOR: We say that, by reference to the recycles that I took you to in the UNFCC and the Paris Agreement, but the scientific changes in analysis that come subsequent to these treaties are how the treaties have to be applied. So they are an integral part of it and, as the science develops, that is why they are dynamic, I think I took you to the bit of the treaty that referred to that, but it is effectively a dynamic rather than a static exercise because the science is changing all the time. And there was a point -- the point in Paris, it was a different----

LORD JUSTICE STUART-SMITH: (pause) Thank you.

MISS SIMOR: Well, you will have seen that quote. You will also know, and I do not want to confuse you more, but you will also know that the commitments in NDCs have been assessed, the cumulative effect of those commitments, and they are not sufficient to meet the temperatures.

LORD JUSTICE STUART-SMITH: Hence all the palaver - I do not mean this derogatorily - all the palaver at COP26.

MISS SIMOR: Well, it is a difficult problem for obvious reasons.

LORD JUSTICE STUART-SMITH: I agree.

MISS SIMOR: So the defendants accept justiciability in terms of ground 1A, so we are not concerned with justiciability. But they do argue -- and we do not indeed need to argue, and this is important -- we do not need to argue whether it would have been lawful for the defendants to agree the finance of the project in circumstances where either (a) they had not considered Paris Agreement obligations or (b) had found that the project and its financing

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were not compatible with the UK's obligations under the Paris Agreement. Neither of those scenarios are relevant or before the court. Here the defendants set out to consider Paris Agreement compatibility, they considered that compatibility, they concluded that the project and its financing were compatible with the UK's obligations under the Paris Agreement in two important respects, and, on that basis, decided to finance the project. Accordingly, the only issue in ground A for this court is whether the decision involved one or more errors of law.

There is a dispute between the parties, however, as to the standard of review that you should apply to that exercise. I am probably not going to have enough time to go into that in detail. We understand why the defendants take that approach, having regard to the facts, but, in our submission, whether one applies the test of correct in law or tenably correct in law, the decision is vitiated by errors of law.

Moreover, whatever standard of review the court ultimately concludes that it is obliged to apply, it will have, nonetheless, to determine what the relevant provisions mean, whether that he what they actually mean or what they could tenably mean. And it is notable that the defendants have not set that out. It is difficult for you to determine whether their position is tenable if they will not state what that position is. Of course, all the legal advice as to the position has been redacted.

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Now, before this court their position appears to be that the terms of the Paris Agreement are basically meaningless and we say that this court must reject that. So it is sensible to start by considering what the effect of those provisions are. I was then going to turn to the standard of review. I may skim this very quickly and possibly hand you another note. I hope there is enough in the skeleton. We will check back. But, first of all, as we have already mentioned, he Vienna Convention is the relevant interpretive instrument for your purposes, Article 31 and 32 and Article 26, the duty of good faith. We have put those at authorities bundle 1. If there is any doubt about that, the cases to go to for your note are the case of *Al-Malki* at authorities bundle 3, tab 34, paras.10 to 12, Lord Sumption, and the *Horvath* case, authorities bundle 1, tab 19, p.508 C to F, Lord Clyde, and p.495, A to C, Lord Hope.

LORD JUSTICE STUART-SMITH: Those references are in the skeleton, are they not?

MISS SIMOR: I am not sure. I can send them up to you. We will put them on a note. They should be.

Now, I just want to turn to 2(1)(c) and you need to read it in the light of Article 31 of the Vienna Convention. We find it in tab 3. It is p.53 of the bundle. The Vienna Convention requires you first to look at the ordinary meaning. Well, it was ordinary meaning in the context. Let me actually get the words of Article 31.

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> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes".

So the recitals and annexes, all of those elements, are the context that you can look at or include.

> "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (c) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty …
>
> (c) any relevant rules of international law applicable in the relations between the parties."

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Then, of course, if you need to, you can have recourse to supplementary means of interpretation, including preparatory work, if there is ambiguity or obscurity or the result that you achieve, applying Article 31, is manifestly absurd or reasonable. That is Article 32.

So we go first then to the ordinary words in their context. Article 2, this agreement - and I emphasised that when I opened yesterday - it is enhancing implementation of the Convention. And the Convention -- we are in tab 3 of the first authorities bundle. So it is enhancing the UNFCC. So you can look also at the recitals and the preamble that I took you to of the UNFCC. And it is aiming to strengthen the global response in those prior treaties, UNFCC and Kyoto, in the context of sustainable development. That is not in contrast with, it is all part of the same thing. Sustainable development and climate change are integrally related, particularly in countries like Mozambique, and I took you to the relevant bits of the UNFCC in relation to that, where this country falls very much into a country of extreme vulnerability to the consequences of climate change.

So the key objective at (a) holding the increase to well below 2° and aiming for 1.5. These are the three core objectives. Increasing the ability to adapt to adverse impacts and foster climate resilience and low greenhouse gas emissions development. That is in (b). Then making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient developments. So they go together: sustainable development and climate

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change. This was a huge and significant change from the UNFCC because it brought finance right into the centre of the treaty.

One of the contexts -- in the original skeleton you had piles and piles on all the prior decisions, but we decided to take it all out, because, of course, there are numerous decisions from the moment that they decided to develop Paris through to 2000 and -- the CP 21 decision. I have got the original decision of 2011 when the parties decided that they should enact a new agreement to enhance and strengthen because of the urgency that had been established in the reports showing the gap between what was being achieved and what needed to be achieved.

The context -- we can also go to the recitals to the Paris Agreement. Again, I took you to those. I do not think that I need to go through them again. We will hand you up those. This is the 2011 decision when the parties decided that they needed to draw up a new agreement.

LORD JUSTICE STUART-SMITH: So what is the relevance of it?

MISS SIMOR: That is context in terms of -- it shows you the context for what the Paris Agreement was, why it was being (inaudible).

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So, if we go, for example, to recitals 2 to 3, on the first page, you will see also

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> "decides to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties [it is the second page second recital] through a subsidiary body under the Convention hereby established."

Then 3.

> "Further decides an ad hoc working group for enhanced action shall work as a matter of urgency and shall report to sessions on the progress of its work."

Then the recital at the top,

> "Recognising that climate change represents an urgent and potentially-irreversible … [etc.] widest possible co-operation …"

And then, "Noting with great concern", this is the recital to the----

LORD JUSTICE STUART-SMITH: I am terribly sorry where are you?

MISS SIMOR: I am sorry, it is the recital to the decision right at the top. It is under decision 1, CP.17.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: So this is the decision in which the parties decided to start the process to draw up a new agreement.

LORD JUSTICE STUART-SMITH: Yes.

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MISS SIMOR: And, if you look at the second recital,

> "Noting with grave concern the significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases and aggregate emissions pathway with having a likely chance of holding the increase … to below 2° or 1.5°."

For that reason, because of that concern, they drew up Paris as a matter of urgency.

I am not going to take you to the recitals in the Paris Agreement. I have already taken you to them. Recital 4 emphasises the effectiveness. Article 3 also emphasises the effectiveness. So you find effectiveness all the way through. You find the concept of effectiveness also in the UNFCC.

Object and purpose are clearly to enhance and strengthen. All of this we say must be applied in the light of the ever-revolving science as set out in the IPCC and UNEP. Accordingly, we say states cannot pursue a higher temperature goal than that in 2(1)(a). They have agreed to pursue well below 2°. That is an agreement binding in international law and actions by states in good faith must pursue that commitment.

Secondly, states cannot make some finance flows consistent with obtaining that temperature goal but make others inconsistent with it or, to put it another way, they cannot with one hand

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act to achieve the Paris Agreement goals while, with the other hand, they undermine those goals.

So, in our submission, the ordinary meaning of 2(1)(c) accords with the object and purpose of the provision read in its context. The UK cannot use public finance in a way that undermines the objectives of the Paris Agreement, that is the temperature goals in 2(1)(a) and the obligation to assist developing countries to meet and augment their Paris commitments in the context of sustainable development.

That was made clear -- I took you to the standing committee on finance of the Paris Agreement, which is set out in our skeleton as well, where they make exactly that point. It needs to be -- all finance flows need to be consistent. That is not to say that all finance flows need to result in reduced emissions, but what they must not do is undermine the objectives of the Paris Agreement.

The Government plainly agrees with this, because that is the test that it appears to have set itself, we say, in the climate change report and, moreover, it accords with Government policy as set out in the Green Finance Strategy, and that is at supplementary authorities 4----

LORD JUSTICE STUART-SMITH: It is tab 4.

MISS SIMOR: It is supplementary authorities bundle tab 4, p.92.

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LORD JUSTICE STUART-SMITH: You took us to that a few minutes ago.

MISS SIMOR: It is aligning with -- yes.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Now, that policy was submitted to the UN by the United Kingdom under its obligation under Article 9(5) of the Paris Agreement and we can find that at tab 11 of the supplementary authorities bundle.

LORD JUSTICE STUART-SMITH: Is this referenced in your skeleton?

MISS SIMOR: I am terribly sorry to say I cannot remember whether -- I may have. We will check. So this is a document that is submitted by the United Kingdom under Article 9(5) of the Paris Agreement.

LORD JUSTICE STUART-SMITH: What page?

MISS SIMOR: I am going to go to p.210. This is what the United Kingdom is telling the UN it is doing.

LORD JUSTICE STUART-SMITH: In December 2020.

MISS SIMOR: So in the second paragraph down,

> "The Green Finance Strategy (GFS) states that Paris Alignment of all ODA will be achieved through: (1) use of carbon pricing in bilateral programme appraisals (2) ensuring investment for fossil fuels is in line with Paris temperature goals (3) a proportionate approach to climate risk assessment and (4) ensuring programmes don't undermine countries' NDC and adaptation plans. The approach to integrating GFS commitments into the

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> practice of the UK's ODA spending is underway. For example, in FCDO new related programme controls are being introduced, complemented by a more strategic approach …"

LORD JUSTICE STUART-SMITH: Why do I think that this is to be read in the context of a policy change between the date of the decision we are concerned with and December 2020? Am I wrong about that?

MISS SIMOR: Well, this is what they are doing. The ODA was already aligned. It is in the Green Finance Strategy in 2019. So in 2019 the UK decided that ODA funding should not be for fossil fuels and should be aligned. This is the report to the UN under Article 9(5) setting that out and explaining that all that finance is in alignment. So that is not a policy change, that is just a report of what it was doing since 2019. It is not saying here the new policy in relation to UKEF, which was announced in December.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Then we have the point about the FCDO which is the second paragraph,

> "Beyond UK practice, the FCDO is also working with multilateral partners, such as International Finance Institutions to strengthen Paris Agreement ambition, including through the publication and dissemination of plans for full Paris Alignment."

And the Foreign Secretary makes the point that we cannot persuade people to do this if we fund this Mozambique project. Then the last paragraph.

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Then 214, if you could just sideline 4.2, and then read 4.3,

> "The UK views this mobilisation and enabling environment support as an important step towards Article 2.1c of the Paris agreement; in which all parties committed to collectively align finance flows with low greenhouse gas and climate resilient development. Without the fundamental shift in the financial system as a whole, the climate goals of the Paris Agreement cannot be met.

Then 4,4, again if you could sideline, but perhaps quickly read the first and third bullets. (pause)

So it is unsurprising, in our submission, that the United Kingdom has now taken that policy up in relation to UKEF and, if you can turn to tab 14, you will see that here we have aligning UK international support for clean energy transition. If you go to p.258, you will see under "Scope"

> "Under this policy the UK government will no longer provide new direct financial or promotional support for the fossil fuel energy sector overseas1, other than in the limited circumstances outlined in this document, and align its support to enable clean energy exports. This policy applies to any new Official Development Assistance (ODA), investment, financial and trade promotion activity …"

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LORD JUSTICE STUART-SMITH: I am sorry, I must be getting confused. We are dealing with the 2020 decision and this document says at the top of the page that you have taken us to -- it sets out the details of the new policy of the UK Government to support - blah-blah-blah - effective from 31 March 2021.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Why are we seeing this?

MISS SIMOR: We are seeing this because, in my submission, 2(1)(c) makes no distinction between the kind of the name given to the national funding. So 2(1)(c) does not say "any development funding must be in alignment with Paris". It says, "make all finance flows". So 2(1)(c) does not care what a country calls its finance. What I am saying is that the Government recognised as far back as 2019 in relation to development finance that what alignment with Paris meant. In fact, they agree with us as to what -- insofar as they have articulated it in these documents, they agree with us as to what it means. That was followed by the CDC removing all funding for fossil fuels on 1 July and UKEF then in December. So now no UK finance is going to fossil fuels overseas save for in exceptional circumstances. My submission is that their interpretation of the law as it applied to ODA, subsequently CDC, and now UKEF, is the same and the correct interpretation of the law. And the law applied to this decision.

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If we turn, my Lord, to p.261, at the bottom of 261, para.3, we will see what is being prohibited and what exceptions are being allowed. "Support for unabated [that is without carbon removal technology] gas fired power generation". So it is not the development of liquid natural gas project. It is generation.

> **"…** is conditional on a country having a credible NDC and long-term decarbonisation pathway to net zero by 2050"

So that is what they would expect to see, which is what Mr Caldecott expected to see, but

> "support does not delay or diminish the transition to renewables; that the risk of the asset being stranded has been assessed and managed; that the project intends to follow best practice … etc.

Exceptional support will only be allowed if all of these conditions are demonstrated.

> "If the role of gas is not established in an NDC and long-term decarbonisation pathway to net zero by 2050, it will need to be demonstrated that: the project cannot viably be replaced by renewable energy sources …"

Because, of course, if you create a grid network that is dependent on gas and cannot be converted to renewables, you have by definition created a lock-in situation. But

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> "it contributes to domestic energy security; and that it is consistent with a realistic transition pathway to net zero …"

So they want to see that the country has done that.

> "including demonstrating that mitigation measures have been considered, preferably at asset level.
>
> *Allowed (example):* Support for gas power where this supports decommissioning of coal, alongside a rapid increase in renewables, and where renewables cannot meet total demand immediately. This would help a country onto a science-based net zero pathway.
>
> *Not Allowed:* Support for gas production, distribution and power generation into the global market."

That is for all the reasons that I have explained in relation to 2(1)(c).

MRS JUSTICE THORNTON: What do you mean by "all the reasons I have explained"?

MISS SIMOR: Well, the reason being that the UK will not fund countries to develop or sell energy externally, to export energy. This is actually about energy creation rather than actually taking new stuff out of the ground. But it will not fund revenue and we heard this is 13 billion -- it is worth 13 billion to Mozambique. In the scale of the consequences of climate----

LORD JUSTICE STUART-SMITH: Sorry, what is 13 billion?

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MISS SIMOR: We saw the figure that the net revenue to the Mozambique Government as a result of this project would be 13 billion. The United Kingdom does not consider it is in alignment with their Paris obligations to fund those kinds of revenue -- to do that. That is not what this is about. It will fund any energy for security purposes and when there is a clear transition to net zero.

The policy was implemented on 31 March and you find that in tab 13----

LORD JUSTICE STUART-SMITH: We find that on p.258.

MISS SIMOR: Page 250. It decides to move very, very quickly, the last line on p.250.

Now, the defendants' answer to this is they say that we have taken the interpretative -- the "purposive construction", in their words. They say we have taken the purposive construction in Article 31 of the Vienna Convention "too far'". I put it in inverted commas I should say.

Now, we do not understand what that means. The ordinary meaning of 2(1)(c) is clear. It is even clearer when viewed in light of its object and purpose. As we say, the defendants doubt that 2(1)(c) means anything at all. You find that at para.39 of their skeleton. They say, "Considering consistency with the Paris Agreement is not a quantitative or numerical exercise." And this is a plain misdirection of law.

Assessing consistency with the Paris Agreement is necessarily a numerical and quantitative

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exercise. That exercise must be carried out by reference to the best available science, pathways consistent with the temperature goals are numerical or quantitative assessments of available carbon budgets by reference to time.

The defendants sought to establish that the project would lead to a global emissions reduction for precisely that reason, we say, although I take it that that position has changed. But we say that, if it were different, they would simply have adopted the actual findings of Wood MacKenzie. They would not have needed to go so far as to actually conclude there was some kind of reduction. They would have been content with "there could be a reduction".

At 42.2 of their skeleton, the defendants suggest that they did not conclude that the net effect of the project would be to reduce net global emissions.

LORD JUSTICE STUART-SMITH: I am sorry, did you say para.40.2?

MISS SIMOR: Yes, it is the point you raised this morning and it is very difficult for me to argue with it now because that----

LORD JUSTICE STUART-SMITH: 42.2?

MISS SIMOR: 42.2.

LORD JUSTICE STUART-SMITH: I am sorry, my mistake.

MISS SIMOR: We say that, if the defendants are now saying that, in fact, they concluded the net

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global emissions would be increased, then the decision is vitiated for that reason, too, because we do say that the decision makers, the Secretary of State for the Department of Trade and Industry and the Chancellor, were not explicitly told that.

LORD JUSTICE STUART-SMITH: Well, they were if they read the climate change report.

MISS SIMOR: Not in our view. In our view, the conclusions in that report suggest a net reduction. But, I mean, it may be that we are reading it by reference to the detailed grounds, but----

LORD JUSTICE STUART-SMITH: Well, that is entirely possible.

MISS SIMOR: I will look again at it, but that is the way that it was approached in the summary grounds and the detailed grounds and, as I have said, I do not understand how it is said to be Paris compliant, if it leads to a net increase in global emissions. It has to lead to a net reduction, necessarily.

LORD JUSTICE STUART-SMITH: Well, rather like you, we are not expressing a final view, but it was our concern about what the CCR actually said that prompted the little bit of work that we did and the question I asked Sir James Eadie this morning.

MISS SIMOR: (pause) I actually have not got any time I do not think to deal with the point about Mozambique. We will look back at our skeleton and see whether there is anything that we absolutely must get across to you that we have not got across to you in that, if I could have your leave just to -- we will not burden you with more paper but if there are one or two bullet points----

LORD JUSTICE STUART-SMITH: All right. Well then you will need to have a word with Sir

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James about that. In principle, as I have said, we want to get this right and we want to get it right having understood what the case is about. I think, although we have not discussed this, I think this court will make reasonable allowances if people find at the end of what is quite a compressed but not unduly compressed timescale, if there is something of burning importance which they think that they have not done justice too, a short note can be submitted. Not as a prelude to responses and this, that and the other, but I mean, we have had a 51-page skeleton argument from you.

MISS SIMOR: Yes. Well, it is a highly-complex case. It is an extremely complex case compared with a standard judicial review. It is complex legally, it is complex factually, it is complex scientifically. If I may push to five-past, I just want to make a couple of comments on the social rented of review.

LORD JUSTICE STUART-SMITH: Any compelling objection to going to five-past?

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So, as I have already said, tenability we say is not the correct test and we consider that it is difficult for this court to take a view on the law, but hold that a decision is lawful even though it does not necessarily agree with that analysis of the law. We say that it is, in principle, wrong for all the reasons set out by Lord Justice Green in the *Heathrow* case which we have referred to in detail in our skeleton.

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We say that it does not matter, because, essentially, there is no tenable interpretation here by the defendants as to the meaning of 2(1)(c), 3, 4(3) to 5 and 9 of the treaty.

We also say that it is wrong as a matter of principle for a court generally to accept the idea of a tenable and unarticulated interpretation of the law. It is important in that context to be aware that there is a need for clarity globally as to the meaning of these provisions and unarticulated interpretations by Governments accepted by national courts is not going to help that clarity. National judgments do become part of the international discourse and generally across the world arguments about subjects like tenability in the context of reasonable analyses are not helpful ways of interpreting international treaties. It is the role and duty of the courts even in hard cases to interpret the law, which is precisely what Lord Sumption said in the *Benkharbouch* case and Lord Justice Green in the *Heathrow* case, both of which were concerned with international law interpretation. It is unhelpful and dangerous for national courts charged with that interpretation not to take it on and do it.

So that is where I want to end. As I said, for our case, we say that it does not actually matter, so it is not something that is determinative in the facts of our case, but we urge you, nonetheless, to apply your minds to actually giving meaning to the relevant provisions.

LORD JUSTICE STUART-SMITH: Thank you very much indeed. Thank you for your patience in dealing with predominantly my interruptions. We will start again at two clock.

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(1.06 p.m.)

(Adjourned for a short time)

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: My Lord, my Lady, I am going to structure my submissions if I may by reference to the order in which the grounds are pleaded against us. So I am going to deal with ground 1A first, which is that we committed an error of law. I am going to start where my learned friend effectively ended with the applicable standard of review and I am going to do that because it is quite a big constitutional issue, as you can appreciate, there cannot in truth in relation to this sort of issue be subject matter distinctions. And my learned friend's submissions proceeded on the assumption that the correct position in law was that if only a decision maker takes into account a provision of international law, that provision of international law as a result becomes in effect part of domestic law. By that I mean, becomes part of domestic law, so that the court can without more judge whether the interpretation applied to that provision by the decision maker was correct or not.

LORD JUSTICE STUART-SMITH: There is a variant on that. I am sorry to use that word, but there is a variant on that submission, which I think is also in play which is, if a decision maker, even though they did not have to treat something as material, does that not import the need to interpret the thing that they did not need to take into account but have done? So, if, for example, you did not need to take Paris into account----

SIR JAMES EADIE: Yes, yes.

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LORD JUSTICE STUART-SMITH: -- but you said----

SIR JAMES EADIE: I do.

LORD JUSTICE STUART-SMITH: "I am going to and I do", then is it not still necessary for the people reviewing the decision (i.e. us) to form a view about what Paris means.

SIR JAMES EADIE: That is exactly the issue that I am addressing. No one is suggesting that we had to take Paris into account. Everyone is agreeing that we could have said we are not. It would have been a pretty odd thing for a Government to do, no doubt, but in lots of different areas, international law guides governmental decision making, because on the international plane the UK is bound. So I am starting from the premise that that is the position and the issue I was seeking to describe was exactly the one that my Lord has put to me.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: Is it enough to bring in effect those international standards so they become binding and plausible standards for you to interpret and apply, as courts in the United Kingdom; is it enough simply that the decision maker has taken them into account? That is the very issue I am going to address.

LORD JUSTICE STUART-SMITH: And in that are you going to take into account or help us with the related question which is, is there another stage where to bring it to the facts of this case, what you do should not be characterised as saying "I am going to take Paris into account" or "I am going to ensure that my decision was Paris compliant", but the slightly more subtle

response which is---

SIR JAMES EADIE: It is a subtle----

LORD JUSTICE STUART-SMITH: -- "I am going to do things which are in relation to Paris but I may set my own terms", if I can put it like that. I am not expressing it terribly well, but I hope you know what I mean.

SIR JAMES EADIE: I do exactly. You are positing a position in which the decision maker does not say, or at least does not clearly say, "There is the initial standard, I am going to conform to it". The decision maker, rather, says something more nuanced, which is "There is the international standard, I am going to take it into account in order to see what flavour it has without necessarily reaching some kind of complete final view on the evidence, etc., etc, etc.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: That position I am going to come to.

LORD JUSTICE STUART-SMITH: Thank you. Because, if the claimant is right, if there is a right interpretation of Paris, and if you did not satisfy the right interpretation of Paris, you need that as a fallback position.

SIR JAMES EADIE: I do. So one has to cover that, but it is obviously amongst the range of things that the decision maker can properly do, I respectfully submit, but the starting point, and I am going to give you the propositions and then I am going to work through the case law, because it is not an uncomplicated issue, but the starting point is that -- well, nothing for my

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Lord is complicated----

LORD JUSTICE STUART-SMITH: No, I take it as a threat.

SIR JAMES EADIE: Yes. No, I had not got to the threatening bit. The threatening bit is the breadth of the application of the principle were you to go against me.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: So there is the threat. But, my Lord, can I take it as a starting point, as it were, that we are all agreed that we do not have to take into account the international obligation here. The threat is a serious point because, as I said at the outset, there cannot really be subject matter distinctions. It is either good enough or it is not.

LORD JUSTICE STUART-SMITH: I understand it to be common ground -- I think we understand it to be common ground that Paris is not independently incorporated into English law.

SIR JAMES EADIE: Yes, unlike, for example, the - and there are myriad ways in which it can be done, but, unlike, for example, the Vienna Convention on Diplomatic Relations, which was the subject of the Supreme Court's judgment in *Malki*, which I am going to take you back to for the interpretation under the Vienna Convention principally, but there the technique for incorporation was the Diplomatic Privileges Act 1964, I think it was, which actually scheduled various but not all of the provisions of the Diplomatic Convention on the international plane. So there are ways in which it can be done.

What I was going to do was to start at least with that issue of principle, as defined, and I

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was going, if it is helpful - and I hope this is a convenient way of doing it - I was going to give you six or seven propositions of principle and then come to the cases, if that is an acceptable way of doing it.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: The first submission is that the correct starting point is dualism. The correct starting point is not that error of law is correctable and it is not that error of law is correctable, because that begs the very question which the analysis is aiming to answer, which is whether or not the treaty is law or creates - and/or creates - domestic legal standards. The Paris Agreement is international law and has not, as we have been discussing, been transposed into domestic law by any legislative act and the starting point, and it is important that it is the starting point, is that set out in the famous passage from Lord Oliver in *J H Raynor*. I am sorry to start with an authority which was only recently provided to you, but I hope that it made its way to you, the recent Supreme Court judgment in *SC*.

LORD JUSTICE STUART-SMITH: It did, but I think that I may have left it behind. We have got *Balajigari*, which is my favourite case this morning.

SIR JAMES EADIE: You have got *Balajigari*, but then *SC* I think was provided a day or two ago.

LORD JUSTICE STUART-SMITH: I have got it electronically.

SIR JAMES EADIE: Do not worry. If not, there is a hard copy here. Does my Lady have it?

MRS JUSTICE THORNTON: I have it on an email.

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SIR JAMES EADIE: You do not need another one.

MRS JUSTICE THORNTON: Well, I will -- yes.

SIR JAMES EADIE: If it is there. I am sorry, it is a wedge of paper but I am only going to go to some short paragraphs.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: This was a case in a completely different context and concerned the two-child rule, so far as the payment of benefits was concerned. But the Supreme Court was concerned in that context about the way in which the courts had been analysing human rights issues by reference to international instruments. In that context, the United Nations Convention on the Rights of the Child. So it went out of its way to emphasise various things by starting its substantive judgment with three preliminary issues, as they put it - I am going to the title above para.73. The second and third of them do not trouble us, because they are to do with margin of appreciation and all of that and the use of Parliamentary materials. But the one that is of interest is the title above para.74. Can I invite you to read that to yourselves, if you will, because it will be quicker, paras.74 through to the end of para.79? It is not quite the end of the section, but from para.80 onwards they come to an issue which does not concern us, which is how you go about using international law under the Human Rights Act, so to the end of para.79, if you would. (pause)

That will all be very familiar stuff I am sure, but you will see the basic analysis, if I can

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summarise up to the end of para.78 in a single sentence, that is a strong reassertion of the correctness of dualism. When they get to 79 and the following paragraphs, the question they are there addressing is to what extent that otherwise sound position on dualism is altered by the introduction of the Human Rights Act with the Convention rights attached and, therefore, the approach that the ECHR applies when interpreting the rights in the Convention.

So the principle is not, we respectfully submit, and, consistently with that basic starting point, could not be, that whenever a public body has regard to an unincorporated international convention it is for the court, in effect, to treat that convention as if it were part of domestic law; in other words, by treating it as imposing domestic public law obligations which it is the court's function to interpret and apply as creating such standards. That would be to create, in effect, treaty obligations as, in effect, domestic obligations. That is highlighted, we submit, that starting point - still under the first proposition - as a feature in this case. You have seen in the witness statement of Maxwell Griffin - core bundle 1, p.198 and following, tab 12 in your essential reading bundle - a very detailed analysis of various policies in place to do with climate change, to put the matter at its broadest.

On the logic of my learned friend's argument, none of that really matters. The only thing that matters is that you have some international standard or treaty which the decision maker

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has had regard to. Of course, if you set out a range of policies, by definition, in public law terms, they are there to be taken account of by decision makers. That would be, let us be very, very clear about the logic, not to threaten again, but be very clear about the logic, that that would be to create a situation which was both surprising and extremely concerning constitutionally, especially given that you would not expect the Government to ignore international treaties, namely, that the whole suite of treaties and standards - and there are very many - are effectively transposed into domestic law.

LORD JUSTICE STUART-SMITH: Or could be.

SIR JAMES EADIE: Or could be, but very often will be, if you are dealing with a range of policies which may be taken into account or may not be. I will come more directly to the situation where the decision maker does take them into account, because there are undoubtedly some cases where that has been treated as a significant factor by the courts. But the breadth of the submission made by my learned friend is simply the decision maker takes it into account, ergo the thing creates a domestic legal standard even though it used to exist only on the international plane, and that applies across the range, on the logic of her argument.

That is the first point. The second point is that there is a very good constitutional reason for concern about such a course. And the best exposition, if I may respectfully say so, of the nature of that constitutional concern is the article - it might be thought now reflected in the ringing endorsement of dualism in *SC* by Lord Sales, when he was still Philip Sales, in the

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article that you will have seen reference to in *Cornerhouse*. That is behind tab 57 of bundle 4 of the authorities, if I can invite you to take that up briefly. It does not really matter with what level of authority Mr Sales, as he then was, was speaking in this article, but it might be thought that this had become his specialist subject on the basis that he had spent some considerable period of his tenure as Treasury Devil arguing about whether the ECHR prior to the HRA was an interesting thing or a non-interesting thing so far as domestic courts were concerned. But he starts, as you will see, on p.2952 in the second full paragraph between the hole punches, "In a dualist state". Can I invite you just to read that paragraph? (pause) Then over the page, on p.2953, under the heading "The constitutional context", he sets out the basic constitutional reasons that underpin dualism. Why is it that treaties - in effect, agreements on the international plane entered into by the executive - why is it that they are regarded as being on a different plane? Can I just invite you to read from the beginning of that page at the top down to the end of the paragraph just by the second hole punch? Where it says "L.Q.R 391" you can stop. (pause)

LORD JUSTICE STUART-SMITH: I cannot remember. Was this cited in *Miller 1*, I think it was, was it not?

SIR JAMES EADIE: I am pretty sure it was. It certainly would have had this. We had *Corner House*, we had the----

LORD JUSTICE STUART-SMITH: I certainly have read it for the purposes of this hearing and it has a familiar ring about it.

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SIR JAMES EADIE: Yes. I do not think that they cited from it in *Miller 1*, but it is all consistent with that. Indeed, it may be the case of proclamation which created the big echo in my Lord's mind, because that certainly was the rock on which everything I tried to submit foundered.

LORD JUSTICE STUART-SMITH: It foundered. Yes.

SIR JAMES EADIE: But you will see the note of caution that rings out of that paragraph by the second hole punch is based on the principles, the two core constitutional principles, previously set out and described.

Then over the page, on 2955, if I may, you will see, if I can just invite you to read the two sentences at the end of that second paragraph on the page, beginning "There is no general obligation", just the last two sentences of that, "The House of Lords reaffirmed" to the end of that paragraph.

MRS JUSTICE THORNTON: I am sorry, where are you?

SIR JAMES EADIE: I am sorry, my Lady. Page 2955, under the heading "Unincorporated treaties", that paragraph, just the last two sentences. By all means read it all if you wish, but -- (pause) Then he picks up the no direct effect aspect of that. Overleaf on p.2956 you will see the title about a third of the way down the page, you will see the principle described in the first paragraph under that heading of "No direct effect" and to the authorities that are cited in the first sentence of the next paragraph, "This principle was reaffirmed by the

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House of Lords" and so on, citing *Brind, Lyons* and *McKerr,* all of which were pre-HRA cases, to which can now be added *Miller 1*.

Then he comes to various permitted uses of international law, including on p.2958 "Unincorporated treaties as an aid to statutory interpretation". I am simply going to ask you to note the title. These are the permissible uses all thrashed out, as I say, on the anvil of pre-HRA/ECHR debate. Then "Unincorporated treaties and the development of the common law", so a clear distinction between uses by the courts in exercising a judicial discretion and developing the common law and "Unincorporated treaties and the exercise of administrative discretion", which is different. That is the bit that concerns us.

I am sorry to keep asking you to read things, but I suspect that it will probably be quicker to do it that way. Can I ask you to read from the final paragraph on p.2958 over to end of 2959? Could I also invite you just before you start that to put a little bubble around footnote 77 which is at the end of the first sentence of that little paragraph, the last line of p.2958. That is *Brind*. That is a reference to *Brind*. So down to the bottom of that page and then down to the bottom of the next page, if you would, 2959. (pause) It is this article - this thinking - that is the start of the tenability theory, as you can see. (pause) Perhaps the key bit is the second part of that page, starting from "Part of the problem here is that the executive may not have any practical option but to direct itself by reference to international

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law", down to the end of the paragraph. (pause)

You see what is being done, he is starting from a position of dualism, he says "That is a strict and accepted position". He notes that in at least one case at that stage, which was *Ex Parte Launder* - perhaps also *Kebeline* as well. In those cases the courts had gone and examined in an ECHR context, which is very important to bear in mind, international law even though not part of domestic law, on the basis that it had been taken into account by the decision maker. The rest of that paragraph is, as it were, *dubitante*, at least the breadth of that approach and trying to fashion or to shape some form of constitutional compromise that, on the one hand acknowledges dualism, the strictness of that principle, but, on the other hand, acknowledges the point my Lord was putting to me, "Well, what do you do if the thing that has been taken into account is a material consideration?"

LORD JUSTICE STUART-SMITH: The two mechanisms being marginal appreciation and tenable. Can I just ask a very basic question while I am about it? Is there any difference between tenable and rational or not to be rational?

SIR JAMES EADIE: No, I do not think so. It is just acknowledging margin. It is acknowledging that the primary decision maker is the executive, for this purpose, even though slightly strangely, because it is an issue of law -- or at least international law. I am falling into my own trap.

LORD JUSTICE STUART-SMITH: Thank you.

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SIR JAMES EADIE: I am not sure there is. I am not sure that anyone has strove to define it. What they are actually after is a thing that says, "This is a thing that says …" It does not become a domestic legal standard, like any other, so that the courts would be opining on its interpretation and, indeed, application.

MRS JUSTICE THORNTON: So, when in your skeleton you refer to "tenability", in terms of interpretation and rationality, when it came to----

SIR JAMES EADIE: I did. I am not sure there is much difference between the two, but the terminology in both contexts has been used rather differently. And what that was designed to do was to demarcate a boundary. You can have a debate around the interpretation of an international provision, and I am going to make my submissions in relation to that, but that applies to its meaning and effect, if you will. It is an issue of interpretation. When the question is how to apply that, you end up weighing facts and holding lots of complex different things in your head, and that is paradigmatically rationality, because you are there dealing with the weighting of facts rather than in the analysis of what the legal framework looks like. So, although the two words may be used interchangeably, and I am not sure that they are doing terribly different things, because they are both creating margin, and both recognising constitutional primacy of the decision maker, which is the executive, there is a potentially important distinction between, on the one hand, the ascertainment of the meaning and effect of a legal provision and, on the other hand, the weighing of fact.

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That is all I wanted on the Sales article, but I thought that it was important to show it to you because, as we will see when we get to the case law, this was a thing that attracted Lords Bingham and Browne in *Corner House* and, hence, the analysis, but this is the start. It comes out of Lord Sales' big brain.

That is the second proposition. The third proposition is that, where a decision maker does decide to have regard to an international convention or an international standard, that, as we have established, being an optional not a mandatory relevant consideration, perhaps to put it in public law terms, there is a choice on the case law, and that choice is as to whether or not the court's ruling on the meaning of such provision is justiciable at all - it was not, for example, in the *CND* case - or, even if it is justiciable, what approach to interpretation should be taken? And that takes one into the territory that I have just been demarking, in other words, tenability, if one wants to use that phrase - and it is the phrase used in the case law so I will stick with it, if I may - tenability for interpretation and then, plainly, rationality for application, in any event.

Fourthly, there are, or there is, a series of features on the current case law that may bear on justiciability and would, on any view, also be relevant to see what the standard of review should be. Is this one of those cases where the court should simply treat it as a domestic legal standard and rule itself or is it a situation in which a tenable interpretation approach is

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the right one? There is a crossover in terms of relevance as factors to that set of issues between things bearing on non-justiciability and thing going to tenability. We will see this when we get in particular to paras.164 and 166 of the *Heathrow* case. That is, it might be thought, unsurprising - in other words, that coincidence or potential coincidence of factors between those two issues, because, ultimately, they are simply different points on a margin spectrum: non-justiciability is all black from the court's perspective. It is a "don't go there". Tenability says we accord a margin to the decision maker in working out what the standard means.

Fifthly, it is clear that, if the executive is exercising power and does not take international law into account at all - it is a point that I have already made, but it is noted anyway - there is nothing unlawful about that. That was clearly established as along ago as *Brind*. Of course, the more the courts enter this territory, as Lord Bingham points out in *Corner House*, the more disincentive there is - a slightly strange disincentive for a court to be creating - the more disincentive there is for a decision maker actually taking into the account the international standards, because the moment it does so it opens itself up to judicial review.

That fact is important in its own right - in other words, if it does not take it into account at all, there is no judicial review error, there is no error of law. It is important in its own right

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that that should be so, but it also provides, we submit, an indication of the right approach normally if it does choose to have regard to an international legal standard, as it will often wish to do or, in practical terms, have to do, as Lord Sales pointed out in the article.

LORD JUSTICE STUART-SMITH: Sorry, is this number six?

SIR JAMES EADIE: This is number five still.

LORD JUSTICE STUART-SMITH: This is still number five?

SIR JAMES EADIE: Yes, it is a consequence of the basic proposition that you do not have to take it into account: important in its own right, but also important because it indicates the correct approach, if they do.

It would be very surprising - which is the punchline of that latter point - if a taking of such a voluntary step immediately had the effect of transforming international law (not sanctioned by Parliament) into some form of binding rule of domestic public law. And, for all the reasons that Lord Sales pointed out in the article, there is serious constitutional objection to that.

Sixthly, there may be a need----

LORD JUSTICE STUART-SMITH: It is a sub-juridical equivalent to changing policy by mistake, what we were talking about yesterday, with the claimant.

SIR JAMES EADIE: Yes.

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LORD JUSTICE STUART-SMITH: One of the concerns of the people involved here was that, if they went in a particular direction, although it would not actually be a statement of policy, it would have the effect of creating a change of policy by mistake.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: I think that that is -- it is a similar idea, is it not?

SIR JAMES EADIE: It is. It is an aim(?). One can put the same point in a slightly different way as, as it were, a lighter form of constitutional concern. You are sure that the principle constitutional concern was that, if it, as it were, was all in the hands of the executive, then all these standards come down into domestic law through public law without the interposition of the primary maker of law in our jurisdiction, which is Parliament. To some extent the same point can be made in relation to policy, along the lines that my Lord was putting to me, as a slightly lesser species of that, because, ordinarily, under public law, the executive is the body which decides what its policy should be. As Lord Justice Laws in the context of legitimate expectation frequently reminded us, you can make and remake policy as Government, but that is essentially a decision which is properly for the executive and, if the consequence of simply taking something into account is "Boom! There it is, it is a standard", then there is a problem. But, yes, I agree with my Lord.

The sixth point was to acknowledge that there may at some point be a need, and at some level, be a need for a proper rationalisation of all of the case law. On its present state, there

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appears to be a factorial analysis as to both justiciability and standard and there may be some very unusual cases within that spectrum in which the court considers that it can and should simply treat the treaty as a domestic standard. That I think has only really been done in the context of human rights cases -- query, query GATT in relation to the *Heathrow* case, but certainly in relation to the ECHR cases, those early ones, *Launder*, *Kebeline*, and you get a very different approach at the other end of the spectrum in cases like *Corner House*, where you have got the loose(?) standards and all of that. I will come to what the factors are in a second, but the sixth point was simply to note that at some point it may be that the Supreme Court will need to sit down and work out what the true rationalisation of principle is for all of this.

LORD JUSTICE STUART-SMITH: I thought for one ghastly moment you were going to suggest we had to do that.

SIR JAMES EADIE: I was deliberately making the sixth point to give you comfort that you would not have to do that, because I was not inviting you to do that. And I suspect that it would have to be at the very least at the level of the Court of Appeal and probably of the Supreme Court, because lots of the authorities are from there and quite a lot of them do not actually grapple with lots of the constitutional issues that might arise. Indeed, there was at least the flotation of that invitation and the suggestion that even *Lauder*, even on its own terms, might have been wrongly decided in a case called *Barclay Brothers* in the Supreme Court and they did not need to go there, because it went off on another point before they got there:

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no doubt, because they could see it coming. So I am not suggesting that. I am going to proceed on the basis that it is a factorial analysis. There is not, as it were, some in limine problem or objection. So that is the sixth point.

The seventh point is that the core factors tending towards either court abstinence through justiciability, or non-justiciability, or constraint through tenability are those identified in *Corner House* and the *ICO* case, Mr Justice Lloyd Jones, as he then was, which are then applied on the facts in *Heathrow* without demure as to the basic analysis. In essence, if I could identify three of the core factors that appear from those cases, the framing of the international measure: that is the point that goes, "the vaguer it is and the more broad brush it is and the more aspirational the measure is the greater the likelihood of the domestic court exercising very considerable constraint in this sphere". That is one.

Two is enforcement via an international court, which has developed a body of jurisprudence to assist you on the meaning and effect of a particular provision as compared to an international treaty in which such systems and such enforcement mechanisms either do not exist or have not been operated. So that the court is, in effect, operating blind by reference to jurisprudential explanation of the meaning of the provision.

That, perhaps, leads to the third point which is that there is no clear guidance. If there is not

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any clear guidance in international case law as to how the measure should be interpreted, that is another factor. That is all to be contrasted, therefore, and perhaps it is a key contrast, between lots of situations that create international obligations or standards, on the one hand, and the ECHR - or perhaps even the ICCPR as well, but the ECHR certainly - on the other, because the ECHR does have that whole mechanism. It does have determination by the European Court of Human Rights as to the meaning and effect of the basic provisions in the Convention. So you have got that body to aim at.

The final point to emphasise is one that I have made already, but just to get it down. It is very important to bear in mind the distinction between interpretation where the issues that I have just sought to define and describe are in play, on the one hand, and application, on the other; in relation to the latter, it is plain that the right approach is rationality.

So those are the principles and I hope that will then considerably speed up the spin through the case law. Can I start with *Corner House*, which is bundle 2, tab 25. You will recall the context of *Corner House*. The OECD was the relevant international treaty that was concerned and the context was the threat by the Serious Fraud Office to investigate some bank accounts in Switzerland which produced a direct and pretty serious looking threat to withdraw security co-operation, effectively, from Saudi Arabia.

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The House of Lords overturned and disagreed with the Divisional Court judgment of Lord Justice Moses and Mr Justice Sullivan. Lord Bingham's speech starts at p.1065, but the key passage for present purposes is paras.43 and 44. (pause) The claimant bases itself squarely on *Kebilene* and *Launder* and Lord Bingham, at least, is highly doubtful that they do actually provide the answer for the reasons that he gives in the second part of para.44. In *Launder* there was no dispute. In *Kebilene there* was a live dispute but there was judicial authority in the form of the ECHR structures. Then the disincentive that he draws attention to in the final sentence of 44 I hope chimes with some of the submissions that I have made as well.

That is Lord Bingham. Lord Browne at paras.65 to 68 are the key passages. Can I invite you to read those because you will see -- you do not read the whole of 68 because you have read, and I particularly emphasised the bit from the Sales article which he cites at para.68. So 65 through to the end of 68 if I may invite you just to cast an eye quickly and I hope that it will not take too long, because most of those things I have covered already. (pause)

LORD JUSTICE STUART-SMITH: How far do you want us to go?

SIR JAMES EADIE: To the end of 68 if you would, but you can miss out the quotation because you have read that already. And you will note the second half of 67. (pause) So that is *Corner House*.

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ICO Satellite is Mr Justice Lloyd Jones and that is at tab 26, so the next tab in the same bundle, I hope, and he comes at this issue in the different context of the - he comes at this international issue and someone taking it into account issue. At para.88, again, I am not going to invite you to re-read all of that because lots of it is citation from *Corner House*: 88, 89, 90 and 91 all citations from *Corner House.* Then he identifies that there is a series of circumstances in which domestic law does take into account international obligations, but that has been acknowledged throughout.

Then the key paragraph, perhaps, which I would invite you to read, is 94, because you can see the factors developing, the dispositive analysis -- having analysed what the basic approach of principle is, the dispositive analysis is really in para.94. (pause) It is effectively taking Lord Bingham's analysis on and Lord Browne's analysis on and Lord Sales' analysis on and then applying those and describing them as policy reasons in the latter part of para.94, but you see the sort of things that are being taken into account.

That line of case law is then applied directly by Mr Justice Dove. You can put that file away if you would and take up file of the authorities. It is Mr Justice Dove in *Elliott-Smith* tab 47 of bundle 3. Can I invite you to read para.55 and the first sentence of para.56? (pause) It is simply an application of the approach. Just for your note, I do not invite you to turn it up, but the same approach also by Mr Justice Holgate in *Save Stonehenge* at tab 49 of that

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bundle and the relevant paragraphs are 215 to 216.

LORD JUSTICE STUART-SMITH: They are cited in your skeleton, are they not?

SIR JAMES EADIE: They are cited in the skeleton, I think. Then we come to *Heathrow.*

LORD JUSTICE STUART-SMITH: Just while we are on it, tab 47 in my bundle is the last tab, but at p.2370 is - it may absolutely not matter - we have Mr Justice Fraser in *Good Law Project v. Cabinet Office* and the same again.

SIR JAMES EADIE: I have got that at the beginning of bundle 4.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: 2370.

LORD JUSTICE STUART-SMITH: Okay. Well, you have the advantage of me.

SIR JAMES EADIE: I am sorry, but as long as you have them all. I suspect Mr Justice Fraser----

LORD JUSTICE STUART-SMITH: It is obviously a very important decision, I have got three copies of it.

SIR JAMES EADIE: Particularly important, no doubt, because I think the relevant part of it for our purposes was the one you mentioned yesterday, which is picked up and dealt with in *Gardner* by Lord Justice Bingham and Mr Justice Garnham a few months back. It is that point about experts and admissibility -- admissibility of experts and comments and how JR is not meant to be a battle of experts and so on.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: So you can at least throw away two of them.

LORD JUSTICE STUART-SMITH: Thank you. That will make all the difference.

SIR JAMES EADIE: It may not make much difference. But *Heathrow* is at tab 46 which probably is in the same bundle, bundle 3. The context was a pretty specific one, which was the GATT case -- the GATT treaty. The analysis in question really starts with the title above para.135. Again, I am not going to seek to question any part of this judgment at the moment because, as I say, I am not inviting you to overrule or do anything of that kind, but at some point someone is going to have to rationalise whether this actually works as an analysis.

LORD JUSTICE STUART-SMITH: I am sorry to interrupt your flow, but is justiciability an issue as such?

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: I mean, this morning you said it was not, so we are simply looking at----

SIR JAMES EADIE: We are simply looking at tenability and the reason I am going to the justiciability analysis here is because, as I said earlier, they are really parts on a spectrum: do you not go there at all or do you go there subject to the tenability standard? In this case we restricted the argument to tenability, but some of the analysis of the factors that bear on both you see being considered under justiciability, if that makes sense. I mean, there certainly could be a justiciability argument here, because lots of the factors that it identifies as bearing on that issue would be in play here, some of the factors I mentioned in my sixth, I think it was, submission.

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MRS JUSTICE THORNTON: So why is your case (inaudible) justiciable?

SIR JAMES EADIE: My Lady, I think that we have recognised that the tenability standard is good enough for us and we have stuck there. I am not sure there is anything terribly principled about it. One could have gone the whole hog but we have not done. We have simply gone on to the tenability standard. I am not seeking to persuade you this is non-justiciable.

MRS JUSTICE THORNTON: So it is not to do with the fact that there was an attempt to apply Paris?

SIR JAMES EADIE: It is not, because that is the common starting point for both limbs.

MRS JUSTICE THORNTON: Well, the other climate change cases do not have that link. This is more akin (inaudible) GATT. The Government thought that it was taking account of its international obligations, so I wondered if that is why you (inaudible).

SIR JAMES EADIE: No, it is taking it -- Well, in all these cases it is taking account of an international obligation. That is the necessary starting point for the analysis, because, if it has not, no one can complain about it, so the starting point for the analysis is always that it has been taken into account and so, to that extent, it is similar to the GATT case, it is similar to the ECHR cases of *Kebilene* and *Launder*. It is similar to all the other cases. From that perspective, a true reason for identifying that factorial analysis and what those factors might be does, I respectfully submit, and I will come to it in due course, provide a clear distinction between the sort of situation we are dealing with in relation to GATT - or they were dealing with here in relation to GATT - and ours, because they focus, as you will recall, on the way

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in which the international obligation is framed, at what high level, what are the mechanisms for enforcement, how does all that work? Is there a body of case law which you can go to to inform yourself about the meaning? Those factors do provide points of distinction, I respectfully submit, in defence of my unprincipled position.

As I say, part of it, I suspect -- I mean, part of it was really the point that I made earlier which is that at some point someone is going to rationalise how all of this works, but I am not inviting this court to go here. For present purposes, it is enough for me, anyway. Perhaps, I ought to put down a formal marker about appeals if it goes on, but I am not sure that is truly necessary. At this level, I am not saying that it is *Ex Parte Tarr* or anything of that kind. I am accepting the correctness of dishonest facts. We just say that it is different.

So, just to show you very briefly the nature of the analysis, I mean it is a long and complicated judgment, which deals first with justiciability and then with the standard. The true and core principle, we respectfully submit, is the one identified at 143 in the citation from Lord Oliver in *Tin Council* and, of course, Lord Justice Green and Mrs Justice Whipple did not have the benefit of the wisdom that you saw in paras.73 to 76 of *SC,* reinforcing that message.

Then the court analyses various different cases, including *Launder* at 150, *Kebeline* at 152,

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Kuwait Airways at 153, *Ecuador v. Occidental* at 154, although it might be thought that that is a very, very different case indeed, because that was about an agreement to arbitrate contained in a bilateral investment treaty. Then the explanation for non-justiciability, you will see at 155. He gives in 155 the five examples, as he describes them, of Lord Justice Mance in *Occidental*, I think it was, the five examples that do allow international law or treaty obligations to be considered. And it might be thought that describing those as examples, although he says they are intended to be non-exhaustive, is slightly underplayed on the basis that those principles, those acceptable uses of international law, were thoroughly thrashed out in the period, in particular, prior to the HRA coming into force and might be though to be, if not entirely exhaustive, at least jolly close to it.

Then *Corner House* at 156, and he cites the bits that I have taken you to from Lord Bingham and refers to, but does not cite, Lord Browne. Then he distinguishes the position in *Corner House* as you see at 157. This is back to the factors that I identified. You will see the principle basis that he deploys for distinguishing *Corner House*, which I hope chimes with the factors that I was identifying before you.

Then *ICO Satellite* at 158, Mr Justice Lloyd Jones, and he cites 92 which sets out the permissible uses that had been identified and he also cites 94. You will see at the beginning of 160, prior to the citation of 94, the beginning of what I have described as the crossover

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between the factors bearing on justiciability and the factors bearing on the tenable standard. That is why I go through this case law, because all of those factors, as it were, can play under both, but here he is analysing them under justiciability.

Then 161 you will see, again, his explanation of what Mr Justice Lloyd Jones was doing in *ICO* which again illustrates and bears on the factors that I identified.

Then his analysis of justiciability, as it were, goes outwards. It does not just rely on those factors. He appears to be taking into account - and I make no criticism of him for this - but he appears to be taking into account the broader range of things that tend to bear on justiciability as an issue in 164. But, of course, it is to be borne in mind that those broader issues about non-justiciability are to some extent not quite at the heart of the issues that we are confronting or, indeed, he was confronting.

From 166 onwards, he identifies why it is that in the GATT context, and applying the various factors that he does, particularly from para.170 onwards, he decides that justiciability is all about what he describes as grounding and then identifies a series of factors that he considers to be relevant to the justiciability question. As I say, some of them have strong echoes into tenability, for obvious reasons, certainly on the analysis of Lord Browne and Lord Bingham and, indeed, the other judges in the cases I have taken you to.

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Again, as I say, I make no points at this stage and at this level about the acceptability or the correctness of all of the factors, some of them it might be thought tended to generality in a way that would tend to create an almost inevitable justiciability for international law provisions, whenever a decision maker took them into account, and that would be flatly contrary to the approach that Lord Browne was very concerned to make clear in the second half of para.67 in *Corner House* as you will recall, if they tend too far to that direction. But you will see that many of the factors there either are non-applicable on the facts of our case (see, for example, the fourth one at 173) and, indeed, the one at----

MRS JUSTICE THORNTON: Paragraph 173?

SIR JAMES EADIE: 173, that is not applicable.

MRS JUSTICE THORNTON: You say there is a fourth bullet point.

SIR JAMES EADIE: I am sorry, the fourth point at 173. You see the structure of the analysis. At 170 he is listing all the factors that he says leads to the conclusion of justiciability and that runs through to the seventh one at 176. But quite a lot of them are -- as I say, a few of them tend toward generality and, therefore, have a question mark -- at least, in terms of analysis, if I may respectfully, at least, put down the question mark. But many of them are not applicable on any view to our facts: e.g. the third factor at 172, the fourth factor at 173, the sixth factor at 175 and the seventh factor at 176, all non-applicable in our circumstances. The one that is of real interest, it might be thought, is the fifth one at 174, which provides a

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serious point of contrast.

Then at 178 he turns to tenability. The first sentence of 178 is undoubtedly correct. They have indeed in all of the cases that I have taken you through established that as the standard, but the reason for spending a little time on the Sales article was because it explains the jurisprudential underpinnings of that. Why did they introduce it as an important question? And they introduced it for extremely good constitutional reasons, all of which are explored and all of which you see then reflected in the nature of the factors that are developed by the courts to tell you where you are on that spectrum between non-justiciability and tenability.

Then 180, as you will see, he returns to what we respectfully submit are the key and important features which grounded the factors that I identified in my sixth submission. You see him returning to that theme, effectively, in 186 -- well, 181, first of all, just above the letter D, but there is multiple case law on the application of the GATT to indirect taxation on every argument that was raised before the court. And he returns to that theme at 183,

> "In my judgement, in the context if this case, the issue for the court is a clear-cut question of law upon which there is extensive jurisprudence. In my view, and for the detailed reasons set out below, the analysis of the Government was correct. This means that it is therefore tenable."

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So he expressly endorses, correctly, the previous court learning and endorses the applicability of the tenability standard in certain contexts. He says that GATT allows for a more intrusive approach, if I can put it that way, by the court, but that is because, in particular, of lots of factors that do not bear on our case at all, on any view, and because, to the extent that there is crossover (see in particular the fifth, I think it was, of his factors about how the thing is set up), there are clear points of distinction between our context and the context being considered there.

My Lord and my Lady, I am sorry I have taken a little bit of time on that, but I know that my Lady in your permission decision was interested in this issue and I respectfully submit for good reason. There are difficult and important issues that do provide the gateway into the issues that we then go on to consider. There is some complexity in the case law for reasons you will have seen, so I hope that that has been helpful.

I was going to go very briefly then to the way in which those principles apply here, and just try and draw some strands together so far as our context is concerned with the Paris Agreement. My submission overall, as you know, unprincipled though it may be not to go further, or submission is that tenability is the standard. On any view, tenability is the standard.

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The features from the case law that you have seen tend towards those factors urging or tending towards greater constraints being present in spades. As Mr Griffin's statement makes clear, I referred to it earlier, this is a fluid and developing policy area, going back to the point I was discussing with my Lord about the policy and legislative interventions, policy choices and legislative interventions, live questions at the time of the decision and still as to precisely what policies should be in place in particular departments in relation even to considering some of the standards, some of the treaties in the areas of climate change, which, of course, is a very broad area anyway. There is a massive range of such standards and treaties. There is limited and explicit transposition or adoption of some but only some of those standards in primary legislation. In other words, some but only some of those standards have been chosen to be a direct part of domestic law by Parliament. As to the rest, policy choices have been made and have been developing, and the effect of my learned friend's submission will be that all of that can just disappear. All you have to demonstrate is that, as a matter of policy or on the particular facts, the decision maker took into account the particular standard and that will be enough. That is not the case law. That is the constitutional heresy that Lord Browne was so keen to shoot down in para.67. That, we respectfully submit, through policy choice under the scheme of direction by Parliament in primary legislation, is the constitutionally-appropriate manner and process for adoption of such standards, with Parliament making the decisions as to the standards to which the executive are then held by the courts and, indeed, making judgments about the manner in which they choose to do so, legislatively.

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Particularly, where you are dealing with broadly-framed standards, there are various ways in which things can be done and there is genuine legislative choice about what standards, what approaches, what obligations mandating particular courses of conduct should be created, that is for Parliament and, to the extent there are lesser decisions to be made, those are decisions through policy for the executive.

LORD JUSTICE STUART-SMITH: In your submission, what attention should we pay to the documents that we were shown this morning that postdate this decision and are said to reflect policy. So, for example, the two documents referring to the change of policy on 31 March 2021?

SIR JAMES EADIE: My Lord, my submission is that they fall within the general and well-accepted principle that they postdate the decision, but, more importantly, they postdate the decision so they are irrelevant; more importantly, they are an indication of precisely the point that I have just made, which is that these are policy choices to the extent that the territory is free for them. These are policy choices which the executive is able to make and should be able to make and, if that involves a change, so be it. A change in policy does not establish public law unlawfulness of a prior decision.

I just want to make a couple of specific points, if I may, about the Paris Agreement in the context of the debate that we have been having. I will come back to the meaning and effect of it in due course, if I may. But we do submit that, on any view, the provisions on which my

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learned friend seeks to place reliance, including in particular and specifically Articles 2 and 4, do not create hard-edge rules. They are cast at a very high level in terms of objective and aims and they are as much an expression of political intent as they are of legal obligation. They do not provide clear and specific obligations of the kind, for example, that one saw in the context of GATT, that one saw, for example, in the context of the ECHR, they are far closer to the sorts of provisions - indeed they might be thought to be *a fortiori* to the sorts of provisions that the House was considering in *Corner House* under the OECD.

Secondly, the position is that there is, under the provisions of the Paris Agreement, a dispute resolution process, but, as you have seen, it derived from Article 14 of the UNFCC, but, as you have seen, the principal dispute mechanism involves resolution by negotiation and consensus on the international plane. That, we respectfully submit, is entirely unsurprising. It is a concomitant of the manner and the breadth in which the basic obligations under the treaty are expressed. But true it is that Article 24 of the Paris Agreement provides that the dispute resolution mechanisms under Article 14 of the earlier UN Treaty apply *mutatis mutandis* and that those mechanisms include, at least in principle, the possibility of arbitral resolution and/or ICJ ruling. But Article 14(1) of the UNFCC provides that the parties shall seek in the first instance to resolve disputes by negotiation or other peaceful means. That is the basic rule, therefore. And Article 14(2) of that instrument provides that disputes can be resolved by recourse to the ICJ or arbitration if both parties - so it is a consensual process - if

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both parties have submitted to the jurisdiction of either. As I understand it, only three states have ever filed a declaration under Article 14(20 of the UNFCC, The Netherlands, the Solomon Islands and Tuvalu and only one has extended matters to the ICJ, The Netherlands. In practice, therefore, those dispute resolution mechanisms, as is entirely unsurprising, have not in practice led to any jurisprudence whatever, and that is the third and final point in relation to those provisions.

There is no body of jurisprudence. There is no judicial guidance on the international plane as to what the provisions mean, what they entail, what the nature of the obligations are, the extent to which they are aspirational and/or political, the extent to which they create hard-edged obligations - whether my learned friend is right about how you go about approaching particular issues or wrong - nothing on the international plane by way of judicial guidance. Paradigmatically, therefore, absolutely into the centre of the concern that the court has identified.

LORD JUSTICE STUART-SMITH: Paradigmatically?

SIR JAMES EADIE: Into the centre of the court's concern----

LORD JUSTICE STUART-SMITH: No, what was your first point? Paradigmatically?

SIR JAMES EADIE: Let me recast it. At the centre of the concern----

LORD JUSTICE STUART-SMITH: I referred to (inaudible) yesterday, I would not dream of describing your -- is that a word?

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SIR JAMES EADIE: Paradigmatically? Yes, I use it regularly.

LORD JUSTICE STUART-SMITH: Well, that may not be the answer.

SIR JAMES EADIE: It is the adverb of paradigm.

LORD JUSTICE STUART-SMITH: All right. I am sorry to be so sensitive.

SIR JAMES EADIE: I hope I recast it acceptably. At the centre of the concern that we have been dealing with in *Corner House*.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: But you do not have any of that. You have none of that guidance.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Indeed, to the extent that it exists on the theoretical plane, it simply has not been taken up practically. As I say, that is perhaps entirely unsurprising given the nature and formulation of the obligations in the Convention itself. And that provides the core distinction between our situation and the situation that was being dealt with in, for example, *Launder* and *Kebilene*, because there you have human rights standards and (a) they exerted a greater pull because of human rights standards, but (b) you had a specificity of obligation, the international structure providing a dispute resolution and guidance on the meaning and the exercise of that structure, so that case law existed to inform -- so the courts could be confident of what the true meaning was: ultimately, the concern which Lord Bingham identified. So we submit that all of the features that have caused the courts concern, which have driven the courts towards the tenability standard, are present here. That is the solution.

Still on ground (a)----

MRS JUSTICE THORNTON: I am sorry, if you are moving off tenability----

SIR JAMES EADIE: Yes.

MRS JUSTICE THORNTON: -- what do you make of the definition of "tenability" in the *Heathrow* case? There is no definition he says. You say that is correct.

SIR JAMES EADIE: Yes.

MRS JUSTICE THORNTON: And he says,

> "The dictionary says that it embraces a test of reasonableness *and* a requirement that the person expressing the (tenable) position is able to defend it."

And then there is a reference to an article. Do you accept that, if we are with you on tenability, how do we go about with (inaudible) tenability? Do we do it according to that dictionary definition or do we do it some other way?

SIR JAMES EADIE: My Lady, I would be content for that. I know that we discussed earlier whether it was markedly different or at all different from rationality. My submission is that it is not really. There may be gradations of it, because we know that rationality is to some extent, within its proper limits, a reasonable range of decision making for the primary

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decision maker. It is to some extent a flexible standard, so one might need something slightly different here.

MRS JUSTICE THORNTON: But, on any view, do you accept that, in order for the decision maker here to have taken a tenable view on Paris, the decision maker would have had to form some view on what Paris means?

SIR JAMES EADIE: Well, that rather depends what case I am meeting. At the moment, when I get to it, I am going to be meeting a case that says "Paris means you cannot provide financing into projects that are not net zero or better. My submission would be that that plainly is not in place.

MRS JUSTICE THORNTON: Does it not start one step further back, which is what did your decision maker think Articles 2 and 4 meant? Is it that approach?

SIR JAMES EADIE: My Lady, we are entirely content with that because they considered the Paris Agreement and they concluded that it had the flexibility to allow them to do what they did and that is enough for my purpose.

I was going, if I may, to summarise the positive case and then I am going to come to the particular obligations that we are said to have breached and failed to realise that we had breached and erred in law in not realising that we had breached them. But, if I can just summarise briefly the positive case over a few propositions, if I may.

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The first point is that there is a need, we respectfully submit, to place the focus of this challenge within the proper context of the decision making under challenge, which is the decision by UKEF to provide support for this project. The nature of that decision and the variety of factors that were taken into account are set out extensively in the two witness statements that you have from us, first of all, from Louis Taylor, chief executive officer of the UKEF, and then from Maxwell Griffin. They are behind tabs 11 and 12 of your essential reading bundle. If I could invite you to take those up, they are also in core bundle 1.

LORD JUSTICE STUART-SMITH: Before you start, can I tell you where I am at the moment? I thought that -- I will just deal with Mr Taylor. I thought that his witness statement was astute not to explain what he thought the Paris Agreement meant. He explains that he thought that he was permitted to do it. You may show me that I am wrong in a moment and you may say that it is consistent with the nature of your case, but he does not, as it were, answer my Lady's question from just now saying, "Well, this is what I thought it meant".

SIR JAMES EADIE: He does not take up the passages in our material and say, "I think this means this, that and the other".

LORD JUSTICE STUART-SMITH: Because he anchors down on the decision documents and----

SIR JAMES EADIE: Exactly.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: It may be that we are more in the negative -- and that is why I answered my Lady as I did, that we are more in a negative sense than we are in the positive sense. Does it

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contain a hard-edged obligation that stops you doing this? If you reached a conclusion, if we are right about that - I will come to net zero and all of that in due course - but, if we are right about that, is that a flaw? Is that wrong? Does Paris dictate another obligation?

LORD JUSTICE STUART-SMITH: The fact of the decision implies a view----

SIR JAMES EADIE: It does. It implies a permission at the very least.

LORD JUSTICE STUART-SMITH: Yes, it implies a view that it is not prohibited under Paris to invest in a project which, either viewed in isolation or globally, will lead to an increase in emissions.

SIR JAMES EADIE: Yes. And it is not dissimilar to the situation you had in *Corner House,* if one thinks through that, and thinks back to that, there was the director of the SFO saying, "It is all right under Article 5", but he was saying, "It is all right under Article 5"; he was not saying, "I think the word 'and' or 'the' in Article 5 means a particular thing". It will very regularly be that way in relation to Government decision making. "Do you have the flexibility -- if you get to this stage, do you have the flexibility under the relevant international legal provision? If you are taking it into account or you are applying the tenability standard, do you have the flexibility under that provision to do what you have done?" Or is there something which is hard edged in the Convention which prevents you from doing that? That indeed was the argument on -- even on the Human Rights Act cases that was the argument -- the ECHR prior to HRA cases, that was the argument. You cannot send Launder back to Hong Kong

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because, if you send Launder back to Hong Kong, he will not have a fair trial because the Chinese are now in charge was the argument.

LORD JUSTICE STUART-SMITH: One more irritating question: are we to understand that, in reaching the decision that he was not precluded from investing by what I will call Paris considerations, that it was or was not a relevant consideration for that particular point that the project would go ahead, anyway?

SIR JAMES EADIE: It was a relevant consideration that it would not go ahead anyway. It was. I will come to this and go into that.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: That is going to be my final point under my summary, as it were, of the positive case, if I can put it that way.

LORD JUSTICE STUART-SMITH: It would not be the first time at this hearing that I have been ahead of everybody, so that is fine. Right, so the Government position is simply that the Paris Agreement does not preclude investment in a project that leads to a net increase in emissions.

SIR JAMES EADIE: Yes.

MRS JUSTICE THORNTON: Or is it more specific than that, it does not preclude investment in this project? I think that that is what you are saying. You are not even prepared to go as far as has been suggested.

SIR JAMES EADIE: Just this decision.

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LORD JUSTICE STUART-SMITH: In this project even if it leads to that -- anyway, we can play with it. Yes, I understand.

SIR JAMES EADIE: Yes. You will see in terms of what is in Mr Taylor's statement, whatever is not in Mr Taylor's statement, whether assiduous or not, you will see what is in Mr Taylor's statement, which is a recitation of the range of considerations that were taken into account in reaching this decision, because it goes----

MRS JUSTICE THORNTON: You say, because it is an extremely broad range considerations----

SIR JAMES EADIE: It is.

MRS JUSTICE THORNTON: Are you saying that that is because Paris is so broad?

SIR JAMES EADIE: My Lady, no, I am not sure I -- I mean, I do say that, but I also say that this was a decision in relation to which Paris was but one factor. No one denies that it was taken into account, but it was one factor in the range. They concluded, as it happens, that they were consistent with or aligned with the obligations in Paris, but some of the other factors that were taken into account were plainly relevant.

MRS JUSTICE THORNTON: I do not think we are concerned with that, are we? The key question for us - the court - is the decision maker here decided that this decision was consistent with Paris, be that a lawful or unlawful decision. So the wider factors are not central to our analysis, are they?

SIR JAMES EADIE: They are not, but it is important that they are -- that you place the decision in the proper context. This was not a decision that solely turned on Paris.

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MRS JUSTICE THORNTON: But lawfulness does not depend on -- you might have taken account of (inaudible), for example, but that would not detract from whether the decision on Paris is consistent or not consistent.

SIR JAMES EADIE: Well, it does not touch that, my Lady, no.

MRS JUSTICE THORNTON: So do we need to consider these broader factors? Is it just background context?

SIR JAMES EADIE: It is background context but it also places the decision in its proper context, because this was not a decision -- I do not know whether this does or does not play -- I am not sure that I have got a positive submission to make, whether it does or does not play into the sort of factors that you are considering, my Lady, that you would need to consider in relation to tenability. But this was not a decision that said, "Here is the international standard, it is the only thing we need to worry about, yes/no". This was a decision that was multifactored. It took into account a range of things, including things that had no bearing on Paris, like UK financial benefit.

LORD JUSTICE STUART-SMITH: But, once you accept that it is a material consideration and you are not running the case, which is that the decision would have been the same anyway----

SIR JAMES EADIE: Then the focus is on Paris, I accept that.

LORD JUSTICE STUART-SMITH: -- then my Lady is surely right in saying that the other factors can only be contextual.

SIR JAMES EADIE: My Lord, I am not going to quibble with that.

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MS SIMOR: Perhaps I might assist, we are not challenging the rationality. We are not challenging the rationality of the decision outside the Paris argument, save in relation to the stranded assets decision.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: What I think that it may be right to emphasise, I am not going to take you through all the other considerations that were taken into play, and I was not intending to anyway, but you have seen the various other considerations that were in play. Climate change and the Paris Agreement and the impact of the project emissions were considered as a relevant factor. The fact that that was done is at para.69 of Mr Taylor's statement. But he emphasises, and again I am not sure necessarily this tees up any form of legal submission, but it is appropriate at least to note it. He did so in effect so that people could be fully sighted rather than treating himself as bound by Paris (see para.84) and both he and Mr Griffin emphasise - he does it at para.85, Mr Griffin does it at paras.64 to 72 - that consistency with Paris was not treated in any sense as being a precondition to support. Perhaps, more significantly, or as significantly, Mr Taylor emphasises at para.88 that there was no intention, as it were, to provide some form of definitive answer to the questions about the likely impact of the project.

LORD JUSTICE STUART-SMITH: That goes back to the question that I asked you right at the beginning of your submissions about the extent to which the decision maker can frame the context.

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SIR JAMES EADIE: Yes, it does.

LORD JUSTICE STUART-SMITH: And that is the passage that you rely on in answer----

SIR JAMES EADIE: That is the passage we rely on, para.88.

MRS JUSTICE THORNTON: This is the witness statement?

SIR JAMES EADIE: This is the witness statement.

MRS JUSTICE THORNTON: So you say that this clarifies, otherwise (inaudible)

SIR JAMES EADIE: My Lady, I do say that it clarifies. There is no objection in principle to this. You have seen the ministerial submission, but these statements inevitably explain, when a challenge like this comes in, that it is permissible to explain more fully what the reasoning and the thinking was. Indeed, that is what the court would expect the Government to do. This is not, as it were, an *ex post facto* disagreement with what was said contemporaneously, which is the real problem, in principle.

LORD JUSTICE STUART-SMITH: If I can truncate it, you say that if and when in our leisure we go through all the documents that we were invited to go through - the pre-decision - your submission would be that we can see that again, primarily in the decision documents, but also in the surrounding documents, the scope of the materiality that was given to them.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: That has to be your submission, does it not?

SIR JAMES EADIE: It is.

LORD JUSTICE STUART-SMITH: It is but it also has to be.

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SIR JAMES EADIE: My Lord, yes, subject to us complying with Paris which----

LORD JUSTICE STUART-SMITH: Well, you are meeting the challenge that you are and you are relying upon the scope of the consideration that you gave to it as being reasonable.

SIR JAMES EADIE: As a strand in the answer to that.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And, if we get to the stage of saying, "Did we comply with Paris", we say that the answer is tenable interpretation does not lead to the sort of hard-edged obligation that my learned friend was contending for and, in relation to applications, it is the rationality standard and they were entitled to reach that judgment. The judgment that they reached was that we were aligned with Paris, whatever the phraseology was, which is why we are slightly baulking about whether I need that line of argument.

LORD JUSTICE STUART-SMITH: Just give me a second. (pause) Is this a proper formulation of the decision, that what the decision maker was looking at was whether Paris considerations that he undertook precluded investment? Is that a fair reflection of what I think you are saying?

SIR JAMES EADIE: It is.

LORD JUSTICE STUART-SMITH: It is certainly a fair reflection of what I think you are saying, but do you think that it is fair reflection of what you are saying?

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SIR JAMES EADIE: My Lord, the only reason I am hesitating is because you know that we advance a positive case as well, that there was nothing inconsistent with the Paris Agreement in what we were doing, but, subject to that point, that is a fair reflection.

MISS SIMOR: I am terribly sorry, I could not hear that, my Lord.

LORD JUSTICE STUART-SMITH: Well, you will not get it quite the same again, but what the decision maker was looking at was whether the Paris considerations that they undertook precluded investment.

SIR JAMES EADIE: With a rider that says----

LORD JUSTICE STUART-SMITH: With the rider.

SIR JAMES EADIE: -- if we need to establish that we were aligned with the Paris Agreement, we say that the breadth of the Paris Agreement allows us to do what we did, which is to provide financing into this project.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: You see why I make that caveat.

MRS JUSTICE THORNTON: Why do you say if you need to align with Paris? You did not need to align with Paris, because that is what you thought, or did you (inaudible) undertook to do it?

SIR JAMES EADIE: My Lady, we are back then to the arguments about international law.

MRS JUSTICE THORNTON: Well, I think we are back to what your decision maker thought he or she was doing, are we not?

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SIR JAMES EADIE: Yes, and they thought that they were aligning with Paris, but they undertook the assessment that they did. And the question is whether there was an error of law; that is what ground 1 asks, "Was there an error of law in that?" Did Paris preclude them from investing in this project, to make it simple -- well, from the financing parts of this project through the mechanisms that UKEF uses? (Pause)

My Lady, I am going to come back to some of these points. I am just trying to sketch the positive case, as it were. This was the context of the decision. We have probably done that bit. I was about to say to death, but I do not mean to death, but we have done that bit. I did want to emphasise that there is some considerable need for caution before jumping to the assumption that, as a matter of policy, the UKEF had to comply with Paris. And I say considerable notes of caution because lots of the policies you have been taken to are not actually applicable to UKEF at all. They are to do with overseas development aid and/or - or to the extent that some of them are relied upon - they postdate the decision, in any event, and were not applicable policies at the time. But the position in relation to policy and Paris, and can I just give you some references into Mr Taylor's which I hope will do for this purpose? These are paragraphs in Louis Taylor's statement: 24, 77, 85 and 88 to 89. So that is the context of the decision. That was the first point.

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The second point is just simply to flag a submission to which I am going to come in more detail in a moment, which is that there is nothing in the Paris Agreement to support the key obligation for which my learned friend contended. That is all I want to say at this stage. I am going to come back to that, but just so you note it.

Thirdly, we are here dealing with, ultimately, a challenge to the decision to invest or to finance -- to provide financing into this project. That is the target of the attack. And, of course, that decision involves the whole range of factors that I identified earlier, whether one takes that as Paris only or all of the considerations, with strong predictive elements and a dash of expertise. One needs to be cautious, at the very least, in a judicial review about avoiding treating judicial review, in effect, as a battle between experts. That is the very strong message from *Gardner*, there is no way of resolving differences between experts in this forum with this process. That is the core message along with "Don't do comment or advocacy in your 'expert reports'". That is the core message that comes out of *Gardner*, which is, if you want it, behind tab 52 in authorities bundle 4. That is the target of the attack, ultimately. It is on the decision to finance. My learned friend stands up again and says "Well, I am not attacking the rationality of the decision", but, ultimately, that is the target. And she cannot escape the height of the legal test or hurdle that would plainly be applicable at that stage for all of those reasons, namely, broad rationality, if I can put it that way. She cannot escape the height of that hurdle by claiming this is a procedural not a substantive challenge. That is (a)

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because the substantive judgment is what is truly under attack here, whether in relation to the Paris Agreement or more generally in relation to the decision, but also, more importantly, or as importantly, because rationality is the standard when you are considering procedural challenge. The full range of rational decision making is open to the primary decision maker, here UKEF and the Secretaries of State, and that full range is open in relation to (a) what factors to take into account - even something as basic as that - that, of course, is dependent on the issue in question and how the decision maker considers it appropriate to approach and deal with the issues; (b) in relation to what enquiries to undertake or pursue (that is *Tameside*, but that also is underpinned by a rationality standard) and the (c) *a fortiori* in relation to what conclusions to reach.

Can I just go very briefly back -- perhaps I will not go back to *Plantagenet*, because you have already seen it. But I can pick up all the bits from *Plantagenet* that are interesting in the Court of Appeal judgment which I did hand up this morning, the *Balajigari* case. I did that, because, as you will appreciate, despite the august nature of the Divisional Court in the *Plantagenet* case, it was only a Divisional Court and the *Balajigari* is Court of Appeal. The paragraph that I want is para.70, because that is, in effect, an adoption -- I think that my learned friend said that it was Lady Justice Hallett who was giving the judgment, I think that it was Mr Justice Haddon-Cave on behalf of the court, but para.70 basically adopts in relation to *Tameside* the analysis of Mr Justice Haddon-Cave in *Plantagenet Alliance* at the level of

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the Court of Appeal and expands, I think, on some of the points that are made, but that is the authoritative statement of principle.

All of these judgments about framing the approach, framing the decision, what you take into account, what you do not, what enquiries you should make, how much modelling you should do, how much you chase down an issue or not, all of that is subject to precisely the same legal standard that the final decision is subject to and that is for the same constitutional reasons, which is that this is a judicial review, it is not an appeal, and the primary decision maker on all of those issues is the executive. That paragraph I hope will give you the *Plantagenet* bit in a nutshell.

The fourth point in terms of the summary of the points is a submission that the evaluation of the climate change issues and, in particular, the production of the climate change report, was done, we submit, thoughtfully, carefully and on any view rationally.

On the nature of the assessment of the climate change matters, Mr Taylor brought his education to bear as the statement makes clear, he had sources of expertise available to him, Wood MacKenzie - as Mr Taylor points out at para.81 and Mr Griffin also deals with it at paras.37 to 38 of his statement - experts at the African Bank and within the USECA (see Taylor, para.81, Griffin, para.55) internal UKEF expertise, including from the broader

governmental -- across governmental departmental bodies, the Export Guarantees Advisory Council (ECAG). That is Mr Taylor paras.74 and 87 and then in more detail, in terms of that expertise available within the decision maker, see Mr Griffin at paras.32 and 49 to 54. Still in terms of the process of that decision, as both of those witnesses emphasise, they were to some extent breaking new ground, both nationally and internationally, in doing that sort of work. There was not any established framework, as Mr Taylor points out at 83, and, as is explained in Mr Griffin's statement at 36 and 45 to 48, they were dealing with a context in which there was a range of standards----

LORD JUSTICE STUART-SMITH: Could you just give me the paragraph numbers for Griffin on that last one?

SIR JAMES EADIE: Yes, Griffin, 36 and then 45 to 48.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: They were dealing with a context in which they were designing that framework against a range of standards, including in the Paris Agreement expressed in aspirational and/or discretionary terms, so judgments within a very wide span are built into the DNA of the international legal position, and that obviously chimes with making judgments about that and rationality being the standard. And they were dealing with a context in which UKEF, as it were, were taking their decisions as the body deciding on financing, in circumstances where they are not a research body, they are not a court, they are not performing quasi-judicial functions, they are not an academic institution, and in which it

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was obviously appropriate, we submit, to take the reasonable and sometimes non-determinative approach that they did (see Griffin 127 to 129) but they did produce the body of work and they did do the analysis in the climate change report, as I have indicated.

On the substance of that report and the conclusions so far as relevant to Paris, and again I will come back to the themes in more detail in due course, but just to sketch it at this stage. The conclusions of the CCR are summarised in Taylor, para.90, and Mr Griffin's statement, para.60. As you have seen from the CCR, scope 1 and 2 and 3 emissions are acknowledged and are taken into account. I will obviously come back in particular to scope 3 which was the subject of extensive submissions.

Now, those emissions could not be considered in isolation and they could not be considered in isolation especially because of at least four considerations. One, some at least of the LNG would be used within Mozambique to replace more concerning fuel - oil, coal and trees leading to de forestation - and, so far as the boarder uses globally are concerned, and recognising all of the uncertainties, at least a part of the exported LNG was likely to be used to replace more concerning fuel, such as coal and oil. Thirdly, the money generated by the project, the finances generated by the project would enable not merely the basics to be put in place within Mozambique to enable it to harness its huge capacity for renewables, but also would be used or could be used and would be available for defence against natural events

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that cause the sort of disasters that my learned friend alighted on. Fourthly, in which those moneys would be available, as it was put in at least one of the documents I will come back to, as having the potential to lift millions out of poverty. You will recall that in the Paris Agreement there is a reference to those broader economic considerations playing into the sorts of decisions that one sees in Article 2.

Sill on the substance, the Mozambique NDC and masterplan were considered with particular care (see Griffin 73 to 89).

LORD JUSTICE STUART-SMITH: At some stage could you, not necessarily now, identify the assertion that the NDC took into account this project? I think that it is on p.258 in the CCR.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: I would be grateful to see the link, because, apart from a one line reference to liquid natural gas in the document----

SIR JAMES EADIE: I think that it refers to the masterplan is the link.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: But I will check that overnight.

LORD JUSTICE STUART-SMITH: Could we do it tomorrow morning?

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: There is no rush.

SIR JAMES EADIE: I think the paragraphs in Griffin are 73 to 89. I will see if that link is in there.

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LORD JUSTICE STUART-SMITH: Yes, but I do not think -- well, to my eyes they do not drill down to the document----

SIR JAMES EADIE: No. Can I provide greater specificity overnight on that?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: I will see if I can anyway. My understanding is that NDC then relies on the masterplan and the implementation of the project is part of the masterplan.

LORD JUSTICE STUART-SMITH: Yes, maybe, in which case can we have the reference tomorrow?

SIR JAMES EADIE: Yes. Then the series of points emphasised by Mr Griffin at 81 and 83 to 86 explaining why the project was needed, international finance access, with all the money coming in, especially important because it needed strong investment in the grid structure, in the basic grid structure within Mozambique and that grid structure was an essential precondition to allowing renewable energy projects to work.

Scope 3, just to flag up some of the coal themes, I will come back to it in more detail, obviously, but, so far as scope 3 is concerned, in essence, Wood MacKenzie say - and everyone agrees I think - it is very difficult, if not impossible, to do at the very least impact with any degree of real certainty. Nevertheless, UKEF probed and produced the assessment which they did in reliance on -- with the assistance of Wood MacKenzie so you have got best, worst, middle cases to give some idea. A clear acknowledge that the scope 3 emissions

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would be very high but with a question about offsetting and all of that transition. And then some quantitative, to some extent back-of-an-envelope, if my learned friend is right that it is all jolly easy, some quantitative assessment in the light of and for the purpose of assisting the No. 10 analysis, which was to accept that the project could be financed, in effect, but then to say, "I want a body of work undertaken" to see whether there are other offsetting things that we could do. It might be thought that that in itself is an indication that at the very least No 10 clearly understood that there was some offsetting that needed to be done, which may bear on the understanding, meaning and effect that we will come to tomorrow.

MRS JUSTICE THORNTON: What was that last statement, sorry?

SIR JAMES EADIE: No.10 asked, as you will recall, for some work to be done on offsetting and that in itself, it might be thought, is an indication that they appreciated that there was a case for doing offsetting, which, in effect, means that you are getting very high emissions at scope 3 and they want some work done to see whether something could be done about that.

Then the fifth and final summary point in relation to the positive case is that, if UKEF did not participate, the project would have gone ahead anyway. That may not always be the position but here it plainly is, it is hardly surprising given the countries that were already involved in financing, as to which see the CCR at p.286 in core bundle 2. The only consequence, the true consequence, therefore, of the UK not financing would be that no effect on emissions whatsoever, but the UK business would not be supported in the way that it could be and,

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indeed, a potential loss of the ability - again a factor relied upon at 262 in the CCR - a potential loss of ability to influence Mozambique and to assist Mozambique in the future in relation to cleaner energy alternatives going forward in the attempt to try to harness those natural resources and those renewables in the future. Again, that is dealt with in a little more detail in Mr Taylor's statement at paras.105 to 108. And, in circumstances in which the project would have gone ahead anyway, there was a global point, as it were, which is that the decision itself in truth had no impact on emissions anyway.

Can I then turn to the first of the ways in which ground 1A is advanced, which is that, providing export finance to the project, is said to be a breach of any obligations to make finance flows consistent with a low-emissions pathway.

As to the meaning and effect of the provisions, I have made my submissions about tenable view, and the key issue of interpretation, it might be thought, is the one that my learned friend asserted in answer to my Lord's question yesterday: does the Paris Agreement contain a hard-edged obligation that no financing can be provided to any project anywhere in the world if it involves fossil fuel? The approach to that core issue of interpretation is the approach derived from the Vienna Convention which I do not go back to.

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What I do go back to very briefly, if I may, is the description of how those principles operate in the context of a multilateral treaty of this kind, in the judgment of Lord Sumption in *Al-Malki*, bundle 3, tab 34. As I say, the context in this case was the Vienna Convention on Diplomatic Immunity and Privileges and you will see that from the headnote. You will see the basic structure that they were dealing with which was, as I described it earlier, the 1964 Act, and I should say this passage was applied recently by the Divisional Court, Lord Justice Flaux, as he then was, and Mr Justice Saini, in the *Harry Dunne* case about Mrs Sacoolas heading back to America, the same principles being applied in relation to the same Convention. But we can take it from here because it is a Supreme Court ruling on how to go about interpreting these sorts of Conventions.

There you have the 1964 Act which, as I say, has scheduled certain provisions of the international convention to the Act, so there was no question but that that was incorporated. The question, nevertheless, arose: how do you interpret a domestic legal principle of that kind? The answer to that was, unsurprisingly, perhaps, you interpret it on the basis of the international law rules of interpretation, because Parliament evidently intended to incorporate the international convention and that is what you do. But the key principled approach, so far as we are concerned, one can see from paras. 10, 11 and 12, although you do not need to worry for present purposes about almost the whole of p.1658, namely sub-paras.(3) and (4),

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because they are specific to the VCDR, referring to the diplomatic context. So can I invite you to read from para.10 to the end of para.12(2)? (pause)

You see the basic themes and I do respectfully submit that there is a strong echo between what Lord Sumption was pointing out in this judgment, in relation to this Convention, as incorporated, and what we are dealing with here, including, in particular the point that he makes in the bottom bit of para.11, which is that, in effect, there is a limit to how purposive you can be, some strong chimes with Lord Bingham on domestic statutes, and as it might be thought----

LORD JUSTICE STUART-SMITH: The one thing that it does not mention, which may be a slightly cantankerous note, is that, rather as with contracts, sometimes conventions and treaties are deliberately vaguely worded, so what is said about -- it may well be that every word, every sentence is pored over for hours, days, long into the night, but it may end up as could be said what we saw with COP26, all falling into place at the last minute, because a solution is found which is not specific but allows people to go away saying they have got what they wanted.

SIR JAMES EADIE: Yes, that is possible. I am not sure that that would be dissonant with the analysis of Lord Sumption.

LORD JUSTICE STUART-SMITH: Well, he seems to think that -- well, he seems to suggest in 12(1) that the deliberative process with minute review is going to lead to absolute precision, which I am not sure is necessarily the case.

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SIR JAMES EADIE: No. My Lord, if that is what is being suggested, I agree. There can obviously be a situation in which you compromise and that provides the answer and there can obviously be a situation where you deliberately frame your language in your treaty in a broad or aspirational sense, because you are deliberately leaving open the possibility of different countries doing----

LORD JUSTICE STUART-SMITH: I think that that was the point that I was making.

SIR JAMES EADIE: Exactly. Well, I respectfully agree with that because I am not suggesting----

LORD JUSTICE STUART-SMITH: I just put a question mark by the words "the scope for inexactness of language is limited".

SIR JAMES EADIE: Yes. But, even within that, if the language is not inexact, it may, nevertheless, be broad is your point.

LORD JUSTICE STUART-SMITH: Quite.

MR ROSTRON: And I respectfully agree. What that tends to mean, therefore, is that, if you are in a situation where you have got language which is opaque or broad or aspirational, the chances are that that was either the result of compromise, in order to get something through the door, or it was a result or it must be taken to be the result of a deliberate decision to leave the degree of flexibility which the broad language entails. And you bear in mind the international context, which is that the more global it is, the more multilateral it is, the more likely it is that people will do things in a different way and that the framers of the Convention will be allowing for that. I mean, whether one puts it in the context of Lord Sumption's

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analysis in that case or you say that you test the nature and content of the international convention, particularly if it is multilateral, against the realities of life may not matter terribly, but many states are involved. There may be a hell of a job to get to a compromise, as you rightly point out, and the question ultimately may be, well, if you harden it up, if you try and imply into broad and aspirational language specific legal obligation, the chances are that you would not have got agreement to that in the first place, because one or other set of states is going to disagree. It is not very difficult to put Mozambique into that submission. If precluded from accessing financing to develop a key natural resource, which might be the precondition to creating a grid which would allow it then to further exploit renewables and take all of that forward, and, indeed, in its own terms, might have the effect of lifting millions of its citizens out of poverty, would they have agreed to that obligation? One might think that that precisely explains why the sort of language which we find in Paris is in the language that we find in Paris. So that is what we say generally by way of approach to interpretation.

Article 2(1) then, if I can come to the specifics, of Paris simply declares, we submit, the common aim of making finance flows consistent with a pathway towards low-greenhouse gas emissions and climate resilient development. So, perhaps, three points to make in relation to that alongside the headline points I have just made. First and at the most basic level, it is declarative of an aim. It does not set down a prohibition. It is an extremely high-level aspiration. Indeed, interpreting it as a prohibition is or would be, we submit,

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inconsistent with the core structure of the Paris Agreement, which leaves very, very considerable flexibility to nation states to determine the concrete action that they will take in pursuit of those aims and interpreting it as a prohibition on any particular course or species of financial support for any particular individual project is even more inconsistent, both with that structure and with its terms and evident intent.

Secondly, it is talking about a pathway "towards" low GHG emissions and the Paris Agreement recognises that that pathway might not be a consistent downwards trajectory, especially for developing countries (see Article 4(1) emissions peaking later and all that).

Thirdly, Article 2 is not just about GHG emissions. There are balances inherent even on the face of the article. It is also about climate resilient development (in other words the ability of countries to withstand adverse climatic events) and it is about poverty. Therefore, to some extent it is already recognising on the face of it the necessity for states to make judgments about how to balance what might be thought to be mutually irreconcilable factors: poverty, climate resilient development, emissions and so on. Developing countries, in particular, may well need the revenue streams that could be generated from a project such as this in order to fund resilience building in order to lift the millions out of poverty and, indeed, in order to pursue the longer term agenda, which is to enable it to get off first base, so that it can get to

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the place of establishing, for example, a grid which can then be used as the basis for pulling in the renewables investment.

To some extent that does of course involve robbing Peter to pay Paul but that-----

LORD JUSTICE STUART-SMITH: I did not hear that.

SIR JAMES EADIE: To some extent that does involve robbing Peter to pay Paul, but that balancing of mutually-irreconcilable factors is inherent on the face of the provision, especially, it might be thought, in relation to developing countries.

My Lord asked yesterday about perspectives, where does Paris place the focus in terms of perspective, and our core answer to that is Mozambique. The main substantive provision of the Paris Agreement is for the countries - all the countries - to prepare their NDCs. The NDCs are the mechanisms for meeting the Article 2 objectives. What Article 2(1)(c) means, for a project in Mozambique in the light of the country's circumstances is, we respectfully submit, to be ascertained under Paris, primarily by looking at Mozambique's NDC. So Paris is set up in that way and allows, more importantly, or as importantly, for developing countries to make those sort of balance decisions and judgments. And here we know what Mozambique wishes to do.

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Article 3(1) then of Paris provides there is an obligation on states to undertake the efforts specified in the other articles "with a view to achieving the goals in Article 2". We respectfully submit that that does not add much, if anything, to the analysis of Article 2 and its nature. We do submit that there is nothing in Article 3, just as there is nothing in Article 2, which precludes a developed country, such as the UK, or indeed all of the other countries which have provided financing into this project, all of whom will be in breach of the Paris Agreement, on my learned friend's argument, from providing financing to a developing country like Mozambique in these sorts of circumstances. So, when considering this application for financing in relation to this project, UKEF did consider the broad aims of the Paris Agreement and under the Paris Agreement and it was right to consider them as aims. UKEF took into account the emissions impact of the project, but, rightly, did not consider that to be determinative, nevertheless, UKEF did face up to the fact that this project would or would be likely to increase GHG emissions, but, for all of the reasons I have gone through, they considered that the degree to which the project was consistent or that the other factors that I have mentioned rendered this project consistent with the high-level aims or the broad aims set out in the Paris Agreement.

So they weigh the fact of the emissions increase, which was obvious and inevitable and very high in relation to scope 3, as we will see in due course, they weigh those - that fact - against other considerations, including, in particular, the recognition within the Paris Agreement that

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developing countries make longer to transition and start to reduce their overall emissions. Mozambique's own strategy for achieving the aims set out in Article 2 - that is consistent with the Paris Agreement being country driven - and it is integral, so those sorts of countries do have a choice which itself involve complex balances, including longer term views about infrastructure and poverty reduction immediately.

UKEF considered the absence of any other proposal at the time it was considering financing for renewable energy projects in Mozambique (see Mr Taylor's statement at para.125). That is important because the proposals were being considered at a time when the situation in Mozambique was a real one. It had lots of potential to harness, for example, renewables, but no grid or infrastructure in place to do so and no money to develop things, so that that could be done immediately, and no realistic prospect of getting that at this stage, given the absence of any proposal for renewable energy projects in that country. So what they have effectively done is to choose to sequence their development in the way that they have and the revenues from this project were the only likely source of foreign income which would provide them with the money to develop, both the electricity grid and the renewable energy development when it comes.

LORD JUSTICE STUART-SMITH: I think there are two separate points, are there not? There is that point, but, as a separate point, the revenue is the only means of lifting the millions out of poverty.

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SIR JAMES EADIE: It is, they are separate. They are.

LORD JUSTICE STUART-SMITH: They are two different considerations.

SIR JAMES EADIE: They are and both are legitimate, I respectfully submit, under Paris.

LORD JUSTICE STUART-SMITH: One is more immediately referable to climate change.

SIR JAMES EADIE: Yes, and the other is not.

LORD JUSTICE STUART-SMITH: But the other is an acknowledged----

SIR JAMES EADIE: Irreconcilable----

LORD JUSTICE STUART-SMITH: - function of Paris.

SIR JAMES EADIE: Yes. Just if you wanted a reference on the latter one, in other words, the getting the money together to develop the grid and to develop the renewables, the precondition point, see the supplemental bundle at p.627. I do not invite you to go to it now, but p.627, which is an email from a representative of the African Bank to the UKEF setting out some of the considerations that the African Bank went through in its board approval process.

LORD JUSTICE STUART-SMITH: We have looked at that already, have we not?

SIR JAMES EADIE: I think that you may have looked at it before. There is a bullet, effectively, saying that Mozambique has got the largest power generation potential and it outlines the infrastructure needs: only 20 per cent of the population has access to grid electricity; large investment needed for hydropower.

LORD JUSTICE STUART-SMITH: We looked at the second and third bullets and yours is the fifth.

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SIR JAMES EADIE: Yes, I am grateful, it is that. The same point is made in a Department for International Trade paper, supplemental bundle 1070, second paragraph from bottom. Renewables are not a viable alternative for an energy project of this scale, but revenues will allow investment into the infrastructure and the development of the grid.

LORD JUSTICE STUART-SMITH: You said penultimate paragraph, did you not?

SIR JAMES EADIE: If I said penultimate paragraph----

LORD JUSTICE STUART-SMITH: "Mozambique renewables: Renewables cannot yet provide an alternative …"

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: My Lord, that may be a relatively natural break.

LORD JUSTICE STUART-SMITH: You can have your extra five minutes if you want it.

SIR JAMES EADIE: I am very happy to go on for a bit, if you would like. I think we are going to be all right for time.

LORD JUSTICE STUART-SMITH: In the light of the beneficial effects of long skeletons, I refused the extra day, I suspect that there will come a moment tomorrow when someone feels squeezed, so let us take advantage of the time.

SIR JAMES EADIE: Okay. I was going to address the question whether the only possible way consistent with Paris of assisting Mozambique was to provide it with funding for renewables

straightaway, as it were. Why was the project necessary as a precursor to that? Why not just throw the money at renewables?

The first point to make is that there is no obligation in the Paris Agreement on a specific country like the UK or anywhere else to give money to another country like Mozambique to develop renewable energy for nothing in return. My respectful submission is that, in the light of the materials that I identified a minute ago, it is clear that in the real world, in order to do (a) the lifting of millions out of poverty and (b) the development of the infrastructure that was necessary to harness renewables, it was necessary to attract very significant quantities of, in effect, foreign investment and the immediate and obvious way in which that could be done - and which Mozambique, evidently, thought was the right way of doing that - was to get and to provide financing for the project for that purpose.

LORD JUSTICE STUART-SMITH: Is it fair to characterise this submission as being testing the proposed interpretation by reference to the consequences rather than a pure exercise in interpretation? You have moved on from just looking at the terms of the----

SIR JAMES EADIE: Of the Paris Agreement, I have, I have moved on to application. I am sorry, I should have probably put in a headline saying "application" or something.

MRS JUSTICE THORNTON: Did you say earlier that the confusion in the project was that it would be likely to increase greenhouse gas emissions? I noted you as saying that.

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SIR JAMES EADIE: I do not want to give the wrong answer to that question. It is the point that has been repeatedly put to me. I am going to come back and I am going to deal with scope 3 emissions as soon as separate topic, if I may. I was going to go next to the CCR and to just show you the relevant bits. I know you have read it very carefully but what I would rather do, if I may, is take all of that set of issues in one go because otherwise I will risk at least giving a partial answer. I am pretty sure that I now will not give an inaccurate one, but, if I may.

The climate change report, can I just give you some headlines, as it were? I know that you have read it, I am not going to invite you to turn it up again. If you want it, it is in the core bundle behind tab 21 and is also in the essential reading bundle behind tab 17. But the key bit, so far as it is concerned, in terms of the answer in terms of application of Paris, as it were, is at the UKEF -- the first point is that the UKEF did consider and they did consider with care and with inhouse and external expertise climate change issues in the form that they did. You can no doubt pick it apart and have a quibble with bits of it, but the fact of the matter is that they undertook that task and they did so with the aim of understanding the climate change impacts of the project in more detail. As I said earlier, in public law terms, the degree of investigation and what to take into account are matters conditioned only by rationality; that is a perfectly rational approach to be taken.

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The conclusion section at 2/255-256 is obviously important. That is the overarching conclusion that I am sure the court will have read in full. Then the report looks at the scope 1 and 2 emissions. That is the direct and indirect contribution to Mozambique GHG emissions from the project itself.

LORD JUSTICE STUART-SMITH: It is really 251 to 253 at the top of the page that is primarily scope 1 and 2.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Then 253 and following is scope 3. Then the next is the statement there which you have got.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Then you have a conclusion at 255A which rounds off that section of the----

SIR JAMES EADIE: Beginning the "Project scope 1 and 2 emissions"?

LORD JUSTICE STUART-SMITH: Correct. But then you get on to---

SIR JAMES EADIE: Then you get on to scope 3.

LORD JUSTICE STUART-SMITH: It is scope 3 in the last paragraph. It seems to me that 256, the second -- no, the first paragraph is marginally different from the wording adopted at 253. Then you get back on to it big time at 267, and certainly my present understanding is that you are right in the thick of it when you get to questions 9 and 10, p.267, going on to 272. Then on to 277.

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SIR JAMES EADIE: Yes. My Lord, you do not need me to invite you to read it. We are all inviting you to read this in full.

LORD JUSTICE STUART-SMITH: I think that you can rest assured that we have read it in full.

SIR JAMES EADIE: Yes, I was going to characterise as "in the thick of it" questions 9, 10 and 11.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: They are the essence of it. And then, for good measure, and if I may, question 14, which asks whether the project will contribute to fossil fuel transition and expressly noted the global temperature goal in Paris and so on and, in that context, considered various bits and pieces. So question 14 as well I was going to draw attention to as at least deserving of another read.

Then perhaps if I can just finish this section and then stop for the evening, if I may, the CCR, as you know, and I am not going to take you through it again all the way through, but the CCR then feeds into what you have described as the critical path of the decision making. It was provided to the Secretary of State and to the Chancellor. The 1 June submission you have seen. The decision by the Secretary of State was on 10 June to support the proposal, decision by the Chancellor on 12 June, all of them recognising that the ultimate decision maker was UKEF under s.13 of the 1991 Act. We do submit, therefore, in the light of all of that, in particular the fact that the Paris Agreement does not contain the sort of hard-edged obligation which my learned friend needs to make good the error of law case on any view --

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where are the words that impose the sort of obligations that she has been contending for is perhaps a shorter and simpler way of looking at it. But the punchlines are that UKEF did not misinterpret the Paris Agreement. There is plainly at least a tenable view as to the meaning and effect of those provisions which permits the conclusion that supporting this project was in alignment with Paris and, moreover, when you get into the application part of that -- I did not put the headline of "application" in, but, when you get into those sorts of considerations, those sorts of judgments, you are dealing with rationality. It may not make much difference in terms of legal standard but you get there and there is no case we submit for saying that the applications and the judgments made in this particular project's case were irrational. So no error of law and no error in terms of rationality.

LORD JUSTICE STUART-SMITH: I think it must be time to stop because either you are your dropping your voice or I am failing to hear you. Could you just repeat that last sentence?

SIR JAMES EADIE: Yes, no error of law and no irrationality in terms of application. I was back on that distinction between interpretation and application.

LORD JUSTICE STUART-SMITH: Thank you very much. 10 o'clock tomorrow again?

SIR JAMES EADIE: I suppose that we had better. If I say 10.30, I am going to want half an hour for lunch.

LORD JUSTICE STUART-SMITH: I do not want anybody to be leaving thinking that they have not had the opportunity to put their case properly.

SIR JAMES EADIE: I am grateful. I think that we may be better at 10 then.

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LORD JUSTICE STUARY-SMITH: If we finish by 3 o'clock , no one will be more delighted than I am.

SIR JAMES EADIE: I think that I am due to finish by lunch time.

LORD JUSTICE STUARY-SMITH: Yes, that is fine. Thank you very much. So 10 o'clock tomorrow.

(4.32 p.m.)

(Adjourned until the following day)

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