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

CO/3206/2020

Royal Courts of Justice

Thursday, 9 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

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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

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Thursday, 9 December 2021

(10.00 a.m.)

LORD JUSTICE STUART-SMITH: Thank you very much. On the dot. Yes.

SIR JAMES EADIE: My Lord, my Lady, good morning. I wanted to finish, if I may, Ground 1(a) and the second part of Ground 1(a), which is, in effect, an allegation by the claimant that providing export finance to the project would be a breach of, as they put it, an obligation to support Mozambique in complying with its current and future NDCs.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: We submit there are two answers to that case. The first of them is that enquiring into the correctness of UKEF's conclusion that the project was consistent with Mozambique's NDCs, or, if you want to put it that way, Mozambique's obligation to pursue domestic mitigation measures with the aim of achieving the objectives of its NDC per Article 4.1 of Paris, would contravene the third rule of the foreign act of state doctrine. The principles that govern that third rule are set out in *Belhaj v Straw*, which is the very long and detailed Supreme Court case about the allegations made by Mr Belhaj that he has been involved in rendition and so on. It was that case. It is in bundle 2, tab 31, and the passage I want, if you would, when you get behind tab 31, is on p.1498, using the page numbering on the bottom of the pages, and I want para.123 in the judgment of Lord Neuberger.

MRS JUSTICE THORNTON: Sorry, which paragraph?

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SIR JAMES EADIE: 123, my Lady, which sets out what the principle is. Can I invite you to read that paragraph to yourselves? (After a pause): And from there can I invite you to go next to 130, on p.1500, in which the court gives – or Lord Neuberger gives – a recent example of the application of the third rule, which to some extent helps illustrate the nature of that third rule. See also, if you would, in the other judgments, Lord Sumption at para.225 on p.1534, identifying the principled underpinnings for that rule.

LORD JUSTICE STUART-SMITH: 225?

SIR JAMES EADIE: 225.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: Perhaps, more broadly, the underpinnings for the foreign act of state doctrine more generally.

LORD JUSTICE STUART-SMITH: Is it just my form of printing, I think it must be, but in para.225----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- lines 4 and 5 in my copy look as if they are emboldened.

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: No. That is----

SIR JAMES EADIE: Well, not in mine. So I think "emphasis not added".

LORD JUSTICE STUART-SMITH: Well, I have not done anything to it. So, all right, that is----

SIR JAMES EADIE: Mine are uniquely in one----

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LORD JUSTICE STUART-SMITH: Well, it is rather alarming. Maybe if other symptoms appear, I will let you know!

SIR JAMES EADIE: Thank you.

LORD JUSTICE STUART-SMITH: 225.

SIR JAMES EADIE: 225, if you would.

LORD JUSTICE STUART-SMITH: Thank you. (After a pause): Anything else in *Belhaj*?

SIR JAMES EADIE: I think the only other passage perhaps, but it is more by way of a dotted side-line note, is the rather fuller treatment of at least some of the case law involved by Lord Mance between paras.90 and 95. Can I just summarise----

LORD JUSTICE STUART-SMITH: Do we have to?

SIR JAMES EADIE: You do not have to really. It is all really encapsulated in 123 but if you wanted a slightly fuller exposition, there it is. You have the reference. I am not going to take up time with it. There is then a helpful summary of the case law and a pulling together of the principles in the recent judgment of the President of the Family Division and Chamberlain J, who should know all about it because he was involved in the *Khan* case, as you saw reference to, in the *Al Maktoum* litigation.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And that is in authorities bundle 3, so, sorry, it is a different bundle. You can put bundle 2 away, if you would. Bundle 3 at tab 41. And their consideration of the doctrine starts at para.49 on p.2118, so para.49. I should say this was upheld on appeal so I

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do not think that is more relevant. And it goes forward then to para.52, if you just note – it is really just a review of the case law you have already seen, and perhaps of principal interest here, when they have done the analysis, they have pulled together their conclusions as to what the various judgments in *Belhaj* mean at para.64. So para.64. (After a pause):

LORD JUSTICE STUART-SMITH: Does subparagraph (e) link up with your submission about the absence of a body of established precedent? That is not the right way of putting it but when you were talking about----

SIR JAMES EADIE: Yes, and that article 24 point?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: It does. It does, but what I wanted to emphasis was that the doctrine is not only, or perhaps even centrally, underpinned by the usual things that underpin non-justiciability, of which that is one. As you have seen from the earlier passages, it is essentially a principle of judicial restraint or abstinence, as it were, in relation to particular issues (a) because it involves our courts being beastly about foreign governments but also (b) because, and built into the doctrine, some issues are better dealt with on the international plane, so there is that link into the doctrine in terms of its principled underpinnings. But that essentially the doctrine and I hope that that is all you need out of all those long and complicated judgments.

LORD JUSTICE STUART-SMITH: Yes.

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SIR JAMES EADIE: So the key question, we submit – the key question, we submit, is whether or not the – at least the key question that the claimant is inviting this court to consider, is effectively whether Mozambique is doing enough in pursuit of the Paris Agreement aims and that is a question that involves Mozambique's obligations as a sovereign state pursuant to an international treaty. It is about unilateral domestic acts viewed through the lens of international relations, and it engages for precisely that reason all of the principal difficulties and underpinnings of the third act of state rule. It is, to take but one example of those principled underpinnings, evidently better addressed as a matter of foreign relations on the international plane as is, to pick up my Lord's point, precisely recognised in that primary mechanism for dispute resolution in the Paris Agreement by reference back to the earlier UN agreement we went to yesterday.

So what my learned friend says about this is that this is all a red herring, as she puts it, because there is no question on the claimant's case of Mozambique breaching their NDC, simply whether the UK is assisting Mozambique to meet its NDC. That, we submit, at least has a strong element of casuistry about it. If the foreign act of state doctrine would be engaged by a direct enquiry into whether the project was inconsistent with Mozambique's obligations under Paris, the claimant, we submit, cannot circumvent that rule by trying to frame this as the UK's obligation to support Mozambique to comply.

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LORD JUSTICE STUART-SMITH: Can I just see if I can get a handle on this? There are, in fact, two – there are two thrusts, are there not? One is Mozambique's obligations under the NDC----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- but I suppose one could see this case as involving a much wider – which is irrespective of NDC, if the court were, not to exercise the (inaudible) words, to start saying NDCs – Mozambique's projection was not a low emissions path on a low emissions pathway or something like that, on the claimant's case we would be at least expressing a view about compliance with international obligations.

SIR JAMES EADIE: Of Mozambique?

LORD JUSTICE STUART-SMITH: Of Mozambique.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: So it is not – I am thinking, as you can tell, I am thinking as I go along----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- but it is not simply limited to the NDC, is it?

SIR JAMES EADIE: No, I do not think it is. It is the NDCs and how they play into whether Mozambique is or is not complying with----

LORD JUSTICE STUART-SMITH: Yes, well, you do not get a----

SIR JAMES EADIE: -- Paris.

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LORD JUSTICE STUART-SMITH: -- you do not get a total "get out of jail card" simply by (inaudible) of your NDC. Is that----

SIR JAMES EADIE: No, you do not. You do not but what the claimant seeks to do, in answer to third rule, foreign act of state, is to say, "No, no, no, do not worry about that. We are not actually directly asking you to do that", query, query. "What we are asking you to do is to focus on the UK's role in the provision of finance which amounts to assistance and that is"----

LORD JUSTICE STUART-SMITH: Well, there is – there is a logic in that.

SIR JAMES EADIE: There is a logic to that. The difficulty is whether it can be sustained and we make three points in answer to that, if I may. The first of them is the fact, as you have seen from the case law, the fact that there is a domestic foothold for the question of international law, based in what the UK is doing, does not resolve the question of whether or not the foreign act of state doctrine applies. And that is evident from the principles that you saw in the Supreme Court's judgment. It is illustrated by the *Khan* case, to which you saw Lord Neuberger make reference at 130 of *Belhaj*. There, as you will recall, and as he pointed out at 130, the issue was framed, or sought to be framed, by the claimant as to whether the provision of information by the UK intelligence services to the US Government to assist with drone strikes in Pakistan was unlawful because it involved GCHQ officers and encouraging or assisting murder. That was the way in which the claim was sought to be put but it was barred on this ground because it would necessarily involve, or at the very least be

perceived as involving, the UK, in the form of its courts, assessing with the US acts amounted to murder because otherwise the thing did not get off the ground. So it does not depend on there being a domestic foothold pure and simple and that is because the underlying principled basis for the doctrine is essentially, as Lord Sumption noted and, indeed, as the other judges noted in *Belhaj*, to do with comity and restrain by the domestic courts.

LORD JUSTICE STUART-SMITH: So it is necessary for the claimants to distinguish *Belhaj*, which they do by saying there are two different obligations. One is Mozambique's obligation to put its commitments in an NDC. The other is, I think, a separate obligation on the UK not to – not to finance projects which are not on the low emissions pathway.

SIR JAMES EADIE: Quite and our answer to that, on the facts, when we get to it, is going to be, well----

LORD JUSTICE STUART-SMITH: You come back----

SIR JAMES EADIE: -- you cannot determine one without the other because if Mozambique is, to take your description of the international obligations which they are under as slightly broader than just producing the NDC, if they are not in breach then what is the problem with assisting them? The two are directly interrelated. But just on this first answer, it does not depend on saying, "It is a UK obligation so you must go there" because the doctrinal underpinning of the foreign act of state third rule is broader and includes judicial comity. My Lady, I am sorry, yes.

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MRS JUSTICE THORNTON: Do we end up at some point in having to form a view on the Paris Agreement, i.e., some form of interpretation to decide whether actually this Paris Convention and the obligations on the developed and developing world are sufficiently different that, irrespective of how it might be classified, there is a difference in the obligations of the two countries? In other words, I am trying to marry this with the other part of your argument, which is that we should go nowhere near the (inaudible) to Paris. At some point we have to form some view on Paris and I am trying to work out what that is.

SIR JAMES EADIE: You do and I am not sure there is a terribly clear answer to that question. It is an entirely, if I may respectfully say so, fair and difficult question, but I suspect the answer may be to take it in sequence and, at this stage of the argument, if you are into foreign act of state you are doing, at the very least, tenable interpretations. And I fully accept the logic of the point that you put, which is if you are doing that then you have got to work out how the obligations work, at least on the tenable basis, under Paris for that purpose. I think that is probably the way the logic flows.

MRS JUSTICE THORNTON: So at some point we have to address the meaning of Article 2.1, that all the finance flows with the existing low pathways. We have to form some view on that to arrive at an understanding of whether your view is tenable.

SIR JAMES EADIE: You do. Whether or not you have to go very far down that road is questionable for the purpose of this doctrine, because this doctrine, as you know, is about

being beastly to foreign states and the question is whether or not that is a good idea or a bad idea in terms of comity.

MRS JUSTICE THORNTON: Well, it would not be being beastly to a foreign state to say the UK has a tougher obligation than Mozambique because Mozambique is developing. You are not being beastly there, are you?

SIR JAMES EADIE: Well, that is true if you can get to that point.

MRS JUSTICE THORNTON: Yes.

SIR JAMES EADIE: So, yes, for that purpose. I wanted to give you one more authority, without turning it up, on domestic foothold not being enough.

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

SIR JAMES EADIE: I am sorry, my Lord. (After a pause):

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: Yes. And, as I say, I do not want to invite you to turn it up now but if you need it on this question about whether domestic foothold is enough or not, answer "not", we say. See the *Ukraine v The Law Debenture Trust Corporation*, authorities bundle 3, tab 36, and the two relevant paragraphs are 155 and 164. 155 which, slightly oddly for this purpose at least, which I ought to explain, it sets out the issues but you can see the way in which they set out the issues which make it perfectly clear that domestic foothold is not enough. And then 164. And, as I say, illustrated by *Khan*.

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Secondly, we do submit that there is nothing – to come back to my Lady's point – in the Paris Agreement to support that sort of bifurcated approach. There is nothing in the drafting of the Paris Agreement to suggest that there is any kind of bifurcation obligations in that way. Article 9, as you know, is cast in terms of an obligation – an obligation I underline – it is a "shall" provision, an obligation to provide financial assistance to developing countries, and that is then linked to their, that is the developing country's, existing obligations. That provides you with some context. But we submit it all does link back to Mozambique's obligations and, in particular, if not exclusively, to their NDCs. And we do rhetorically ask the question, if it is acceptable for this project to happen from Mozambique's perspective, and if they are allowed to make various judgments including bringing into play lifting people out of poverty, longer term development, the creation of the grid, all of those sorts of matters, if that is judged to be acceptable by Mozambique why would Paris set its face against the provision of support from the developing countries to enable them to do that? And we respectfully submit that that is both consistent, i.e., it all linking back to those sorts of judgments by the developing country, that is consistent both with the language and with the spirit and, indeed, with the potential injustice otherwise to developing countries of Paris.

In any event, it is to be noted, for the very least for the purpose of this argument, that the claimant's positive case, as we understand it (see their skeleton at para.47(b) amongst others) is that the project was not compliant with Mozambique's obligations under Paris

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anyway, and that is because – and I will come back to the issue about how you measure scope 3 and all of that in a second – but that is because even if you take your scope 1 and scope 2, says the claimant, you are going to end up in territory in which Mozambique is in breach.

LORD JUSTICE STUART-SMITH: Because it is increasing.

SIR JAMES EADIE: Because it is increasing and so on and the numbers end up being kind of half the thing they were going to save, even on scope 1 and scope 2, unless, therefore, you are allowed to take in the sort of broader balancing considerations that I identified from Paris yesterday. So that is the first answer, or set of answers, to that point.

The second answer is an "in any event no breach" answer, and that is because, as we submit, the Paris Agreement is based on national parties determining their own voluntary contributions, that is the centrepiece of it, communicating those NDCs into the relevant bodies and then taking measures to achieve them. And in this case, therefore, the UKEF took Mozambique's own NDC as a starting point. It is not, I respectfully submit, for the UK to start assessing whether another foreign state's NDC is insufficient. And that NDC says that Mozambique's contribution will include implementing certain expressly listed policy actions and programmes, including its master plan for natural gas (that is core bundle 2, tab 2, p.13). And see, without needing to turn it up, under that heading "Mitigation

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contribution". At 9 then the type of contribution, implementation of policies and programmes and actions, and then at 6 "master plan for natural gas 2014-2030".

LORD JUSTICE STUART-SMITH: And has someone kindly drilled down to see if we have got anything lying behind the master plan for natural gas?

SIR JAMES EADIE: I hope I have done so but Mr Heppinstall confidently tells me that he is going to deal with this issue as well, so I am just going to give you some headlines.

LORD JUSTICE STUART-SMITH: Good. Yes.

SIR JAMES EADIE: That is the first document to go to. It refers, as the punchline, to the master plan for natural gas. And then the master plan, we submit, envisages the delivery of the project. In particular, supplemental bundle p.833.

LORD JUSTICE STUART-SMITH: Okay. Let me get down, please.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: Supplemental bundle 833.

SIR JAMES EADIE: If you would just give me a moment to get it up. (After a pause): I am sorry, start at 831, if you would, noting in the introduction the fourth paragraph starting, "Taking into consideration such vast potential …". And then, as I understand it, the table at 833 is a list of existing concessions – that is licences to companies interested in undertaking exploration and production activities – and this lists the project which, I think, is Area 1 – Offshore – Rovuma – Anadarko.

LORD JUSTICE STUART-SMITH: Because it was Anadarko at that stage.

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SIR JAMES EADIE: It was Anadarko at that stage and, as I understand it, Total subsequently purchased that interest. And then 843, referring to the core objective of fighting poverty and the role of natural gas in driving development----

LORD JUSTICE STUART-SMITH: Hold on. 843?

SIR JAMES EADIE: 843.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: And 846 to the same effect, referring to gas projects being the only opportunity for the industrialisation of the country. And then 848----

LORD JUSTICE STUART-SMITH: I know you are a bit pressed for time but I think this may be important, so on 843 I have identified the first paragraph and then you wanted to go to 848?

SIR JAMES EADIE: I wanted to go to 848.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: The penultimate paragraph and the final paragraph, if you would, particularly that reference to the natural gas master plan's role being to ensure that the natural gas becomes a true catalyst for the sustainable development of the country. (After a pause):

LORD JUSTICE STUART-SMITH: I am not sure the claimants would agree with the last sentence of p.848 but there we are.

SIR JAMES EADIE: I have got a reference to 869, referring to the object of a developing infrastructure in Caba Delgado for the development of LNG. I think it is about halfway

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down the page if I have got the right reference. If not, someone shout at me. Yes, sorry, at the top. That first item on 869, do you see the second column?

LORD JUSTICE STUART-SMITH: Implement the LNG product?

SIR JAMES EADIE: Yes, second column, first item. (After a pause):

LORD JUSTICE STUART-SMITH: Okay. So that is 869.

SIR JAMES EADIE: That is 869. If you could just give me one moment to check a reference. (After a pause): Yes, and then I think there are some African Bank development – African Bank analysis of all of this but perhaps the only reference you need for that purpose is, into the CCR, which I think refers to – the Climate Change Report – which I think refers to it at p.257-258 and 270.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And two references into the witness evidence, if I may, on this point, if that is helpful. One of them is in Mr Griffin's statement at para.76-77, essential reading bundle, tab 12, and then Dr Hawkes, who is the interested party's expert, at para.28, essential reading bundle, tab 13, p.272. So you have got the – those are the links, I think, back into the master plan for natural gas, and so on, and you have got already the points about the broader aims that Mozambique was taking into account to balance all of that, including the need for financial resources to become climate resilient and, in effect, to develop renewal energy projects in the future, the precondition to which was the development of the grid. So you are back to all of the complex balances involved but this time in the context of

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Mozambique making its own judgments about what appropriate NDCs should look like, what appropriate form it wanted its compliance with the Paris Agreement to take, and it then went out and sought international financing for that. But these are fundamentally choices about Mozambique – for Mozambique about Mozambique.

I wanted to pick up one topic, which was discussed yesterday, which was about accounting for Scope 3 fuel. I am not sure it terribly matters for this purpose, given the expected impact even in relation to Scope 1 and Scope 2, but it was asked about it and you have got Scope 3 and the question is to whose account does it go? And I just wanted to pick up our understanding of that. Others may have a different view but can I give you our understanding of that? It is, of course, for each country to determine and define their own NDC. The UK's NDC is reflected in the Climate Change Act 2008 and it is a target to reduce carbon emissions "from UK sources" by reference to the 1990 baseline that it uses. That is clear from s.29 of the Act.

LORD JUSTICE STUART-SMITH: From UK sources.

SIR JAMES EADIE: From UK sources.

LORD JUSTICE STUART-SMITH: So that gives some wriggle room.

SIR JAMES EADIE: That gives a little bit of wriggle room, yes. UK – well, it is UK sources, so we are responsible for what we use effectively. That is 29 – section----

LORD JUSTICE STUART-SMITH: Oh, I see what you mean.

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SIR JAMES EADIE: -- that is s.29, and really on that thing of how do you – to whose account? Does it go to Mozambique's account if it is Scope 3 exported, if that makes sense to the idea? I am not exploring that. It does not look like that is the position. It looks like it is user. So that is s.29 of the 2008 Act, authorities bundle 1, tab 15, p.337.

The Mozambique NDC refers to the conditional target, as you saw, to reduce emissions by about 76.5 million tonnes of CO_2 equivalent in that ten year period, 2020-2030. And that NDC does not make expressly clear what that refers to, whether it refers to emissions from internal sources, but, if I am allowed to put the point this way, we consider it is likely that that is what they are doing – internal sources. And, as I say, for the purpose of this point, I have already referred you to the Scope 1 and 2 emissions and the need for balancing and all of that, so I am not going to repeat all of that.

The only final point to note in relation to this is that if that is the right approach and that the 95 per cent, or whatever it is, of Scope 3 is exported and that the effect of that, in terms of Paris accounting, is that those exports move from Mozambique's account, if I can put it that way, to the user country's account then that provides a mechanism for effective protection under Paris anyway because what that would mean would be that if, and to the extent, that LNG was used in the foreign country, leave aside displacement of coal and everything else,

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if it was used and the emissions went up in that foreign country, it would operate as a debit in their account and they would then be required, in order to conform to their own NDCs----

LORD JUSTICE STUART-SMITH: To compensate.

SIR JAMES EADIE: -- to compensate and take measures to deal with that. And that is quite a significant point, if I have got that right.

LORD JUSTICE STUART-SMITH: Okay. Can I just ask, is that agreed?

SIR JAMES EADIE: Yes. I do not know.

LORD JUSTICE STUART-SMITH: Would the claimants agree with that as a proposition? That if the exported LNG goes to the importing country's account and thereby increases emissions to that extent, is it right that it was then the obligation would be on the importing country to compensate elsewhere, i.e., to make cuts elsewhere?

MISS SIMOR: So I would like to be able to give you a yes/no answer. The first answer is, yes, but I have to make an addition to it.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Because----

LORD JUSTICE STUART-SMITH: Do you want to do that now or do you want it in reply?

MISS SIMOR: I do. I will just do it very, very quickly----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- if you do not mind. And that is that there is an enormous gap between the NDC commitments and the temperature goal.

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LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And, therefore, it is not a complete answer.

LORD JUSTICE STUART-SMITH: Yes, okay.

SIR JAMES EADIE: My Lord, I am entirely prepared to accept that caveat----

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: -- for the purpose of peace breaking out, as it were, on this point.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: The only----

LORD JUSTICE STUART-SMITH: I am sorry to interrupt you in mid-flow----

SIR JAMES EADIE: Not at all.

LORD JUSTICE STUART-SMITH: -- but I think that is quite helpful.

SIR JAMES EADIE: It is helpful. The caveat, however, is, of course, an overarching global problem.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: So that is all I wanted to say about that issue. I was going to turn – I am going to deal with Scope 3 emissions rather more fully, as you will expect, under the next broad heading which is Ground 1(b), whether we committed errors of analysis, in effect, and obviously to some extent----

LORD JUSTICE STUART-SMITH: Yes.

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SIR JAMES EADIE: -- there is flow-over between the two ways of putting the grounds but just for the sake of convenience. If we are dealing with no an error of law because of breach of Paris Agreement but we are dealing with this, it is a pure rationality challenge. The overriding standard of review, we submit, at whichever level you choose to pitch it, whether it is in relation to the substantive decision, factors taken into account or enquiries pursued, it is for the primary decision-maker to make the primary judgment. It is that constitutionally which attracts the notion of rationality because rationality has built within it that margin, that degree of respect for the decision – for the primary decision-maker under our constitutional arrangements.

And if you wanted at least an analysis, in a slightly different context, but if you wanted an analysis of how rationality works and how broad it is, there is quite a long chunk of it but, to pick out the highlights, if I may, Hickinbottom LJ in *Spurrier* – I do not invite you to turn it up now. My Lady and his Lordship will be familiar with the passage I am sure, I think in the planning context. Authorities tab 37. I am afraid I have rather lost track of which file that is but maybe it is 4. It is 3 or 4. It does not matter. I am not inviting you to turn it up now. 148 is the paragraph number, to 152, and then 176 to 181.

LORD JUSTICE STUART-SMITH: 148 to 152?

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SIR JAMES EADIE: 148 to 152 and then 176 to 181 are at least helpful in terms of this whole long passage and identifying all the case law and so on. So that is the legal standard. That is all I wanted to say about the legal standard and I touched on it yesterday anyway.

What I wanted to do, if I may, was to try and deal with the principal way in which the challenge is now put, which was centrally focused on the topic to which I am going to devote most time this morning, which is Scope 3 emissions generally, and there are various aspects to Scope 3 emissions. And then at the end I am going to make some very brief submissions, just pulling together a few short points and giving you some references in relation to three other discrete areas, two trains locked in, stranded----

LORD JUSTICE STUART-SMITH: And just so that we know, because there is an art to the building up of suspense, you are aiming for 12.30, are you? Or are you----

SIR JAMES EADIE: I am aiming for 12.30. I am rather hoping I will be before that. I think I have technically got until one but I am going to try very hard not to take that time.

LORD JUSTICE STUART-SMITH: Okay. Thank you.

SIR JAMES EADIE: So Scope 3 emissions, see generally, if I may, Mr Griffin at para.112 and following in the witness evidence. The UKEF, if I can just summarise the points at the beginning, and then when I will come to six or seven plea grounds of challenges in the answers, but just to summarise very broadly at the beginning, our submission is that UKEF went as far in considering Scope 3 emissions as it judged was useful and appropriate in the

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context of the decision which it was making. And at a very, very high level – and I will come back to some of these points – in the CCR, as you know, the conclusions in essence were very difficult to do a full emission impact assessment, a clear recognition that Scope 3 emissions will be high – I think "very high" was the phrase used – will significantly exceed Scope 1 and 2, will exceed 25,000 tonnes of CO_2 equivalent per year. However, that did need to be considered, at least in terms of assessing the overarching impact, on the basis of the potential at least of LNG to displace more polluting fossil fuels. But even acknowledging some deficit in terms of CO_2 emissions, there were a range of other factors in play relating to Mozambique which meant that the provision of finance would still be aligned. That is, in essence, the core skeletal reasoning in that document.

I wanted then to come to the main points and the answers to the submissions made by my learned friend in relation to this and, if it is not too wearisome, six main points. The first of them is that, as you know, a qualitative assessment was made that the emissions from the plant, unsurprisingly, would be significant. The decision-makers knew and appreciated that Scope 3 emissions in particular were very high and would have a significant impact, and that is significant – that is essentially CCR p.253. The significance of that is two-fold, it might be thought. The first of them is that the UKEF, and other decision-makers, faced up to the fact, but considered that fact in the round against the context of all the other decision – all the other aspects bearing on the decision about whether, e.g., Mozambique would be

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on a pathway still. And, second, in those circumstances, given that conclusion, it was rational to decide that there was not a need to undertake some form of precise quantitative assessment. That is the first point.

The second point is that UKEF instructed Wood Mackenzie to attempt, at least, a quantification of the Scope 3 impact and Wood Mackenzie's view was that it was not possible – on which it was permissible and rational for us to rely – that it was not possible to quantify that impact reliably. That is recorded in the CCR at p.272. And I emphasise that because the CCR did not conclude that it was impossible to estimate Scope 3 emissions (see Griffin, para.59). It was using the language of impossibility in the context of Scope 3 emissions impact (see the CCR at p.253, 272 and 275-6).

LORD JUSTICE STUART-SMITH: Just hold on a second. (After a pause): 252?

SIR JAMES EADIE: 252 – sorry, 253, I am so sorry – 253, 272 and 275-6.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: And in relation to that impact there was inevitable uncertainty given the uncertainty of off-taking. That is a judgment call in the end, not a mistake or an error. And I should say in the context of this second point that our submission is that the defendants were properly and rationally entitled to place the weight that they did on the Wood Mackenzie report in that regard. How they actually viewed it is set out by Mr Griffin, in particular, at paras.37-44 where he deals, amongst other things, with the implication behind

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lots of my learned friend's submissions in relation to this, which is, "Well, what were you doing relying on Wood Mackenzie given that they were instructed by Total?" And Mr Griffin addresses that point and we do not accept that the Wood Mackenzie conclusions were in any way undermined – and it would be very surprising if they were – by some form of lack of expertise. They considered that they were expert for the purpose of opining on the matters they opined on and there is no reason for the decision-maker to second-guess that. That is the second point.

Thirdly, we do submit that it is clear, from the CCR in particular, that UKEF did not conclude that the Scope 3 emissions and/or the project more generally was likely to be emissions net zero or better. The key passages, as we discussed yesterday, are at 253, 274 and 277, and the correct reading, we submit, of UKEF's conclusions on project emissions is that it would lead to an increase in emissions with some reduction if, and to the extent, that it is displacing more polluting fossil fuels in the importing country that would otherwise have been used. And that is the natural reading of the CCR as a whole and all of the passages, and that is how it should be read. You cannot just pick up on isolated phrases and leave out the rest of it. See, for example, and if I may, if you have the CCR to hand – it is in the essential bundle – it might not be marked up but it is in essential tab 17 or core bundle 2, tab 21, and the first passage to draw attention to is the one about two-thirds of the way down 253 beginning, "On balance …". I am sure you have marked that up, but:

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> "On balance, taking the three posited scenarios, it appears more likely than not that, over its operational life, the project will … result in some [and then I have underlined or circled] some displacement of more polluting [fossil] fuels, with a consequence of some net reduction in emissions."

And that comes after two paragraphs that are talking entirely about the capacity of LNG to displace more polluting fossil fuels such as coal and oil rather than the overall net position of the project. That is all the clearer when one reads the summary in the context of the body of the CCR. If you go forward to 269, question 11 asks:

> "How does the Project impact on the NDC, the Paris Agreement and other related national climate strategies?"

Notes the economic benefits that will flow from the project and then says, at the top of 270, the last sentence of the first incomplete paragraph:

> "However, alongside these economic benefits, is the negative impact of the Project's GHG emissions."

And then at the top of 271:

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> "The Project has a significant impact on the country's emissions but is still considered in alignment to Mozambique's stated climate policies and by extension with their Paris Agreement commitments."

LORD JUSTICE STUART-SMITH: That is Scope 1 and 2, is it not?

SIR JAMES EADIE: That is Scope 1 and – Scope 1 and 2.

LORD JUSTICE STUART-SMITH: If one looks at the context. "Mozambique's climate strategies promote …", blah, blah, blah. Just below where you took us to on 270:

> "UKEF considers that whilst the impact on the country's emissions is significant …".

And the last paragraph on that page is also talking about Scope 1 and 2 and Domestic Scope 3.

SIR JAMES EADIE: Yes, I think that is----

LORD JUSTICE STUART-SMITH: And the summary is:

> "The Project has a significant impact on the country's emissions …".

SIR JAMES EADIE: I think that is fair in relation to question 11, not least because they then go on at question 13 to deal with Scope 3.

LORD JUSTICE STUART-SMITH: Precisely.

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SIR JAMES EADIE: Yes, I take that.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And then 273, you are very well aware of the three different scenarios, and then the mid-case scenario, which is dealt with at 274, and this perhaps is the clearest of all, look about halfway down "Scenario 3" on p.274, you see a line beginning, "The likely scenario for the use of the Project's LNG based on the SPAs". And then:

> "A combination of replacement and displacement of coal and oil power generation will lead to a net reduction in future GHG emissions when compared with fossil fuel alternatives."

LORD JUSTICE STUART-SMITH: Hence the additional words in your skeleton argument.

SIR JAMES EADIE: Hence the additional words in the skeleton argument and, I think, hence the way in which the decision-maker puts it in the evidence. And, as I say, that is also how Mr Taylor understood and summarised the findings of the CCR in his 1 June submission to Ministers, core bundle 2, tab 17, p.153 at para.56e, where he says----

LORD JUSTICE STUART-SMITH: Just give me that again. Core bundle 2?

SIR JAMES EADIE: Core bundle 2, tab 17, p.153 and the relevant paragraph, in the summary of conclusions is at 56e where he says that he has taken into account:

> "the Climate Change Report setting out the significant impact that the project will have due to increased GHG emissions …".

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That is the key headline on overall emissions, impact being communicated to Ministers, and that is reflected in his witness evidence at para.95c.

LORD JUSTICE STUART-SMITH: Just----

SIR JAMES EADIE: Yes. Do you want the submission?

LORD JUSTICE STUART-SMITH: I am just not sure whether I got – Yes, no, I think I did get that.

SIR JAMES EADIE: The submission is all over the place but it is also behind tab 15 of the essential reading.

LORD JUSTICE STUART-SMITH: No, I have got it. Thank you.

SIR JAMES EADIE: It is 56e.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Yes? And then in the witness evidence of Mr Taylor, which is behind tab 11 in the essential reading bundle – I think I am right in saying – at 95c.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Yes. So that is how it is – that is how it is done in the CCR. That is how it is presented in the ministerial submission. Everyone saw it. There can be no suggestion that the ministers in some way were miscommunicated to about this issue, not least because of the clarity of 56e and because of the clarity of the CCR, we submit, particularly when they are actually dealing with Scope 3 emissions in that sentence I highlighted. And I made the point yesterday, by way of rhetorical question, why would the PM ask for everyone to have

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a look at offsetting measures unless he appreciated that offsetting measures were necessary? So that is the third point.

The fourth point is a submission that the analysis in the CCR that there would be some net reduction in GHG emissions in the manner that I have just explained, was a plainly justified and rational conclusion. It involved a series of predictive judgments where the LNG was likely to be used, for what purposes, what are the future options, and so on. And, in essence, a particular focus in the CCR, on the fact that most cargoes from the project would be likely to be – or a significant proportion would be likely to be – directed at the Asian market (p.272), and that there was particular scope for displacement of coal to occur in China and India and in Indonesia. And that was----

LORD JUSTICE STUART-SMITH: And you balance those two out by saying it is – you are not going to do a quantitative assessment and the CCR did not do a quantitative assessment about what would happen in Asia? It is qualitative at every point?

SIR JAMES EADIE: It is. It is. There is no attempt to chase everything down. You are trying to get an impression as to whether there is some scope and so the conclusions are necessarily guarded. It slightly goes back to the point I made yesterday about the UKEF not being a research institution and not conducting a trial. What it is actually trying to do is to get an impression, to get a flavour, and the overall impression was an accurate one, which was really significant emissions coming out of this project, might to some extent, in relation to

Scope 3, be offset by displacements/transition from more damaging fuels, but even if you end up with net-plus, as it were, you have still got the Mozambique features to factor in.

LORD JUSTICE STUART-SMITH: I think I know the answer to this but what do you say in response to the submission, oh, well, Ben Caldecott was telling you that these things were possible and should be done in a full climate change assessment?

SIR JAMES EADIE: The answer to that, in principled terms, is that whether or not any particular step should or should not be chased down or taken was a matter for the decision-maker. To the extent that they decided not to chase down all of those strands, that was entirely justifiable, particularly for the sorts of reasons and on the sort of basis we have just been discussing; qualitative at any stage, trying to get an impression, not conducting a trial. There is nothing wrong with, indeed it is an entirely appropriate and sensible part of decision-making, for those who are engaged in making these decisions to receive challenge from a whole variety of different sources. That improves rather than denigrates decision-making and----

LORD JUSTICE STUART-SMITH: Including a couple of Secretaries of State.

SIR JAMES EADIE: Including?

LORD JUSTICE STUART-SMITH: A couple of Secretaries----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- of State.

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SIR JAMES EADIE: Yes, but the fact that someone is challenging some of the statements in an earlier draft or in an approach is not an indication of irrational decision-making on any view. We certainly do not accept the impression, not least because it is an entirely unfounded one having regard to the level of expertise that was available (see Mr Griffin's statement) that in some way, shape or form everyone that my learned friend wished to rely upon was super-expert and everyone else was a duffer. It is also to be borne in mind that Mr Caldecott, and his comments that you were taken to, were, in the first instance, I think, in April, some six weeks before the CCR was finished, and the later comments some three weeks before the CCR was finished and before the Scope 3 emissions scenario analysis was added to the CCR. But I do not take my stand on that. My submission is a broader one. You are perfectly entitled to have a series of comments taken into account. So that is what we say in answer to that.

I just wanted to refer finally in relation to whether the conclusion in the CCR about that net reduction, judged in those terms, or possibility or potential net reduction judged in those terms, was justified, and just to identify the fact that it also corresponded, and was no doubt based a significant part on, a work that was done first by Wood Mackenzie, on which it was obviously centrally based, and you have read their report. I do not need to go back to that. Secondly, the fact that US EXIM was of a similar view (supplemental bundle p.621), future coal use in China expected to trend down with gas used and so on. And it is right to point

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out that the US gave notice on leaving Paris on 4 November 2019, that it would withdraw, but that was always and only going to take effect from 4 November 2020, so it is not right to say that the US was already outside Paris at this point.

LORD JUSTICE STUART-SMITH: I do not know whether it does not----

SIR JAMES EADIE: It does not advance matters much.

LORD JUSTICE STUART-SMITH: It does not affect what they actually said.

SIR JAMES EADIE: It does not. I just wanted to correct that in case there was a misapprehension.

And then on the same point, about noting the LNG demand in China and India being expected to grow and replace – and operate as a displacement for coal, see also the memorandum to the board of directors of African Development Bank. For that purpose, supplemental bundle 649-650. So that is the fourth point, which is justified to reach the conclusion that they did about net reduction in terms of impact.

Then the fifth point is emissions impact in quantitative terms as a topic, and the question there is whether it was irrational not to produce a bear quantitative estimate of gross Scope 3 emissions. And it is to be noted at the outset of this set of issues that the UKEF was provided with, and took into account, at the very least a rough and high-level quantitative estimate of the project Scope 3 emissions, which was sent to officials from the Department of International Trade (supplemental bundle 1586). Those figures were calculated by Robert Towers, who was the Head of International Energy Economics and Analysis at

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BEIS, by Helen Meekings of UKEF (see core bundle 1). Sorry, I am going to give you an essential reading reference because it is into a witness statement. I think it is Mr Griffin's witness statement at para.49 for her expertise, if you need it. And the Head of the International Energy Unit at the FCO. And Mr Taylor confirmed in his evidence that prior to his 30 June decision, he reviewed the papers before him which included the BEIS advice, containing that rough quantification of absolute Scope 3 emissions relating to the project (see his witness statement at para.103), and the underwriting minute also contained those estimates (see core bundle 2, p.338-9). So he did have a rough quantified figure before him when he made his final decision but, as he says in his witness statement, those figures only served to confirm the existing qualitative conclusion in the CCR that Scope 3 emissions would significantly exceed Scope 1 and Scope 2 (see para.104 of the statement).

LORD JUSTICE STUART-SMITH: That would not be an answer if we accepted that it was irrational to proceed without a full quantified----

SIR JAMES EADIE: It would not.

LORD JUSTICE STUART-SMITH: -- assessment.

SIR JAMES EADIE: It would not. I accept that. But it is at least to be noted. So, in essence, the rational decision-making, as we submit it was, was to go as far as was considered to be useful and appropriate for the purpose of the exercise that they were undertaking and the decision they had to make.

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I should just note, because there is a complete answer, as I respectfully submit, to this part of the case, but I should just note that the suggestion was repeatedly made that calculating absolute Scope 3 emissions was easy and anyone could do it. You just do a bit of multiplication. Well, if that is right, the rough and ready calculation would do (a), and (b) we do not necessarily accept that but we do submit that the calculation, even of absolute Scope 3 emissions, is an uncertain and not entirely easy or straightforward exercise (see, for that purpose, Mr Griffin's statement, paras.58, 59 and 130) and there is not, we submit, any policy or guidance requiring any such exercise, and none of the documents my learned friend took you to provided such an indication.

MRS JUSTICE THORNTON: So the GHG protocol (inaudible) taken to, you say that does not?

SIR JAMES EADIE: I say that does not. That is supplemental bundle 2.

MRS JUSTICE THORNTON: And do you say----

SIR JAMES EADIE: 823-5.

MRS JUSTICE THORNTON: -- do you agree that it is for us to take a view on how difficult that exercise is? Again, we have got to form some sort of view to be able to evaluate both your competing submissions on that.

SIR JAMES EADIE: Well----

MRS JUSTICE THORNTON: The claimant says it is very difficult. You say – the claimant says it is easy and you say it is very difficult. At some point we have to engage with that to be able to----

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SIR JAMES EADIE: Well, my primary submission would be that you do not actually have to engage in that particular issue because the short and complete answer to this is that a qualitative assessment, with the conclusions that it fed to, was enough for the rational decision-making and once you have got to that place what is the benefit of doing the absolute number? I mean, to some----

MRS JUSTICE THORNTON: We might only get to – To get to a view on the qualitative point, we might need to look at how easy the quantitative point was, might we not? But, in any event, do you accept that we have to form some sort of view, however much we step back, however much the margin of appreciation we give your view that it is very difficult to quantify Scope 3?

SIR JAMES EADIE: My Lady, I do not accept that that is a necessary part of the court's analysis. Of course, it is a matter for you what you take into account in weighing whether the decision-making was rational having regard to its nature and the context in which it was done. So I am not making a positive submission that you would be precluded from doing that. My submission is the slightly lighter one, which is that it is not necessary to do that here. And if and to the extent that it were necessary to do it, you would then have an initial question anyway, which is, was it necessary to do it at a greater level of specificity and detail than was in fact done? So that is, I think, how I would answer that question.

LORD JUSTICE STUART-SMITH: Just for my note, you were – I think you gave us quietly the reference from the GHG protocol.

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SIR JAMES EADIE: My Lord----

LORD JUSTICE STUART-SMITH: Could you just repeat it?

SIR JAMES EADIE: -- I am sorry, I did, and I am sorry it was quiet, but – So the GHG protocol, in terms of the reporting standard, is I think at supplemental – maybe supplemental authorities bundle 2, 823, and the GHG protocol guidance, which I think was also referred to, is at authorities bundle 1, tab 11, p.297, 298 and 302. And then I think the other document that you were taken to was the UKEF's ESHR policy, core bundle 2, tab 5, p.33, which there says the UKEF "will comply with all international agreements which apply to the operations of ECAs" and so on, and that takes you into OECD Common Approaches and into the Equator Principles and so on. It gets quite complicated at that point.

MISS SIMOR: Sorry, the protocols are at 11, 12 of 13 – the protocols are at 11, 12 – 10, 11 and 12 of the first authorities bundle.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: Thank you. Yes, sorry, I only have a duplicative reference so, sorry, that is a convenient way of finding them. If you wanted to drill down from the EHSR into – sorry, ESHR, into the OECD Common Approaches or to the Equator Principles, you have those at authorities bundle 1, again, I think behind tabs 7 and 8. I think the key passages, at least according to my notes, are OECD, see p.46, and Equator Principles, see p.199 and 205. But our fundamental submission is that it was not irrational for them not to have sought that

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quantification. It was working on the assumption that the project would have a large Scope 3 emission budget in absolute terms, which would exceed 25,000 tonnes per annum.

LORD JUSTICE STUART-SMITH: 25,000 tonnes is peanuts in this – in the numbers we are talking about, is it not? 25,000 tonnes is the threshold but it is----

SIR JAMES EADIE: It would exceed----

LORD JUSTICE STUART-SMITH: -- a very small fraction----

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: -- of what we are actually talking about.

SIR JAMES EADIE: Yes, it is. That is why they qualified it by saying "very high", so that was their qualitative assessment.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: And what the decision-maker was then truly interested in was what – what did the impact look like, and for that purpose it was plainly of some importance and some significance not simply to look at the gross number but to look at any things that might net it, and that is what essentially was done.

LORD JUSTICE STUART-SMITH: yes, but there is – I think there is force in the claimant's point that the netting off, you do not know whether it is 1 per cent or 50 per cent or whatever, which may be a reason for leaving it unquantified, properly understood.

SIR JAMES EADIE: Yes. And part, this exercise, unless you are going to conduct, as the decision-maker, a trial down, this is bound to be to some extent evaluative and broad-brush,

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particularly having regard to the way that even the Paris Agreement works with those other considerations playing into the decision.

So that takes me to my sixth and final submission on this area, which is how then, in the light of points one to give, was the UKEF able to conclude that the project was consistent with Paris, despite it increasing, or probably increasing, the overall global GHG emissions? And the answer to that, I respectfully submit, is in broad brush terms that the Paris Agreement does not prohibit developed countries from supplying finance to any energy project that is not carbon neutral, i.e., that will by definition, therefore, add to global GHG emissions. On the contrary, Paris expressly contemplates that there is room for manoeuvre in respect of developing countries and, indeed, on the face of Paris, that in conducting those sorts of analyses a broader range of what I have described as mutually irreconcilable factors can properly be taken into account; lifting millions out of poverty, developing long-term infrastructure, creating the sort of protections that might be needed for climatic change events.

And so in terms of the answer to that question, first, Article 2.1(c) does not contain any such prohibition. I do not want to go back over the territory I covered yesterday but, in very brief summary, 2.1(c) could easily have said so. There is nothing in the language of 2.1(c), or any other part of Paris----

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LORD JUSTICE STUART-SMITH: Well, we come back to Lord Sumption. You say 2.1(c) could have said so. We are not construing the contract and, anyway, that is always about the weakest argument when you are construing the contract. But 2.1(c) is what it is as a process of negotiation between sovereign states.

SIR JAMES EADIE: It is, but what it----

LORD JUSTICE STUART-SMITH: And the simple point surely is it does not----

SIR JAMES EADIE: Specify the obligation.

LORD JUSTICE STUART-SMITH: -- it may be a good point or a bad – or a bad point, but the point is it does not, not that it could have done.

SIR JAMES EADIE: It does not specify the obligation.

LORD JUSTICE STUART-SMITH: It does not.

SIR JAMES EADIE: It does not. My Lord, I am happy to take that correction. And, indeed, as I made the point yesterday, it might be thought to be highly unlikely----

LORD JUSTICE STUART-SMITH: We will never know.

SIR JAMES EADIE: -- we will never know, but it might be thought to be highly unlikely to have been agreed given that the – given the respective national interest both on the developing country side and on the----

LORD JUSTICE STUART-SMITH: Again----

SIR JAMES EADIE: It may not be----

LORD JUSTICE STUART-SMITH: -- sitting in a court in London----

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SIR JAMES EADIE: -- it may not be necessary----

LORD JUSTICE STUART-SMITH: -- it is easy to speculate.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: But the fact is, it did not or the fact is they did not.

SIR JAMES EADIE: The fact is they did not and not merely did they not but, if I am allowed to make one further positive point on the interpretation, not merely did they not but they did other things which were inconsistent with that.

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: Allowing all those other factors, types of factors, to play in and making it clear that the pathway down was not necessarily a uniform negative one, and recognising that developing countries will peak at different times and so on. All of that.

LORD JUSTICE STUART-SMITH: I think I will allow you that as an admissible point!

SIR JAMES EADIE: Thank you. I do not want to chance my arm! That might have been the last point but for that. So that is the first point.

The second point is to some extent an adjunct to that, which is that the imposition of such an obligation through Paris would be inconsistent with the recognition which does sit throughout Paris that greater latitude is available to developing parties and that, as I have already submitted, has a consequence for how you approach the assistance provision. And to some extent that provides or needs to sit in the context of the third point, which is that

providing finance to some projects that are not carbon neutral or carbon clean does not mean that the low emissions pathways that Paris is concerned about will be unattainable. I make that point in absolute terms, as it were, recognising – and it is a very, very important recognition because it provides the global answer – recognising that the other mutually irreconcilable factors are in play, but even on its own terms it does not lead to that conclusion. Again, it depends on national choice. It depends on the NDCs that each country puts in place, that go back into the – by way of the reporting mechanisms, back into the centre, as it were, and would then be the subject of further negotiation if, as appears is the case, you end up with a gap when you add up all the NDCs, it goes back to international negotiation at that point.

LORD JUSTICE STUART-SMITH: I noted these submissions being providing finance to non-carbon clean projects does not mean that lower emissions pathways are unattainable.

SIR JAMES EADIE: Yes.

LORD JUSTICE STUART-SMITH: I think there is a *non sequitur* in there.

SIR JAMES EADIE: Is there?

LORD JUSTICE STUART-SMITH: I think there is because – well, in a world where there is the enormous gap anyway between projections and the attaining of either plus 2 or plus 1.5, at the moment lower emissions pathways, as defined, namely a route to 1.5 or well under, are unattainable, full stop.

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SIR JAMES EADIE: Well, I think to avoid the logical inconsistency one needs to recognise that that problem, which creates that logical difficulty, is a global problem that has not yet been solved by the international negotiation that will be necessary to solve it. The logic does not necessarily apply if you view each country's position individually as current.

LORD JUSTICE STUART-SMITH: I think I could possibly – I could possibly live with providing finance to non-carbon clean projects does not of itself----

SIR JAMES EADIE: Does not of itself and in relation to----

LORD JUSTICE STUART-SMITH: -- mean the lower emissions, because – but then you are going into what the claimants accept is a complete assessment of the world we live in.

SIR JAMES EADIE: Exactly.

LORD JUSTICE STUART-SMITH: Which----

SIR JAMES EADIE: Which has not----

LORD JUSTICE STUART-SMITH: -- with all the enthusiasm in the world, I think this court is not going to be----

SIR JAMES EADIE: No.

LORD JUSTICE STUART-SMITH: -- particularly willing to undertake.

SIR JAMES EADIE: But that is why I said, and if you judge it by reference to Paris as it stands, the NDCs as they stand and the position of each individual country, or the individual countries, it is a fact, no doubt, that if you add them all up you end up with a global problem, *non*

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sequitur that Mozambique should not be allowed to do it or should not be allowed to have the NDC that it has.

LORD JUSTICE STUART-SMITH: Yes, well, that is a different point.

SIR JAMES EADIE: That is a different point. And it is to be noted, perhaps is the final point in relation to this, that there has been some recognition – and I think it was recognised by Wood Mackenzie and then the CCR followed the advice, and I think the recognition is in the IEA report – that gas could, and probably will, still form part of the world's energy mix in a scenario that would still be consistent with well below 2 degrees centigrade as the temperature goal. So just to give you a reference to that, in the Wood Mackenzie report, at p.69 of core bundle 2, which is then picked up and noted in the CCR at p.275, that figure of gas forming 24 per cent of the world's energy mix is noted and that there was still room, therefore, for new LNG developments within that scenario. Now, as I say, that does not necessarily provide a complete answer to all of this but it does provide some real world context to this. So that is what we say about – that is what we say about Scope 3, which was the first of the main areas I wanted to deal with.

Three other short areas, which I can deal with very quickly, and then I will finish. Firstly, the defendants, we submit, were entitled to quantify the Scope 1 emissions of the project on the basis that it would be – or the emissions in the project – on the basis that it will be operating two trains and not more (see, in that respect, Mr Griffin's statement at 101-111, so

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101 to 111), and the key answer perhaps is that the current project, in relation to which support was provided, was defined as two trains. The African Development Bank's analysis, which set out a six train scenario, was citing the ESIA analysis conducted in 2014 but that was out of date by 2020 because the project scope had been reduced. And the references to eight to ten trains and so on are references to how many trains the gas reserves could justify, not what was actually proposed. And so we do respectfully submit that in applying whichever test is used to apply, it is appropriate and, at the very least, rational to proceed on the basis that the project in question is defined by its current scope and is also defined by the financing which is to be provided, not least because if the project then does expand, and would presumably then need further international finance to take that forward, fresh decisions would need to be made. So that is the complete answer to that one.

The second aspect is lock-in risk, which we submit the UKEF properly considered (see in that regard Mr Griffin's statement at paras.138-143). The lock-in risk was expressly and specifically considered but it was weighed against the LNG project being important for Mozambique's energy transition, in summary, not irrational to go – not to go any further in that analysis, and----

LORD JUSTICE STUART-SMITH: I mean, it is referred to in – the risk of it or the possibility of it is referred to in the CCR.

SIR JAMES EADIE: It is, at p.275-277.

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LORD JUSTICE STUART-SMITH: Which might be more compelling than the statement of someone who was not actually there at the time.

SIR JAMES EADIE: Yes. Well, you have the reference; 275-277, if you prefer that one. And then the same point can be made in relation to the stranded risk – stranded asset risk. That, again, was considered with care in the CCR, see pp.254, 256 and 283-285, and again we submit no error of the hard-edged kind that would be required to ground rationality of any description in relation to any of that.

My Lord, my Lady, unless I can assist further, those are my submissions.

LORD JUSTICE STUART-SMITH: I think we will just take a moment to have a discussion to see whether there is anything we want to ask you.

SIR JAMES EADIE: Of course.

LORD JUSTICE STUART-SMITH: Which will give you also a moment. Say, five minutes. Thank you.

(Short break)

LORD JUSTICE STUART-SMITH: Thank you very much. Yes.

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MR HEPPINSTALL: My Lord, my Lady, I represent the two interested parties, the first interested party being the current operator and the second interested party being the borrower, the company that has undertaken the financing.

I do want to go back to some of the pleas and issues that have already been traversed by the parties to the judicial review but maybe looking at some of the issues with a slightly different emphasis from the point of view of the project itself or, indeed, from the point of view, in some occasions, of the Government of Mozambique. I do want to touch upon this issue of common but differentiated responsibility, which you will have guessed from our skeleton argument is one of the central parts of our position in this case. So I do want to go back and look at some of those recitals and parts of the Convention and the Paris Agreement.

But, first, I just want to start with looking at Professor Philippe Sands' textbook where he introduces this issue and shows where it has come from. It is at tab 58 of the last volume of the authorities bundle, volume 4.

LORD JUSTICE STUART-SMITH: Just again, because I like to know, how long have you got or how long are you scheduled for?

MR HEPPINSTALL: I have got an hour and a half. I do not think I will be taking it all. Tab 58, opening with the title piece of this well-known textbook, and so "Principles of International

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Environmental Law", and we see the well-known Professor Philippe Sands is one of its principal authors. And then if we turn to – and I think the bundle page numbers have gone missing but there are internal page numbers – so if you turn to internal 244, which is actually 3019 of the bundle for those on the PDF. There is a heading "Principle of common but differentiated responsibility"----

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: -- and he, or the authors, discuss its history here:

> "The principle of common but differentiated responsibility has developed from the application of equity in general international law, and the recognition that the special needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law."

And that should then take you to where it appeared in previous climate change treaty, the Rio Declaration. And then over the page you get a helpful discussion of the common responsibility, the shared obligation of the states towards the protection of a particular environmental resource, and then on the next page the other part, which perhaps is the part that we are more interested in, the differentiated responsibility; differentiated in the sense of the developing countries have a different responsibility based on that equity, that potential injustice. And it is mentioned in that first paragraph:

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> "The differentiated responsibility of states for the protection of the environment is widely accepted … It translates into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of developing countries, and historic contributions to causing an environmental problem."

The historic contribution mainly coming from the developed countries, of course, in this context. And all of that is suffused into both the United Nations Framework Convention and then into----

MISS SIMOR: Sorry, could you go there perhaps to the next page – the next page, next paragraph. The next page, middle paragraph.

LORD JUSTICE STUART-SMITH: "The special needs"?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Okay. (After a pause):

MR HEPPINSTALL: Yes, that is the financial technological assistance that obviously developing countries require. Although, as I will develop my submissions, there is a difference between myself and my learned friend as to whether that financial assistance only has to go to something that is purely designed to mitigate or reduce GHGs or whether – and we will look at it in a minutes – there are other goals, other – as I think Sir James put it – irreconcilable goals of eradication of poverty and sustainable development. So you might supply finance that leads to a later peaking of GHG, that might then eradicate poverty and

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be used later on down the line for green energy, for renewables. Of course, it depends where your least developed countries, such as Mozambique, is in terms of developing its economy and its green economy.

So those principles are to be found in both the United Nations Framework Convention, which I am afraid is back in the first authorities bundle, tab 2, and we know that the Paris Agreement sits within this convention and, indeed, my learned friend has taken you to these recitals in order to say this is how you should interpret the Paris Agreement, looking at the recitals of the Convention. But just looking at those recitals, at p.8, tab 2, the third recital:

> "*Noting* that the largest share of historical and current global emissions of [GHGs] have originated in developing countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs."

Indeed, you might say they will have to grow. And then the sixth recital, in common CBDR, you can see it in the final words of the sixth recital, "common but differentiated responsibilities". Two recitals down, you get the sovereign right of countries to exploit their own resources pursuant to their own environmental and developmental policies.

MRS JUSTICE THORNTON: Sorry, where are you now?

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MR HEPPINSTALL: That is – I have numbered it eight. They are not numbered. It is three from the bottom----

LORD JUSTICE STUART-SMITH: Three from the bottom.

MR HEPPINSTALL: -- yes, "*Recalling* …".

MRS JUSTICE THORNTON: Yes. Thank you.

MR HEPPINSTALL: Sovereign right. And the final recital:

> "… States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

And we will come to this concept a little bit further on, that one country's climate mitigation policy, let us say of cutting off finance flows for fossil fuels, can have an unwarranted and detrimental effect in another country that needs that finance. Another NGO, which comes to the end of my submissions, refers to this as "kicking away the ladder", which the developed countries have already gone up. And that is the sort of thing that is being referred to here.

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And then just over the page, at p.10, we get these words, which you will see again in Paris, at the top, the top recital:

> "*Affirming* that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty."

And then all that you find again in Paris, if we go into the next tab, at p.52. (After a pause): It is again the point we were looking at in Philippe Sands' book:

> "… need access to resources required to achieve sustainable social and economic development … energy consumption will need to grow taking into account the possibilities for achieving for achieving greater energy efficiency …".

MISS SIMOR: Sorry, we are back to the UNFC.

MR HEPPINSTALL: Yes. My learned friend asked me to read the final one, p.10 of that tab.

MRS JUSTICE THORNTON: The last section.

MR HEPPINSTALL:

> "… including through the application of new technologies on terms which make such an application economically and socially beneficial."

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And then into----

MISS SIMOR: I am really sorry. You ought to read the whole of 8 as well.

MR HEPPINSTALL: Sorry?

MISS SIMOR: The whole of 8, in its entirety.

MR HEPPINSTALL: I think I----

MISS SIMOR: I do not think you read the whole thing.

MR HEPPINSTALL: -- did.

LORD JUSTICE STUART-SMITH: I am sorry, I cannot hear. Do I understand that you would like us to take into account the whole of p.8?

MR HEPPINSTALL: No, recital 8 I think.

MISS SIMOR: Recital 8, the entirety of recital 8. I think we just had half of it.

MR HEPPINSTALL: So I think I read out:

> "… the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

I mean----

LORD JUSTICE STUART-SMITH: Well, that is just impossible.

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MR HEPPINSTALL: Well, it depends what it is referring to. It is referring to something like putting----

LORD JUSTICE STUART-SMITH: If it is referring to emissions it is impossible.

MR HEPPINSTALL: Well, it is because they are global but I think it might be referring to putting something that is terribly polluting on the border of another country and the emissions being carried over the border or whatever. But I agree with my Lord that asking Mozambique not to put emissions into the stratosphere that then go round the world is obviously, as my Lord says, impossible.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: Page 52 of tab 3, recitals to the Paris Agreement.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: The third recital down----

LORD JUSTICE STUART-SMITH: "In pursuit"?

MR HEPPINSTALL: "In pursuit", we get again:

> "*In pursuit* of the objective of the Convention, and being guided by its principles, including the principle [we have just looked at] of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

If you skip two recitals down, you have got "the specific needs and special circumstances of developing country Parties …", and then the next down one we actually get to Mozambique

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because Mozambique, as you may have seen from a footnote in our skeleton argument, footnote 3, p.2, is a least developed country and has been since 1988. So you take into account its "specific needs and special situations". And then this----

MISS SIMOR: Sorry, "with regard".

MR HEPPINSTALL: "… with regard to funding and"----

MISS SIMOR: "… with regard to funding and … technology".

MR HEPPINSTALL: Absolutely. And then the next – the next recital:

> "… [the] Parties may be affected not only by climate change [again the theme I mentioned earlier], but also by the impacts of the measures taken in response to it."

And then the next recital we have, again:

> "… the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty."

The next one is "safeguarding food security and ending hunger". The next one "just transition of the workforce and the creation of decent work and quality jobs". And the next one again, "common concern of humankind", and we notice within the next one there is

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mention of "the right to development, as well as gender equality, empowerment of women and intergenerational equity".

And then all this comes out again within the treaty. You have looked at the treaty before. I do not want to go back through it in any detail but the main one is Article 2.2. So Article 2.1 is the critical pathway and Article 2.1:

> "This Agreement will be implemented to reflect equity and the principle of [CBDR] and respective capabilities, in the light of different national circumstances."

And you have got the same in 4.1, "… recognizing that peaking will take longer for developing" countries, and it is all done "on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty".

Now, I just want to draw your attention to the obligation in 4.4 on developed countries to "lead by undertaking economy-wide absolute emission reduction targets". Now, if you can remember that phrase "absolute emission reduction targets", because, as I will show you through Professor Hawkes' report, that is not what Mozambique has provided and they do not have to because they are not a developed country, and they have not provided an absolute emission reduction target. Indeed, you have to go to 4.6, over the page, to find that

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for an LDC and small islands they can "prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances". Then it gets a little bit repetition, but at 4.19, again parties are reminded about CBDR. So if I could----

MISS SIMOR: Sorry, can you read the whole? That is an important – important clause.

MR HEPPINSTALL: Well, I am sure the court can see what 19 says. I do not think I need to read it out to you.

LORD JUSTICE STUART-SMITH: No, I think we have read it.

MR HEPPINSTALL: Thank you. I would like to just turn now to that NDC, which is CB2/2.

LORD JUSTICE STUART-SMITH: I am sorry, I was just re-reading. Reference?

MR HEPPINSTALL: CB2/2, so tab 2, common bundle 2. At p.5 you get a thumbnail sketch of Mozambique and in the second paragraph reference is made to its many natural resources. We see there, the third line of that paragraph:

> "… mineral resources including renewable and non-renewable energy sources and a long coastline … [It is true that] the country is extremely vulnerable to climate change occurring through alternations in the precipitation and temperatures patterns …".

And there is a mention there, of course, of cyclones which devastated parts of Mozambique in 2019. But I am going to pick up the theme of cyclones and how Mozambique could have

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dealt with that impact had it, in fact, had had the following currency revenue that the project can give, and how that itself has been raised as an issue by Mozambique.

So Sir James stole a little of my thunder on p.13, but it is just worth going back there. Page 13 is where all the main action happens in the NDC. It is headed "Mitigation Contributions", and these are the policies and programmes that the state is going to put into play in order to meet the target that is in box 10. And the opening words of box 10 make that clear: "Based on the policy actions and programmes outlined above, the country estimates …", and then it gives its target, which I am going to come back to. But when you look at the twelve policy actions and programmes, they are a mix of dealing with biofuels, the third one. You will have seen in the evidence that one of the principal ways of domestic heating and lighting in Mozambique is the use – is the burning of wood, the use of biofuels. You have got new and renewable energy development strategy at 4; more biomass at 5 – 6 we will look at in a minute – but then I will leave you to look at the other list, including at 10 "Renewable Energy Atlas for Mozambique".

But at 6 is the master plan for natural gas, so----

LORD JUSTICE STUART-SMITH: We were told by the claimants that there is no commitment by Mozambique to – I think this was the submission – no commitment by Mozambique to channel revenues from the LNG project into renewables. I think that is----

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MR HEPPINSTALL: Well, I think you were told that that is what the CCR says. So in terms of the evidence underpinning the decision then I think that is right. That is – or that it is right that that is what the CCR says.

LORD JUSTICE STUART-SMITH: Okay.

MR HEPPINSTALL: So UKEF, I assume, looked for evidence that revenue might go into renewables, found none and recorded that absence of evidence when they were making their decision. But obviously you can see here that Mozambique has at least policies and programmes with "renewable" in the title. I cannot go beyond that because we have not – they are not in evidence before you. So it has ambitions. Whether they can be realised, whether they are real or not, is another matter.

LORD JUSTICE STUART-SMITH: So is this right, that the only one that is before us is number 6?

MR HEPPINSTALL: That is right.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: As far as I am aware.

LORD JUSTICE STUART-SMITH: And could you, while I am on this page, just give me the reference to number 6?

MR HEPPINSTALL: I am going now to number 6.

LORD JUSTICE STUART-SMITH: Good.

MR HEPPINSTALL: Yes.

LORD JUSTICE STUART-SMITH: My apologies.

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MR HEPPINSTALL: So the master plan is----

LORD JUSTICE STUART-SMITH: My quill/pen is poised!

MR HEPPINSTALL: -- is supplementary 2, p.827.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: So as you can – if you are there at p.827 – you can tell immediately, looking at the title page, this is the quintessential foreign act of state. This is a policy, a plan adopted at the 16th Ordinary Session of the Council of Ministers of the Republic of Mozambique Cabinet Council on 24 June 2014. So this is one of the plans and projects it is going to deploy to meet its NDC commitments. And at p.831, and Sir James took you to this, but I do draw your attention to the third and fourth paragraphs on p.831 because this, in a nutshell, is Mozambique's sovereign plan. In previous paragraphs it notes the situation it is in. Paragraph 3:

> "Despite this reality, Mozambique is still one of the least industrialised countries in the world, a scenario that can be overturned with the sustainable use of these resources [LNG]."

It talks about "the total primary energy consumption in 2011 was" only eight million tons of oil and equivalent, "below average consumption in the world and in Africa". "78% of the primary energy supplied comes from biofuels", and, of course, that in and of itself is a problem because if you cut down forests the carbon sink capacity is lost.

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And then really paragraph 4 is, to some extent, the answer to how does the project fit within Paris, because Mozambique's government is saying that:

> "Taking into consideration such a vast potential, it is of the utmost importance that a long-term strategy is drawn to ensure the rational and sustainable use of these non-renewable natural resources, particularly gas; that is, using these resources in such a way that they can contribute to the country socioeconomic development, while at the same time, preserving the environment and ensuring enough resources for future generations to fulfil their energy needs and develop the country. The development of the gas industry, including … (LGN), megaprojects, gas processing, gas pipelines and other infrastructure may contribute significantly for the growth of the Gross Domestic Product."

And when we look at the predictions for the impact on GDP, that is, in fact, something of an underestimate or an understatement given that the impact will run into three figures of billions of US dollars. But that is what Mozambique wishes to do with the latitude it is granted as an LDC under Paris, and is entirely consistent with the aim of the eradication of poverty and sustainable development.

And then just to cover it off, but Sir James did it, you can see that the project is at 833. We are Area 1 Offshore and I think it should be Area 1 Onshore – the one is missing at p.833. You will see there are other areas, Area 4, Area 3 & 6, and some of the figures sometimes

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you see about production capacities are referring to the whole of what Mozambique has described as an LNG path, which at some points you might see in the papers it says there is room for twenty trains on the path, but they would be – it would not just be this project. There are other areas. There are other commercial operators in that area, operating, for example, Area 4. There are going to be other LNG trains and other projects. In fact, if we could----

LORD JUSTICE STUART-SMITH: What page are you on?

MR HEPPINSTALL: I am sorry, my Lord?

LORD JUSTICE STUART-SMITH: What page are you on?

MR HEPPINSTALL: Page 833. 833. It is the table of the LNG concessions----

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: -- for Mozambique. And actually the Rovuma Basin is mentioned on p.834. under the map:

> "… represent[s] an important landmark, not only due to the potential existing quantities of gas, but also the opportunities that will allow the development and implementation of various integrated projects …".

And notice there "fertilizers". You can take the nitrogen from the air, the hydrogen from the LNG, create ammonia, NH4, which turns into fertilizer. And the production of fertilizer is very important to Mozambique for its food security.

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And then at 853----

LORD JUSTICE STUART-SMITH: Before you go there, am I right in understanding that p.837 as setting out the – or summarising a policy framework which includes at (b) their renewable energy development policy, which has obviously been approved by somebody or other----

MR HEPPINSTALL: Yes.

LORD JUSTICE STUART-SMITH: -- with those objectives? So the policy framework includes – as I read it, includes an existing commitment to renewables.

MR HEPPINSTALL: Yes, I think that was approved by----

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: -- a resolution of the Mozambique Cabinet.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: Yes.

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

MR HEPPINSTALL: 853.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: Some guiding principles. Just to – not go through them in detail, just to note what they are. For example, (b) sustainable use of revenues. Over the page, education and training, regional development, promotion and inclusion of SMEs (small and medium enterprises), and I will show you how the project is having an enormous positive impact on

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SMEs in Northern Mozambique. Environmental sustainability and then the use of local resources, and again I will show you how that is happening.

So I do now just want to go to the report of Dr Hawkes, as he was then, now Professor Hawkes, which is in CB1, tab 10. He is now the Professor of Energy Systems, Imperial College, London, produced with the permission of Foster J, 2 September 2021. My Lord gave an invitation to review his report. I do not consider that any of it falls outside of the remit of Part 35 CPR. It is offered to the court in these sort of rare circumstances of a judicial review and its only purpose is to show the difference of opinion. It is show that there is a difference of opinion out there in the scientific community about whether any project, or this project, comes within the Paris aims. Now, there clearly is a difference of opinion between the experts put forward by the claimant, Mr Muttitt and Professor Hawkes, but that is the point; that there is no – but none of that difference of opinion reaches the level, gets anywhere near the level, in my submission, of some incontrovertible error of science that would go towards vitiating this decision. But----

LORD JUSTICE STUART-SMITH: But, anyway, on a JR, if I had to decide that point, I would want to hear from the experts concerned for days and days and days, which is just not going to happen.

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MR HEPPINSTALL: Well, it is also not what happens because you would have to – you have to – in a way, if you are going to cross the standard it is obvious. You would not need the experts. It would be an incontrovertible error of thought, of rationality.

LORD JUSTICE STUART-SMITH: It is amazing how often incontrovertible things are controverted.

MR HEPPINSTALL: Well, indeed, if it was – if it truly happened, it would not be (inaudible) at all.

LORD JUSTICE STUART-SMITH: Could I just mention, and I do not mean this in any sense to cause embarrassment or difficulty, but my eyeline is absolutely concentrated upon you and, therefore, if people who are to the side or behind you nod, shake their heads and so on, I find it very distracting, so I would be very grateful if they would, if only for my sake, retain absolute stability.

MR HEPPINSTALL: Well----

LORD JUSTICE STUART-SMITH: You are all right.

MR HEPPINSTALL: I cannot see them?

LORD JUSTICE STUART-SMITH: I am expecting you to duck and weave. It is that I would just like other people to stay still if they possibly can.

MR HEPPINSTALL: The point I am on at the moment is just trying to decode Mozambique's NDC and this target of 76.5 million tons that is put forward. It is a little bit complicated. If you turn to p.271, para.26, Professor Hawkes tries to do that decoding for us. At 26 he notes

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that "NDC does not commit it to a formal emissions reduction target". 27, just reading the highlighted main conclusions:

> "It is not possible to assert that the Project would breach any limit on emissions Mozambique has set in relation to the Paris Agreement."

And that is because, as it says at the top of 272:

> "It is important to note that the reduction stated is not an absolute emissions reduction target set relative to a specified historical year."

So if you remember that Sir James told you that the UK had benchmarked against 1990 and there is nothing like that in the Mozambique NDC. His interpretation, and it is just that, of the stated ambition, "is that it is a preliminary estimate of emissions reduction relative to business as usual", and if your eyesight can bear it, if you look at footnote 22, he says:

> "… 'business-as-usual' emissions means the level of national emissions that would be expected if the actions set out in their NDC do not take place. Some countries have chosen to set emissions reduction targets in their NDCs relative to a specific level of expected business-as-usual emissions, thereby creating [that] quantitative … target. In contrast, Mozambique has not defined what they expect their future business-as-usual emissions to be, but have instead only defined a level emissions

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> reduction. As such, Mozambique [h]as not set any quantitative emissions target …".

So the 76 million tons is an ambition but we do not know what it is against. So in that sense, even though there is a quantity, it is not quantitative because it is not relative. And, of course, when I showed you what an LDC has to do under Paris, it does not have to produce such quantitative assessment. It just has to set out its ambition, its plan, its strategy.

He says at 28 that the project has been acknowledged in the NDC. I do not need to take you through that because you have seen how that works. And then at 29, he very fairly says the increase in the NDC-relevant emissions, the Scope 1 and Scope 2, "is unwelcome, but can be weighed against the benefits along[side] Paris Agreement guidelines". So over the page, he has worked out that you are looking at a 10 per cent increase and he says that this "is of course unwelcome if considered in isolation." But then he gives in a, b and c the counterweighing benefits that we – I have already outlined, about positive economic impact, the latitude and then something I am going to come back to, where he shows how the use of the gas is – and note the careful language – "is not inconsistent with Paris Agreement targets".

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Now, I do just want to go to a very helpful document that was produced by the African Development Bank, which is back in the supplementary bundle at 632, and I just want to use that document as an aid to pointing out to you, if they are not already evident, the enormous benefits of the project.

LORD JUSTICE STUART-SMITH: Okay.

MR HEPPINSTALL: So it is p.632 of the supplementary bundle.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: The African Development Bank, it has been around since 1963, UK joined in 1983. The twentieth board seat is shared by this country, the Netherlands and Italy, and as you have already heard, I think, the----

LORD JUSTICE STUART-SMITH: I am very sorry, I must have misheard you.

MR HEPPINSTALL: 632.

LORD JUSTICE STUART-SMITH: 632?

MR HEPPINSTALL: Yes. It is----

LORD JUSTICE STUART-SMITH: So this is a memorandum?

MR HEPPINSTALL: Yes, exactly.

LORD JUSTICE STUART-SMITH: Okay.

MR HEPPINSTALL: It is a memorandum to the Board of Directors of the African Development Bank, dated 2 July 2019. One of the board members, I think you have heard – you have already heard the reference, it is in evidence – if you want the reference, it is CB1/184,

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para.61, Mr Taylor says that the twentieth board member at that time, although it is on rotation with the Britain, Netherlands and Italy, was with British, it was a DFID nominee. And reference has been made, my learned friend saying that there had been a positive vote, but it is true to say that this is – this project is supported by the Board of Directors who represent all the member states of the Bank, fifty-four African countries, twenty-seven non-African.

And then if we turn to p.640, it is a canter through some very big numbers. The first one is at 1.5, "largest project financing in Africa to-date", 25.4 billion. The project is then described at 2.1 and it is important to note that we are on the 12.88 million tons, so they are looking at a two train project. Now, I did have a range of submissions to sort of do two trains to death because it is very important to my client, but I think you have already heard submissions on two trains. I just – I would like to pause just to note that Mr Anderson, in his witness statement that was later reformatted, without any changes, into a Part 35 compliant report, or purportedly so, describes doing his emissions calculations on six trains as "more honest". Now, that is precisely the sort of language which we expected to be removed from that partisan witness statement when it became a Part 35 *Ikerian Reefer* compliant balanced, fair, independent evidence to this court.

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Monsieur Bescond, who is my – who is my client's witness, deals with two trains, paras.35 and 36 of his witness statement (for your note, CB1/251), and here we have the African Development Bank dealing with two train.

LORD JUSTICE STUART-SMITH: Okay. I am looking at p.640?

MR HEPPINSTALL: 640, at the bottom, the production capacity is this magic number 12.88, which is the two train capacity. I think we are all agreed on that. Right at the bottom of 640.

Over the page, 641, there is a description of the concession itself and, as my Lord noted, at this time Anadarko, my client's predecessor, is the owner of the concession. That is important for a reason I will come to. At 2.8 you get the project rationale, including supplying domestic and regional markets, and if you want more on domestic supply, Monsieur Bescond gives you that at CB1/248, paras.18-24.

Then skipping forward a bit, I want to go to 2.42 at 648. It notes that the Government of Mozambique has provided a sovereign guarantee at 2.2 billion.

LORD JUSTICE STUART-SMITH: I thought you wanted us to read the last line a bit slower so where have you gone now?

MR HEPPINSTALL: 648.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: I apologise.

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LORD JUSTICE STUART-SMITH: That is okay.

MR HEPPINSTALL: Bottom of 648.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: And a sovereign debt guarantee has been given but to give that sort of in-debt guarantee the Government of Mozambique had to have an IMF, and, if you look at the footnote, a World Bank waiver. Now, my learned friend – I think it is just a small point but my learned friend pointed out that our skeleton argument was inaccurate in saying that the IMF and the World Bank had provided financial support. She is absolutely right that the support that the IMF and the World Bank have provided is that recorded in para.2.42, and if our skeleton argument gave a different impression we apologise. But that is the IMF/World Bank support, which is to allow the Government of Mozambique, notwithstanding its current debt situation, to give that sort of a guarantee.

Over the page, 2.43, 649, more on domestic use, including, in the middle right-hand side of that paragraph, the Fertilizer Project. 2.45, expansion, expansion beyond the 12.88 million tons per year "may only resume after Completion and remain subject to market conditions". Now, my Lord, my Lady, my learned friend cannot have it both ways on stranded assets. The commercial imperative is to sell the gas because there is demand for the gas. The gas from the two trains is already sold. It is subject to the SPA. If international climate change obligations, treaties and regulations meant that gas for demand – demand for gas fell, as it

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would if the regulations said “no more gas” or “less gas”, then there would be no more trains because the demand is falling. So my learned friend went to that vast document and sort of almost made submissions as if market demand is somehow something distasteful or something that is inimical to climate change but they are inextricably linked. The trains will come with demand. No one is going to lend the money. My clients are not going to invest money if there is not demand for further trains, and there will not be demand for further trains if there is not the market, and the market will depend on the world’s governments coordinating and negotiating on that issue. And that is why it is important to stick to the two trains, because the two trains are, by definition, not stranded. They are not locking because my learned friend took you to the SPAs. Gas is already sold.

Although I have to say that my learned friend at one stage, earlier on in submissions, very fairly made the point that the SPAs, whilst – when you look at that table she took you to – have those percentages in Europe, Centrica could buy – Centrica, a British energy player, would buy it but then the point is, and then we see throughout the CCR, it could end up being resold on the world market. It could end up being resale if it gets diverted elsewhere, to a customer – another customer, either wholesale or retail or otherwise, of Centrica.

Later on, when she was looking at those percentages, that nuance fell away but it is an important nuance and it is one that leads to the many uncertainties that makes UKEF’s

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qualitative appreciation of Scope 3 correct. It is one of the many uncertainties that means you cannot actually just look at a mathematically – arithmetically derived figure under Scope 3.

And at 2.47 the point is made about demand at that time but actually what I am – what I do want to show you here is footnote 7, that when Anadarko was the incumbent concessionaire, Wood Mackenzie was already – and, in fact, the evidence from Mr Bescond is it had been since 2014 – the lender's market adviser. Now, Sir James has already answered the point but actually it was not pressed in oral submissions, the fact that there is something the court needs to be worried about about Wood Mac because somehow they are biased towards my clients or they are a creature of my clients or they have given an award to my clients. They were the incumbents with Anadarko before my clients – well, my client at this stage of this report was literally just coming onto the scene, was in the process of taking over the assets. But they were already long established as the lender's adviser and Bescond in his witness statement – I am sure you have already seen that disclaimer at the back of the Wood Mac report, it is also repeated at para.41, p.253 of CB1. The disclaimer in the Wood Mac report says, "This is for the lenders. We are the lenders' adviser. It is for the lenders to rely on."

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Just over the page, 651, bottom of 2.53, it is just a note that it is not just Asia that we are concerned with in terms of who is going to have the gas, but I think you have already heard about the interconnector to South Africa and South Africa is very much heavily reliant on coal. And if we can move South Africa to gas and they can use Mozambique for gas, then that is all for the good and we hear about some of the developments in that regard at 2.53.

LORD JUSTICE STUART-SMITH: Where is the reference to South Africa in 2.53?

MR HEPPINSTALL: It is the last three lines of 2.53.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: 3,000 megawatt gas-fired power station. And then another very small point, 654, 3.18. Just for your note, White & Case are the lender group's lawyers. It would be----

MISS SIMOR: I accept that. That was my error.

MR HEPPINSTALL: -- it would be an odd situation, of course, if they were both lawyers to both lender and borrower, and it came as some surprise to those who instruct me.

MISS SIMOR: I am sorry, I misconstrued something on a website.

MR HEPPINSTALL: Page 655, para.3.24 talks about GDP and it is helpfully summarised at the top of 656, table 2. And that graph, which comes from, as you can see in the parenthesis, from a PricewaterhouseCooper report of April 2019, actually also finds its way into the submissions of the Secretary of State for International Trade at CB2/148.

MRS JUSTICE THORNTON: Sorry, which graph?

MR HEPPINSTALL: The graph – sorry, not graph, table.

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LORD JUSTICE STUART-SMITH: The table.

MR HEPPINSTALL: At the top of 656. Sorry, Table 2. That finds its way into the submission to the Minister and, in fact, this is why I say the gas master plan is an underestimate because you can see these are enormous figures. The total impact – direct, indirect and induced – is US $225.9 billion. The current GDP, I think, is around 15. So it has enormous impact and the impact goes just beyond GDP, because if you read down, you have got jobs and skills, 5,000 Mozambican nationals to be – are being – are employed.

LORD JUSTICE STUART-SMITH: Quite a lot of this is in the – in the – one of the reports, is it not?

MR HEPPINSTALL: It is. It is. You get household income, government revenue and, again, we are talking big figures, 60 billion direct; indirect, 50 billion, and again you have got another table, Table 4, and you have got some SME opportunities, 850 million already spent with SMEs in Mozambique and, if you want move on that, para.29 of Bescond.

So we have looked at how it fits with the NDC. We have looked at those positive benefits. Next, now we turn to Professor Hawkes to see how he fits it with paths. CB1/263, back to Professor Hawkes, para.10, please, 263. Now, he is the expert. He has done some assessment at para.10 of all those different pathways in the IPCC. At (a) he has worked out the interquartile range of gas production consistent with the pathway, and what is important to note as we go through this is the ranges. 48 to 119 exajoules. Apparently an exajoule is

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10^{18}, a quintillion of joules. And he gives you the minimum and maximum ranges of 2050 gas production consistent with Paris. It is 15 to 199. And he fairly notes, in the next – on the top of the next page:

> "… this dataset indicates that it is not possible to conclude that gas will not be used [he is a fan of the double negative] in significant quantities over the period of the Project. While it is clear that global natural gas production does decline to 2050 in most Paris Agreement compliant scenarios, it is also a fact that in some of those scenarios its use remains approximately the same …, and in some outlier scenarios it even increases."

The point is that we are looking in a crystal ball and there are lots of different scientists coming up with lots of different scenarios about how we can try and meet the critical pathway of Paris. Some see more gas, some see less gas. He goes on to talk about the IEA's net zero scenario and how much gas that allows for. He notes at para.12 that because this project has already begun then the IEA's advice that there should no further oil and gas fields does not apply. And then he goes on in paras.13 and following, over the page, to a very important topic of CCS (carbon capture), and in para.14 he points out that we are all pinning our hopes on carbon capture because a lot of those compliant scenarios require carbon capture technology. And then he goes on 15 to again show you how the production from the two trains can fit within those interquartile IPCC ranges because it is 0.55 – between 0.55 and 1.35 of what could be considered acceptable in 2050, and that is the final

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three lines of 265. And that is why he says this project can plausibly – so it is measured language – plausibly be accommodated in Paris Agreement compliant futures.

He is not too excited, in para.16, about NETs, where you try and take the carbon out of the air. He notes at para.17 that the project is economically competitive in his view, unlikely to be stranded, indeed, unlikely to be stranded for the very straightforward reasons I have given, which is the gas itself.

At para.18 he talks about that graph you may have seen in the Wood Mackenzie that shows the gas from this project is lower carbon and will produce less Scope 1 and 2 emissions relative to other energy projects. That is the highlighted conclusion.

LORD JUSTICE STUART-SMITH: Where are you?

MR HEPPINSTALL: Paragraph 18, the bold – emboldened words at the top of para.18 on p.267.

LORD JUSTICE STUART-SMITH: Thank you.

MR HEPPINSTALL: But then he goes on to deal with Scope 3. So if we just turn forward to 273, you get lots of information about Scope 3, although I do not think we need to go through that because I think we are all familiar now with what Scope 3 is and how it works. Perhaps turn to 275, at 33 he states something of the obvious, Scope 3 "is likely to be the combustion of the natural gas at its point of end use". And then at para.34 he introduces you to an important topic of avoided emissions. So you report Scope 1, you report Scope 2

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and 3, and then you can report what emissions you may avoid, although you tend to report them separately. He makes some comments, further comments, about how to do it at 35 and 36 and then at 277 and 278 he actually then goes on to set out his assessment of Scope 3. But, as you see at para.38, p.277, it is all back to the crystal ball. It all depends on what happens next. He thinks that it will probably all be used to generate electricity, or a lot of it will be. Therefore, he takes that as his model. You are looking at electricity generation or blue hydrogen generation and then he gives you two figures at (a) and (b), one imagining we have not cracked CCS and we have got a problem because we are at 93.5 kg, or we have and you are at 11.7. And very fairly, at the top of 278, he says:

> "… early in the project lifetime scope 3 emissions are likely to be simply the combustion emissions of the gas. Later in the project … scope 3 emissions depend largely on whether the gas use is combined with CCS as suggested by IPCC and IEA …".

And then he says you have got a seven-fold range, which he describes as very large. These are the uncertainties. You cannot just do what Professor Anderson does, which is to burn all the gas and say, especially if you are using six trains, "That is an extraordinarily large figure. Oh, dear." You have to take into account the imponderables, the uncertainties and reflect them in your analysis, which is precisely what the CCR does.

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And then he says, "Well, you know, let us look at avoided emissions", but, again, very fairly, at 39, it depends. If this gas displaces coal then we have excellent news. We are displacing 215. So again those 93.5 and 11.7, we might be able to displace 215. But if it displaces solar or wind power, we are at zero. Now, these are like the worst case/best case/ mid case scenarios in the CCR report. And at 40 he says it is a wide range of possible values. And then on he goes in the following paragraphs essentially to say that, given the uncertainties, the extensive caveats in the CCR report – well, let us just look at para.43:

> "The alternative qualitative scenario-based method adopted by UKEF is a reasonable approach given the uncertainties. Instead of making a specific calculation of scope 3 and avoided emissions, UKEF have taken a qualitative scenario-based approach in their [CCR] … They considered a possible best-case, a possible worst-case and possible mid-case scenario. Given the uncertainties discussed above, the scenarios considered represent a reasonable range of possibilities. In my opinion, their decision to use the mid-case scenario where 'some' of the LNG from the Project displaces coal or oil-fired power generation is a reasonable middle-ground …".

Now, Mr Muttitt mentions what you should have done is modelling. You can see that, if you want, at CB/1295 para.30. And I think my learned friend very fairly said that Mr Muttitt does not actually tell you anything about this modelling. He cites a paper, one paper, in his footnote from 2014. But I think it would be, and I think my Lord said on the first day, it would be "fiendishly complicated", and it would be fiendishly complicated, not

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least because every time you make an attempt you are looking in a crystal ball. You have got so many, it is like three or four dimensional, there are so many different elements that you would need to put in play to come up with something even approaching a guesstimate, and there is no modelling before you. There is no other model that could have done any better.

Now, it is just – it literally is a difference of opinion between scientists. It certainly cannot amount to an incontrovertible error that vitiates anything.

LORD JUSTICE STUART-SMITH: Does your submission add up to this, that although you can calculate the carbon content of a given amount of production of LNG, you cannot or the calculation of impact is dependent on variables including displacement, what is being displaced, which gives such a wide range of numbers as to be unhelpful?

MR HEPPINSTALL: Misleading to a minister, my Lord.

LORD JUSTICE STUART-SMITH: Well, they are not misleading. They just may not be of any use. I mean, if, for example – if, for example, you decided that if you took as an assumption that X per cent was going to displace more polluting fossil fuels, someone might attack your assumption but you could do the sums.

MR HEPPINSTALL: You could but then you would have to provide some extensive caveats which essentially amounts to "but we do not know".

LORD JUSTICE STUART-SMITH: Yes.

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MR HEPPINSTALL: So I suppose the misleading nature would be presenting it as concrete certainty when it is – when it is no such thing and can be no such thing. And, therefore, the caveated, careful, qualitative approach in the CCR is the way to present it.

LORD JUSTICE STUART-SMITH: Yes, so the submission would be that it is not irrational, not unreasonable to decide to use a qualitative term such as "very high"----

MR HEPPINSTALL: Indeed.

LORD JUSTICE STUART-SMITH: -- and subject to some – But that is – I do not think – I do not understand your submission to be that calculations cannot be done. I think I understand your submission to be that the potential variables are such that the range of results will be unhelpful.

MR HEPPINSTALL: Exactly, my Lord. I cannot say the calculations cannot be done because my expert has done them. It is just that it leaves you scratching your head because, you know, you have got seven-fold differentials. You have got all the way from "the gas has displaced something green or something nuclear" all the way through to "the gas has gone to Asian countries where they want to use gas to displace coal". And mid-case, middle ground, reasonable.

I do not want to take you to any authorities but you may want to note a very recent decision of *Green Peace v Advocate General* in the Inner House of the First Division, with the Lord President sitting. So it is a bit like our Court of Appeal with the Lord Chief Justice. Which

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is at authorities bundle 4/51 for your note. It starts at 2472. But in, I admit, a very different context, permission to exploit North Sea oil and gas. But at para.68----

LORD JUSTICE STUART-SMITH: 68?

MR HEPPINSTALL: 68, p.2485, you will find an interesting comment on:

> "It [is not] practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer."

LORD JUSTICE STUART-SMITH: Well, I am sure if you want us to read it, we will read it, but what use are we meant to make of that?

MR HEPPINSTALL: Well, it is a – it is a judicial endorsement almost of the approach, that it is, in that context – and I am not going to oversell this submission because I will be told that it is in a completely different context, which is entirely correct – but in that context, for the decision-maker to work out where all the oil and gas will end up and how it will be consumed is not practicable because it would all depend and you do not know. It is also said, at the end of that passage, that what we should do with all the oil and gas is essentially a political and not a legal question, which may well be----

LORD JUSTICE STUART-SMITH: As I sit here at the moment, it does not – it does not, in the context of other things that the courts sometimes have to look at in terms of calculations, it does not look particularly complicated in principle. It is just that the variables would be

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subject to – could be subject to challenge and would lead to a very wide range of results, and that emerges quite clearly from the evidence on a number of fronts.

MR HEPPINSTALL: Yes. And----

LORD JUSTICE STUART-SMITH: Well, are we going to go any further than that?

MR HEPPINSTALL: No, my Lord, and, as Sir James was saying earlier, also it depends on other sovereign nations and their NDCs. I mean, I am trying to sell gas to, let us say, Indonesia. If it changes – if it ratcheted up its NDC and said, "No. No, thank you"----

LORD JUSTICE STUART-SMITH: My Lady and I both relish number crunching and would do it if it was going to be of any use but I think your submission is that it is really not going (inaudible)----

MR HEPPINSTALL: Well, it is no use to Professor Hawkes because he is left with such uncertainties and large ranges, so it is no use to the court.

LORD JUSTICE STUART-SMITH: Right. I think we have probably dealt with that one.

MR HEPPINSTALL: Can I make two – just do two further things? One is p.310----

LORD JUSTICE STUART-SMITH: This is still on Professor Hawkes, is it?

MR HEPPINSTALL: No, I am just going into Mr Muttitt.

LORD JUSTICE STUART-SMITH: Okay.

MR HEPPINSTALL: I am finished with Professor Hawkes. I just want to show you how stark this difference of opinion is but it is just difference of opinion. If you look at p.310, para.76, this is his very different view of common but differentiated responsibility.

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LORD JUSTICE STUART-SMITH: Give me a moment, please. (After a pause): Yes. 310, para.76.

MR HEPPINSTALL: 310, para.76.

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: He says:

> "While the CCR mentions that under the Paris Agreement, developing countries may reduce GHG emissions more slowly …".

Again, he is not "peaking later", "reduce more slowly".

> "… it does not follow that fossil fuel expansion in those countries is consistent with the goals of the Agreement. Indeed, as noted above, achieving the Paris goals will require a rapid *global* reduction in gas production and use. The notional of '[CBDR]', at the heart of the [Convention of Paris] … means that all countries have a common responsibility, but the way in which they meet it is differentiated between them. When it comes to fossil fuel extraction, this implies that all countries should begin a reduction, but the reduction should be fastest in wealthiest countries, and poorer countries should receive finance and support to enable their reduction."

So a very different view of CBDR but the only point is, is that it is not really for this court to choose because it is just a matter of debate between scientists and right-thinking people as to what Paris – what action Paris requires, and that action is decided upon by states and

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negotiated on the international plane. But, as you can tell, we fundamentally disagree – Professor Hawkes fundamentally disagrees. But the existence of the disagreement cannot vitiate the defendant's approach.

And then, as I promised, as my final act, I just want to show you the very different view of another NGO. It is the supplementary bundle at 1867, supplementary bundle volume 3, tab 49. I beg your pardon. Tab 51, sorry, p.1867. This is a report of the Tony Blair Institute for Global Change. It is entitled "A Just Transition for Africa: Championing a Fair and Prosperous Pathway to Net Zero." We can skip over the foreword from our former Prime Minister, but at p.1872 you get a very different view:

> "High-income countries must become genuine partners to African nations and help them advance their economic transformation and industrialisation plans in a way that minimises damage to the planet. At present, [high-income countries] are seen to be prioritising climate mitigation over Africa's development, restricting development choices and 'kicking away the ladder' that they themselves have already climbed."

And then you get a number of different principles but actually – and you get a bit more at 1878 on "kicking away the ladder".

LORD JUSTICE STUART-SMITH: I do not quite understand why you are taking us to this.

MR HEPPINSTALL: Well, only to show, my Lord----

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LORD JUSTICE STUART-SMITH: I do not know who the authors are. Obviously I know the person who gives their name to this institute but, I mean----

MR HEPPINSTALL: I am only----

LORD JUSTICE STUART-SMITH: -- we know – we know there is a conflict----

MR HEPPINSTALL: Yes, very good.

LORD JUSTICE STUART-SMITH: -- between the self-interest of developed nations and the self-interest of developing nations.

MR HEPPINSTALL: Indeed. My Lord, my only kind of marginal interest, p.1882 and 1883, which is where this project is used as a case study.

LORD JUSTICE STUART-SMITH: Okay. 1878?

MR HEPPINSTALL: 1882, 1883.

LORD JUSTICE STUART-SMITH: 1882. Thank you.

MR HEPPINSTALL: So this project is used as an exemplar of how sustainable exploitation of liquid natural gas or naturally occurring assets can assist a developing nation, including a developing nation that in the end is on its journey to a low carbon economy but needs to get there through the destination of exploiting its natural resources. So I----

LORD JUSTICE STUART-SMITH: You have cited this in your skeleton and----

MR HEPPINSTALL: Indeed, my Lord.

LORD JUSTICE STUART-SMITH: -- we will look at it again obviously.

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MR HEPPINSTALL: I am very grateful. It only goes to the difference of opinion point and how inapt that sort of territory is, of course, for a claim at this stage.

LORD JUSTICE STUART-SMITH: Sorry, how inapt?

MR HEPPINSTALL: How inapt some – how inapt it is to bring a claim saying that there is some vitiating evidence, saying that there is only one way to look at Paris and only one way to look at how Mozambique should behave and how it should keep its natural resources in the ground when, in fact, it is just all a matter of debate. It is not a matter that can be raised----

LORD JUSTICE STUART-SMITH: Well, it is a matter – sorry, it is not just all a matter of debate. Whether or not, on public law principles, there has been a vitiating outcome is a matter for the court to decide.

MR HEPPINSTALL: Of course, my Lord.

LORD JUSTICE STUART-SMITH: The court is, I mean, it is probably not as aware as some of the people in – or not as well informed as some of the people in this court, or listening, but the court is fully aware of the conflict between developed nations and less developed nations and the existence of irreconcilable objectives.

MR HEPPINSTALL: Indeed.

LORD JUSTICE STUART-SMITH: That does not of itself make this claim inappropriate.

MR HEPPINSTALL: Of course not, my Lord, but it is very important context. One accepts my learned friend for the claimant's submissions in its proper context, where it is not all one-sided, it is not – there is not one view of what Paris requires. There is not one view of what

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Mozambique has to do. And, importantly, of course, is the foreign act of state of Mozambique's own view. But to raise Mr Muttitt, and all those arguments, to a level where you say failure to follow that line is a public law error, clearly is not sustainable.

LORD JUSTICE STUART-SMITH: I think that is a different point, if I may respectfully say so.

MR HEPPINSTALL: Those are the submissions of the interested parties.

LORD JUSTICE STUART-SMITH: Thank you very much. They are very clear and we have your skeleton which is also extremely clear. Thank you very much.

MR HEPPINSTALL: And we are grateful for allowing the extended length of the skeleton which has hopefully led to an economy, I hope, of oral submissions.

LORD JUSTICE STUART-SMITH: Well, there are economies and economies. Economies in judicial time possibly.

MR HEPPINSTALL: I am grateful.

LORD JUSTICE STUART-SMITH: Thank you. It is useful to have your references there. Yes.

MISS SIMOR: Now, my Lord and my Lady, I fought very hard to obtain yesterday morning, initially I was only offered a day. It now looks like we have much more time than expected.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: If I may, I would like to just respond on the last point that was dealt with. We may come back after the adjournment on that issue. And then, if possible, perhaps we could adjourn a little bit earlier so that I can just put in order----

LORD JUSTICE STUART-SMITH: Yes.

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MISS SIMOR: -- the best things to deal with?

LORD JUSTICE STUART-SMITH: As you know, it is always one of the most compelling submissions that counsel can make that, "If we just break now my submissions may be shorter later". So, speaking entirely for myself, I usually find that utterly compelling.

MISS SIMOR: So I find myself slightly----

LORD JUSTICE STUART-SMITH: So do----

MISS SIMOR: -- having to simply promise to re-order them.

LORD JUSTICE STUART-SMITH: Yes, do by all means deal with whatever you want to now----

MISS SIMOR: Thank you.

LORD JUSTICE STUART-SMITH: -- and then we will take a break.

MISS SIMOR: So just to deal with the final debate between my Lord and my learned friend, my Lord said that there is a conflict between the interests of developed countries and the interests of developing countries, and, of course, that is right. It is a very complex conflict because in this what we have to remember at all times is that the most vulnerable countries to climate change are the developing states generally, and Mozambique, as my learned friend correctly said, falls into a category of a least developed country and the most vulnerable, according to the 2019 Climate Watch Report that I showed you to, the most vulnerable state – one of the most vulnerable states in the world to the impact of climate change; the consequence being that this project will be built on high land to protect itself

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from cyclones and hurricanes. With sea-level rises there will be loss of the low areas. There are obviously coral reefs. There are diversity issues – biodiversity issues, tourist issues, there are all kinds of complicated issues going forward in terms of development.

Put on the other side, one assumes, well, the interest of the developed world is for climate change not to happen but, in fact, a country like the United Kingdom is actually in a relatively good position. We may suffer storms and problems but in global terms it is in a relatively good position.

LORD JUSTICE STUART-SMITH: Suffolk does not think so.

MISS SIMOR: Well, quite. But in relative terms.

LORD JUSTICE STUART-SMITH: In relative terms, yes.

MISS SIMOR: In relative terms only, of course. And, of course, one should not assume that we are talking only about finance to Mozambique. You saw the list of concessions in the document in relation to these liquid natural gas projects in Mozambique, which obviously are much wider than simply the one before you, and those concessions are held by the USA, by Italy, by France and by Norway. Norway, as far as I am aware, has one of the highest per capital purchasing power GDP in the world.

LORD JUSTICE STUART-SMITH: It certainly does.

MISS SIMOR: These are extremely wealthy countries and there is also documentation about where this revenue is going. It is not – one cannot approach this on the basis that the revenue is

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going directly into Mozambique. There are obviously direct and indirect benefits but it is complex in that way as well, because there are economic interests of the developed world in exploiting these resources. And insofar as it is being suggested that somehow the claimant is kicking away the ladder from Mozambique, that could not be further from the truth.

LORD JUSTICE STUART-SMITH: Why not?

MISS SIMOR: Because the Paris Agreement, looked at as a whole, is a commitment by countries to each other, they have made an agreement, whereby finance flows will flow from the developed world to the developing world to compensate the developing world for the causes of climate change and the consequences of climate change. So when we looked yesterday, I think my learned friend said something like – and I am going to come to this in my submissions – the court needs to look at whether the parties would really have agreed this – if this is what it means, would they really have agreed it? Well, what they agreed, if you look at the document in the round – the treaty in the round, is they agreed a complex set – a deal effectively, a deal that involves finance flows. And one part of that is climate finance, which is a specific category of finance and you will have heard of the hundred billion commitment that has been made by the developed world and not paid. That commitment has not been met but it was made. And the other thing is finance generally which is necessary, if you like, to achieve – well, it is necessary to achieve the temperature goals. It is a core part and it's a fundamental change from the UNFCC.

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So when we talk about complexity, it is complex and what one cannot do is simply say it is "kick away the ladder". I am going to make some submissions on the Tony Blair Foundation report after the adjournment because I want to consult my juniors as to what it would be appropriate for me to say and not to say before I do it in open court. So if it is all right by you, I would be happy to take a break now and get my sort of thinking in order.

LORD JUSTICE STUART-SMITH: And start again at two?

MISS SIMOR: Is that all right with you?

LORD JUSTICE STUART-SMITH: Does anyone object to starting again at two? Very well, we will start again at two.

MISS SIMOR: Thank you very much.

LORD JUSTICE STUART-SMITH: Thank you.

(Adjourned for a short time)

MISS SIMOR: My Lord, my Lady, I am going to reply by reference to ten points. I am going to start briefly on the two trains point, deal with lock-in and transitions, stranded assets, the Scope 3 arguments made by my learned friend this morning, the approach to rationality generality, the tenability argument, the interpretation process under international law, the question of net increase, acts of state and then poverty.

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LORD JUSTICE STUART-SMITH: And then we will all go away happy. Ten points. Okay. Thank you.

MISS SIMOR: First of all, I am just going to start though with a list of things that were not addressed by the defendants or the IPs. The question of the relevance to interpretation of the Paris Act, these are – these are issues that are directly relevant to the interpretation of the Paris Act, ground 1(a), and matters to which they should have had regard, the rationality arguments under ground 1(b).

LORD JUSTICE STUART-SMITH: Forgive me. I was just getting myself aligned. What was your first thing?

MISS SIMOR: So what I am addressing is matters that have not been considered in relation to both----

LORD JUSTICE STUART-SMITH: Yes, and the first one is?

MISS SIMOR: Well, no, to both arguments. The first one is the urgency of the threat of climate change. That has been left out of all accounts. And it is, of course, in the UNFCCC of 1992, but it is the basis on which in 2011 the parties got together to agree that they should go forward to enact and to agree a further agreement to respond to that urgency, not----

LORD JUSTICE STUART-SMITH: 2011 is Durban.

MISS SIMOR: Exactly. Yes, Durban, and I handed you the decision by which they decided that they should go forward and negotiate, draft, negotiate and finally agree a legal instruction; so not a declaration but a legally binding instruction. And that was a response to the urgency

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and that is something that has not been raised or touched on. Indeed, I would say the opposite because what has been said today is, "Well, okay, it does not work. The NDCs are not enough. We are not on track. But it is all right because the parties can come together again and they can negotiate again, and they can at that point maybe improve the situation slightly." But that ignores the fundamental point, which is it was the urgency in 1992 that led to this extraordinary international agreement, the UNFCCC. It is an extraordinary agreement. Also the Ozone Montreal Agreement. But that agreement, even post-Kyoto, was found not to be sufficient and the indicative NDCs were not sufficient and the urgency was recognised in the light of AR4 and 5, the reports in relation to what – the scientific reports as to what was necessary. And as a result of that, the parties decided to draw up a new instrument and that was the Paris Agreement.

The second thing that the parties have both ignored is the implications of the specific temperature goals in Article 2(1)(a) for the implementation of the rest of the Paris Agreement. Those temperature goals are crucial. They are central.

The third thing that they have ignored is best available science, as set out in the IPCC and UNEP, and you will recall that I explained to you that the IPCC had taken eighty scenarios, including the kind of scenarios that Mr Hawkes mentions in this witness statement, where he says in one world we do not need to do anything at all because technology will have

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developed so much that we will be able to either capture all the carbon, or some people talk about putting mirrors up to reflect back, etc. Technology will enable us to continue to exploit fossil fuels. Now, the IPCC 1.5 report looked at eighty scenarios, and some of those are on that extreme spectrum, and we have to respect the conclusions that are reached in that report. That report was then – from that report, UNEP took eighteen scenarios that the IPCC had considered were feasible scenarios and it was on the basis of those eighteen scenarios that you get the UNEP production gap report.

The fourth point that the defendants and IPs have left out is the production gap, and all its implications for the delivery – and the implications for delivery of all NDCs. So we heard this morning about the fact that, of course, the NDCs, even if met, even if fully met, would come nowhere close to enabling the world to meet the well below 2 degrees.

LORD JUSTICE STUART-SMITH: Is it lawful for any sovereign state to increase its emissions?

MISS SIMOR: Is it lawful?

LORD JUSTICE STUART-SMITH: Hm.

MISS SIMOR: Only on that – well – (after a pause) – it is lawful but they have all got to go for net zero ultimately. There is a different time point but, yes, so for Mozambique, the later peaking for Mozambique, not for Mozambique's sale exports but for Mozambique itself, and I think we had an exchange on that yesterday, my Lord.

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So turning to my – those are the things that we have not heard anything about. Turning then to my first point, the two trains point, I obviously – I just want to make two points about this. First of all, the defendants say that they only took into account two trains, they accept that, but they it was a reasonable approach. And we say that is wrong for two reasons. First of all, because of the obligations on the party – on the defendants under the Paris Agreements to assist Mozambique in meeting commitments but, significantly, increasing and enhancing those emissions. And, in relation to another submission, I am actually going to take you to those provisions, and that is the so-called "ratchet effect". And, therefore, it is essential for the defendants, in acting reasonably, to look reasonably at the thirty year trajectory that are concerned with. And while – well, the interested party made submissions this morning about the position and made it very clear that the question of whether they extend is responsive to demand. So if demand continues to expand, the IPs understandably, it is in their commercial interest, will respond to that demand and that reflects exactly what Total says on its website – and I think we may have put the materials in. I think we have certainly linked the hyperlink in the skeleton. They say what this project is expected to produce and that is reflected in all the documents relating to commerciality, risk, etc. So it is accepted that this is a demand issue for Total.

It is relevant also for the defendants to look at this question of assets and extension, both in the context of Mozambique developing its own renewable resources, which is something

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referred to specifically in Paris and in the UNFCCC, and not getting locked in to a gas-dependent economy. And it is one thing in relation to the grid, we have got to build a grid, but, first of all, that gird has to be a grid that can be transferred to renewables and I think that is dealt with in Mr Muttitt's witness evidence, but, secondly, it is not simply a grid. In this country we are highly dependent on gas boilers, for example. It is possible that a country dependent on liquid natural gas might move to liquid natural gas transport, which is something you can. You can have cars with liquid natural gas. So it is also about not creating an economy that becomes dependent on a fossil fuel and that was relevant to the defendants' assessment of the number of trains and the capacity, the overall capacity and intention in relation to this project.

The second point is the IFC standards to which the defendants were supposed to have regard, and say they did have regard, and say they complied with, and this is really a question of legal interpretation. And we find that in authorities bundle, tab 9, so authorities bundle 1, tab 9, p.242, and if you can read 4. So this is Standard 1 and the defendants say that Standard 1 only required them to look at two trains and, in our submission, Standard 1 required them to look at six/eight trains, and I am going to show you the terms of Standard 1:

> "This Performance Standard applies to business activities with environmental and/or social risks and/or impacts. For the purposes of this

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> Performance Standard, the term 'project' refers to a defined set of business activities, including those where specific physical elements, aspects, and facilities likely to generate risks and impacts, have yet to be identified. Where applicable, this could include aspects from the early developmental stages through the entire life cycle (design, construction, commissioning, operation, decommissioning, closure or, where applicable, post-closure) of a physical asset. The requirements of this Performance Standard apply to all business activities unless otherwise noted in the specific limitations …".

And then if we look at footnote 6, which is to as yet to be identified, you will see it says:

> "For example, corporate entities which have portfolios of existing physical assets, and/or intend to develop or acquire new facilities, and investment funds or financial intermediaries with existing portfolios of assets and/or which intend to invest in new facilities."

LORD JUSTICE STUART-SMITH: But that is not this case.

MISS SIMOR: It is because we are talking about the project.

LORD JUSTICE STUART-SMITH: No. The project, as presently defined, is a two train project. This surely – well, to my reading – I have never seen this before, you obviously have – but this is saying, "If your project includes physical assets, developments which have not yet been identified, then you should take them into account." That is not this case. This case is, "You have got a project which is a two train project. There might one day be a six train

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project or an eight train project which will then have to be considered as such." But the present project does not have, as part of it, six, eight, ten, twelve trains.

MISS SIMOR: Well, if I can take you to the next bit----

LORD JUSTICE STUART-SMITH: I thought you might say that.

MISS SIMOR: -- and 8----

LORD JUSTICE STUART-SMITH: But that is what reading this looks like to me.

MISS SIMOR: So 8:

> "Where the project involves specifically identified physical elements, aspects, and facilities that are likely to generate impacts, environmental and social risks and impacts will be identified in the context of the project's area of influence. This area of influence encompasses, as appropriate:
>
> - The area likely to be affected by: (i) the project and the client's activities and facilities that are directly owned, operated or managed (including by contractors) and that are a component of the project; (ii) impacts from unplanned but predictable developments caused by the project that may occur later or at a different location; [and] (iii) indirect project impacts on biodiversity or on ecosystem … which [are] Affected [by] Communities …".

And then the second bullet:

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- Cumulative impacts that result from the incremental impact, on areas or resources used or directly impacted by the project …".

And then if you go to the actual definition of the----

LORD JUSTICE STUART-SMITH: I have to say that so far, subject to definitions, para.8 seems to me to reinforce the point I was just making. But I may be----

MISS SIMOR: So we rely on "reasonably defined developments" in the second bullet, "reasonably defined developments at the time the risks and impacts identification process is conducted."

LORD JUSTICE STUART-SMITH: Sorry.

MISS SIMOR: And----

LORD JUSTICE STUART-SMITH: Sorry, sorry.

MISS SIMOR: Sorry.

LORD JUSTICE STUART-SMITH: Where are we?

MISS SIMOR: Page 244, second bullet, and we say----

LORD JUSTICE STUART-SMITH: "Cumulative impacts"?

MISS SIMOR: Yes. We say that the development of this site, and I – did I take you – it is all in the skeleton but I have not taken you to the May 2020 EIA, because that identifies the larger number of trains. So it is "reasonably defined developments" that are likely for this project. Now, it may be that the UK is only investing – I should not say "only", it is the biggest investment ever – but the UK is footing 7 per cent of the cost of the two trains. Now, we do

not say – or the project so far, which is obviously the – expanding the trains is very much an incremental cost on the project, and we say----

LORD JUSTICE STUART-SMITH: Well, it is actually, in every new sense, it is a new project because it is not catered for in this project at all.

MISS SIMOR: Well, my Lord, we disagree on that. It is----

LORD JUSTICE STUART-SMITH: Okay. Can you give me the – can you give us the reference that you are referring to?

MISS SIMOR: Well, it is the – I would go to the 2020 EIA and you would have to go to the Total documents, which – in fact, the submission was made this morning, that it is a question of a response to demand. It will be expanded if the demand is there. And we say that that is reasonably defined and in the documents, right back to 2014, it starts with being eight to ten, it is then scaled back. Initial development is two, to be expanded up to fourteen. And those are what the EIA documents say right up to 2020.

LORD JUSTICE STUART-SMITH: Okay. Well, I may be wrong so could you give me – give us the reference for that?

MISS SIMOR: Apparently it is at 113 to 114 of our skeleton but where the EIA 2020 – perhaps I will – (after a pause): Yes, we will find it. I think I may actually – oh, I have got it. It is the next paragraph in my notes. Supplementary bundle 1, p.1228, para.2.3.

LORD JUSTICE STUART-SMITH: 1228?

MISS SIMOR: 1228.

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LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So it is supplementary bundle 2. So here we are, yes, p.1228. This is – so what happened was in 2014 there was an environmental impact assessment. The project starts in 2012. 2014 we have the EIA. This is an update of the EIA and then 2.3 says:

> "The Onshore Project is designed to receive, treat and convert natural gas from the Subsea Production System into a liquid. Two LNG trains will be constructed initially and additional trains are planned for future phases. Space for up to 14 trains has been allocated to include the potential for future growth."

And that is exactly in line with how it always was and, indeed, it was confirmed this morning by my learned friend, who said, "Yes, we will expand in response to demand." And we say that in the light of that, IFC Standard 1 required the United Kingdom to assess by reference to at least a larger than two train project, because a larger than two train project is planned and, yes, they are only funding 7 per cent but they do not assess 7 per cent of the two trains. They must assess the project and its reasonable expansion and that makes sense both under the IFC, and complies with its intentions, but also, of course, under the Paris Agreement in relation to its obligations to assist Mozambique.

For your notes, there are some other references. First of all, we asked – the evidence given by the defendants was that it was only two trains initially in 2014 – Sorry, it was eight trains

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in 2014 but then it was narrowed down to two trains. So the original impact assessment in 2014 – (after a pause) – the early one was for six or eight trains, the early assessment, 2014, and we said, "Well, where was it narrowed? When did the project become narrower?" And the response given by Mr Griffin, at paragraph – So, sorry, start again. Mr Griffin said in para.101 of his statement that it had been narrowed down and that, yes, we were right, originally it was larger. So we asked him to tell us where it had been narrowed down and the document he produced was effectively the – was the 2020 one, the one I have just shown you. So if we go to the original project, it is at core bundle 2----

LORD JUSTICE STUART-SMITH: So we are going to six to eight trains in 2014?

MISS SIMOR: We are going to go to the 2018 memorandum, which is at core bundle 2, tab – p.31.

It is the mostly redacted document and it says:

> "The Project will develop the Golfinho-Atum Field by constructing and operating a two-train … LNG plant and the necessary equipment for processing … The initial two train Project will produce – 12 [that is what they agree] --- however, the Project Site is designed to accommodate the installation of up to 100 … [so that is actually eight times that] of the liquefaction capacity for potential future developments."

And then – so I have already showed, I am not going to go back to it, in the RAD report, the risk report, they proceeded to look at eight – that is CB2, tab 180.

LORD JUSTICE STUART-SMITH: CB2?

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MISS SIMOR: Tab 1 – p.180. And in footnote 6 to our skeleton – sorry, it is footnote 6 to Mr Anderson's second witness statement, which is at CB1, p.157, he links the Total website page.

LORD JUSTICE STUART-SMITH: Sorry, is CB2/180 a page about reserved risk?

MISS SIMOR: Yes. It says eight – I hope it says "eight trains" at the top.

LORD JUSTICE STUART-SMITH: We went to it, I think----

MISS SIMOR: Yes, I went to it already.

LORD JUSTICE STUART-SMITH: Okay. And I think you said read it later.

MISS SIMOR: Oh, probably under pressure of time. But it is----

LORD JUSTICE STUART-SMITH: All right.

MISS SIMOR: -- basically that what they did was they said – they assessed the risks to this project, the commercial risks, and the reserve risk, by reference to eight trains and they said there is a low reserve risk because it has got eight trains potential. So you cannot have it both ways. You cannot, on the one hand, decide that the commercial risk is low to British taxpayers because there is lots of capacity there and it will – there is plenty of fuel and, on the other hand, say, "We are not going to look at the environmental implications of that".

And then the third place you can find reference is on Total's website, and that is hyperlinked in Mr Anderson's second witness statement at core bundle 1, p.157, footnote 6, and I do not – I will not go to it. It says on my note go to the footnote and show all the references. All

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the references are there. They particularly to what – I mean, it accords with what was said this morning by my learned friend.

And then I took you to the 2020 environmental impact update by RINA, who is the independent adviser on this project for Total, and there you saw that it is planned to be eight trains. And we say that is sufficient for IFC Standard 1 and not to look at it is----

LORD JUSTICE STUART-SMITH: Forgive me, could you give us the RINA reference just once more?

MISS SIMOR: Yes, sorry. It is supplementary bundle 2, p.1228, para.2.3. It is the page that is basically a black page with a line in the middle.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: So that is it on trains. Second point, lock-in transition. Now, my Lord, my Lady, this is a crucial element of any assessment. There are two elements to lock-in. One is the emissions produced by the infrastructure itself and the other is the locked in emissions that result from a society that develops on the basis of LNG or gas use for electricity and generation. I just mentioned that. And both of these relate to the consequence of developing----

LORD JUSTICE STUART-SMITH: I am very sorry, I am trying to take a note. I know----

MISS SIMOR: I am sorry. Am I going----

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LORD JUSTICE STUART-SMITH: -- you are – I know you are still feeling under pressure of time but I am trying to take a note so that when you have gone we do not have to write to you and say, "What was this about?" Two elements. What was the first? Emissions?

MISS SIMOR: There are two elements. It is all – two elements of lock-in. One is the known lock-in from the project. So we know that the project produces 6 million tons of CO_2. It is not – that does not include the methane but there is at least 6 million tons per annum that the actual generation of liquid natural gas by the project site will involve and that is locked in to Mozambique's emissions for thirty years. So that is one element of lock-in.

The other element of lock-in or transition - /transition is the creation of a society that becomes dependent and, therefore, does not move to renewables because the cost of transmit – the cost of – the cost benefit of transferring to renewable once you have actually invested in gas infrastructure is negative. So that is another risk that needed to be taken into account.

And both of these, in our submission, relate to the consequence of developing this source that will endure and potentially prevent development of renewable energy sources, and I refer my Lord and my Lady to Mr Anderson's second witness statement, para.23, core bundle 1, p.163.

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The defendants' conclusions on lock-in and transition are in the CCR at core bundle 2, p.268, and we have been there but I would like to just go back to it briefly. Yes. Page 168 (sic).

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: Now, UKEF says three things. First, it says that the committed cumulative carbon emissions of this project, that is the commissions of this – the emissions of this project, could not be calculated.

LORD JUSTICE STUART-SMITH: Where are we looking?

MISS SIMOR: It is – so the first line, sorry, in the second paragraph:

> "When considering the potential for fossil fuel lock-in for Mozambique, UKEF considered whether the Committed Cumulative Carbon Emissions for the Project could be calculated. This would involve using advanced methodology for estimating future emissions from energy sector assets which in the UK is being developed by academic[s] … [etc.] CCCE calculations would need to be undertaken by specialist consultants and driven by/contributed to by the Mozambique Government."

Now, that arguably relates to the society, the committed cumulative emissions that might come, for example, in developing a bus network that is fuelled by liquid natural gas rather than electric vehicles. But what it does not deal with is the 6 million tons of CO_2 from the project, which can easily be calculated, and that is simply not done. And you will recall that Mr Caldecott criticised the climate change report for its failure to calculate cumulative

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emissions and I believe it was John Murton, or perhaps Julian Critchlow from the COP Unit, who also said you can do these calculations. But our witness evidence of experts who deal with this is that those calculations can and certainly should have been done.

The second thing that UKEF says is it cannot say whether the project will replace renewables. So----

LORD JUSTICE STUART-SMITH: Are we still on p.268?

MISS SIMOR: Yes. Whether it says it exactly here – Oh, I should just make a point about above, the paragraph above. We gave you some papers from Mr Caldecott. When it actually talks about Oxford University, the reason it talks about Oxford University is because it is Mr Caldecott who is developing those methodologies to look at things like if you create a transport network based on LNG. So it was not really a question of it could not have been done, it was a question of it would be either too time consuming, and we know that anyway, or it could not be done at a sufficient cost. We have not got any evidence of that. We have got the time issue. Oh, yes, here we are. So in the middle of the next paragraph, about six lines down, after the brackets, it is said:

> "It is not known for certain whether or not the Project will displace renewable energy potential or low carbon solutions."

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I suppose by "low carbon solutions", we are talking about things like a bus network or a heating network based on electricity created by renewable energy rather than directly powered by gas. So they do not know.

Thirdly, they do not know whether the Government of Mozambique has a plan as to how to use the finance, i.e., whether it will be used for renewables. And that you find in the last line there:

> "No further information is available from the government of Mozambique related to this, nor is there further information as to whether the government has a plan in place as to how the Project funds will be utilised."

Now, that is relevant to transition because what they are saying is they have not got any information to suggest that – or to commit to transition, and I remind you again that this is something that Mr Caldecott called to UKEF's attention and said, "Have you got the plans from Mozambique as to how they are going to transition?", because the UK is supposed to be helping developing countries to transition to a net zero economy whereby they can have energy, power, sustainable development and develop sustainably, not to get locked in to greenhouse gas projects, or rather, greenhouse gas infrastructure, which then will be very costly to replace when it cannot be used anymore.

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And then, fourth, UKEF says openly that it would be better for Mozambique to develop renewable energy, and that is in the summary:

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

And then it says:

> "… but it should be recognised that the same financial incentives …".

Well, "financial incentives" goes to the finance issue.

LORD JUSTICE STUART-SMITH: No, they do not. You cannot build a renewal infrastructure without finance.

MISS SIMOR: Exactly and the finance----

LORD JUSTICE STUART-SMITH: But it is just not – it is not a game that is in town.

MISS SIMOR: The finance obligations lie on the developed countries.

LORD JUSTICE STUART-SMITH: So, on your projection, no developed country, or person who is capable of financing this, should finance liquid natural gas and no one will finance renewables because it is just not on the table.

MISS SIMOR: Well, it is----

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LORD JUSTICE STUART-SMITH: So where – where does one go from there?

MISS SIMOR: Well, interestingly, you will see – I do not know whether I put the documents in but I believe I did, the UK Government policy, and, indeed, it is said by the Secretary of State for Development that when she – it was she, was it not – Trevelyan----

LORD JUSTICE STUART-SMITH: I am just – I am just dealing – I am just dealing with this point which is made in the – which is it would be preferable to be investing money in Mozambique in renewables. That, I am sure, is something that everybody in this room can subscribe to. But it is just not available.

MISS SIMOR: But that – that is----

LORD JUSTICE STUART-SMITH: You----

MISS SIMOR: Well, that – that – first of all, it is contestable but, secondly, it is contrary – it is – the obligation on the developed world is to take steps to assist developing countries to develop that energy. Now – and renewables are specifically referred to in the recitals of the Paris Agreement. The UK's current policy – first of all, the UK's objection, the ministers who objected to this said, "No, we should be developing British industry, so we should be" – and they are actually doing that now, that is their existing policy – "we should be investing in our renewable industry in the UK and persuading people to go into Mozambique and make money, just like Total". So Total is making money in Mozambique while British companies building solar power or hydropower, or whatever, would also be making money and that is where the United Kingdom should be putting its investment assistance.

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LORD JUSTICE STUART-SMITH: Every developed country – on your submission, no developed country should be supporting this liquid natural gas project and the developed world should be supporting Mozambique to go straight to carbon neutral.

MISS SIMOR: Insofar – you will see the existing UK policy, and the reason I raise it----

LORD JUSTICE STUART-SMITH: Just a – sorry, I am sorry. Just – I may be missing something so just – It seems to me at the moment it is a complete, it does not matter whether you call it Hobson's Choice or (inaudible) or any of those things, I have not – and this may be my failing and maybe I will come to it when I do more reading after you have gone – but the view taken by the decision-maker was that there was currently no prospect of renewable – of investing in renewables in Mozambique. And the reasons were given, which was that it did not have the – it just was not there. Now, unless I missed something completely, although when this point has been raised you cavilled about it, you have not, I think, submitted that that was a misapprehension by the decision-maker and that, in fact, there was a – I think someone once called it an "oven-ready product" or something – an over-ready deal which would enable people to invest in Mozambique's renewables. So at the moment the difficulty I am having is that it seems to me that the logical consequence of your submissions are that Mozambique can go and stew literally.

MISS SIMOR: Well, first of all, we have not – the United Kingdom does, and DFID has – I hope the documents are in there – does invest in renewables in Mozambique.

LORD JUSTICE STUART-SMITH: Yes, I know it does.

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MISS SIMOR: Yes. So that is a fallacy. But the second point is, if you look, and I know you do not like looking at the current policy of the United Kingdom, but we do have to remember that it was in order to bring the UK in alignment with Paris, and the current policy says that the exceptional circumstances in which they will allow a natural gas development, although not projects, just power stations, is when exceptionally there is no renewable alternative, and I took you to that document. Now, if we were in a situation where we were talking about a gas-powered station in Mozambique that was necessary for Mozambique's development and Mozambique's energy resources, so that Mozambique people could have electricity and Mozambique's businesses could have energy, that would be a different thing. What we are talking about here is revenue and we are talking about the United Kingdom's obligations vis-à-vis climate change and its obligations vis-à-vis climate change are not to do something which causes global emissions to rise and undermines the temperature goals. And the flip----

LORD JUSTICE STUART-SMITH: So – so----

MISS SIMOR: So, yes.

LORD JUSTICE STUART-SMITH: -- on the facts of this----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- on the facts of this case, Mozambique stews?

MISS SIMOR: No, because, in fact, it is not – it is not actually – Well, first of all, we are going to get to this question of it being, you know, development or die. They are not – they are

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actually – the problem is that the increasing of climate change is also going to destroy Mozambique, so there is actually a fundamental problem here which is why Paris dealt with it as a core objective in Article 2, to make finance flows consistent with a pathway to the temperature goal, because the temperature goal itself is fundamental to Mozambique's survival.

LORD JUSTICE STUART-SMITH: That I readily accept.

MISS SIMOR: So the fourth – so we say that, despite those four points that the defendants have found in that bit of the climate change report, 268, despite that, they conclude no lock-in or transition risk and we say that does not play a part of the basic rationality test. The conclusion has no basis, in fact, or evidence or even theory and, as Mr Muttitt says in his witness statement, it is perverse to say that expanded carbon infrastructure is needed to enable investment in reducing carbon – carbon intensity. And you find that at core bundle 1, p.311, para.79. We also say it was based on a fundamental error that they could not do a committed cumulative carbon emissions calculation and we also say they did not take into account the period of the project, twenty-five to thirty-two years. It is wrong, as the defendants say, to say that the CCCE methodology has only been developed for power sector. Mr Muttitt explains that that is wrong in CB1, p.312, paras.83-84. Mr Anderson also explains that in his second statement, core bundle 1, p.163, paras.25-26. We say, again, the defendants simply put their finger up in the air and had a guess, and they had a guess that Mozambique would have to develop this first before developing renewables and, on

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that basis, they said transition was more likely and carbon lock-in less likely. And we say that is manifestly inadequate and does not constitute rational decision-making.

The third point I am going to deal with, very briefly, is stranded assets.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: I took you to the analysis on stranded assets in the RAD report and that is at core bundle 2, p.201-203.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: In relation to stranded assets, all of the arguments that apply in relation to failures, all of the arguments that we have made in relation to Scope 3, displacement, transition, lock-in, all of those failures play into stranded assets. Those errors we say necessarily undermine the view taken that there was a low risk of the asset being stranded. The entire assessment, as with the assessment of Scope 3 emissions, was premised on an increased need for demand for gas without any regard at all to the climate change risks. But a stranded asset assessment required consideration of the opposite scenario, namely carbon pricing and regulation, reducing significantly the use of gas. And my learned friend made that point this morning, that if, in fact, China really moves very fast, and it now says 2060 for its net zero, say it moved to 2050, say India did the same, well, those two markets, according to the SPAs, make up about 20 per cent of the already purchased gas. But the already purchased gas is only the first few years. Where are we in ten years?

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LORD JUSTICE STUART-SMITH: But when you say "already purchased", and I am – I may be wrong about this, there are framework agreements in place but has the gas actually been purchased as such----

MISS SIMOR: Well, I----

LORD JUSTICE STUART-SMITH: -- or is it that the framework is in place for the calling off of gas?

MISS SIMOR: I believe that the agreements have been entered into under supply purchase arrangements, is it?

LORD JUSTICE STUART-SMITH: SPAs.

MISS SIMOR: And I believe 83.9 per cent has been purchased on a take – it is not take or pay. It is the opposite, is it not? That they – they have to – they have to take it. Is that right? That they have to take it so it has been purchased.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: That is my understanding but I will be corrected if I----

LORD JUSTICE STUART-SMITH: No, I think you were being confirmed. So the SPAs – the existing SPAs impose an obligation upon the purchasers to take?

MR HEPPINSTALL: I believe that is right and I will be corrected or I will correct myself.

LORD JUSTICE STUART-SMITH: Well, it can be confirmed at some stage.

MISS SIMOR: But that covers – well, perhaps we can be informed, but I believe it is four years, the first four years of the project. Someone will tell us from behind exactly how long.

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LORD JUSTICE STUART-SMITH: Well, I have to say, I would be amazed, possibly delighted for Total, not for anybody else necessarily, if people had already committed themselves to buy 89 per cent of whatever production was for thirty years. I think that would be----

MISS SIMOR: Well, no doubt all these things----

LORD JUSTICE STUART-SMITH: -- very----

MISS SIMOR: -- underlain with all kinds of guarantees and insurance and hedging and all of that rest of it.

LORD JUSTICE STUART-SMITH: Yes, but there is----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- a fundamental divide between whether people have entered into an agreement which obliges them to take the oil or whether they have entered into an agreement which gives them the possibility of calling off----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- calling off suppliers as they want them.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: So I do not want a thesis but I would like two or three lines just to set out the position.

MISS SIMOR: Yes. Yes. So the initial gas has been purchased. That does not tell us anything about the asset going through to twenty-five years, and I believe that for the first fifteen years – we are going to give you another report – but for the first fifteen years no money

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goes to Mozambique. So it is a complex exercise. This is not a charity project for Mozambique.

And then I should note that – so we say the stranded asset consideration requires consideration of carbon pricing and regulation reducing significantly the use of gas. Again, these things are modelled. You need to model what happens if China does this, Japan does this, etc., and----

LORD JUSTICE STUART-SMITH: And presumably – I mean, my expect – this may not be a level that we need to go to – but my expectation is that all such agreements would be underwritten.

MISS SIMOR: Under?

LORD JUSTICE STUART-SMITH: All such agreements would be underwritten.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: As, indeed, would the risks.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I mean, my anticipation would be that there would be something which may not be called it, but would be called "stranded asset risk" or----

MISS SIMOR: Yes. Well, there will be insurance and reinsurance and eventually----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- it will be live.

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LORD JUSTICE STUART-SMITH: Because there is reference to bodies----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- who create----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- and provide information that inform risks.

MISS SIMOR: Yes. I mean, if you – an insurance market like Lloyds produces vast reports about lock-in and climate change.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And----

LORD JUSTICE STUART-SMITH: The reason why I am raising this is not to be difficult or even for my own interest in insurance, but because my suspicion is that, like quite a few of the arguments I have heard on both sides, there is a degree of oversimplification----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- going on for the purpose of the argument. So it is not – I would be slow to accept without qualification that if China stops----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- then Mozambique does not get its money or something like that.

MISS SIMOR: Exactly, but I am not making that submission. I recognise that I have not got a clue exactly where the money is going to flow in this. There are reports that Mozambique does

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not get any money for fifteen years. That does not – how come? We will give you the relevant report. But the reality is that we do not know or understand this. What we are looking at is the minister's decision and we are looking at what the minister had in front of her and him, because, of course, it was the Chancellor as well, and it was absolutely crucial to the Chancellor's decision because this is taxpayers' money. So a stranded asset assessment is the key question for the Chancellor in determining whether the Treasury should put at risk. But it is also crucial for the purposes of the United Kingdom's assessment of its obligations to Mozambique because what we do know is that there are various stages of danger, and we know, for example – I showed you those documents about the DSU, the debt service something, I showed you in the RAD report. We know that if – that Mozambique is guaranteeing the 2.6 billion debt of ENH, which is the Mozambique entity, and we know that Mozambique cannot afford that debt and, therefore, it will return to debt distress. So there are all kinds of risk.

LORD JUSTICE STUART-SMITH: My understanding, and I cannot my fingers on it exactly, is that Mozambique is in debt distress.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Yes, it has guaranteed but also steps have been taken to protect it or which are accessible in the sense that, I cannot remember where I read this, but there is provision for monies to be kept offshore, there is provision for revenues to be used for

repaying and getting out of – and one of the ideas – sorry, this is very high level – but one of the ideas is to enable Mozambique to get out of debt distress.

MISS SIMOR: Well, yes, but in the DSU document I took you to, one of the reasons it is considered a low risk that the project will not happen is because if it did not happen Mozambique would be bankrupt again, back in serious debt distress. So the debt distress was – there was a waiver from the World Bank of its debt position in order for it to be able to borrow, because it was not allowed to borrow before.

LORD JUSTICE STUART-SMITH: Okay. Sorry to be----

MISS SIMOR: So it is complicated.

LORD JUSTICE STUART-SMITH: -- sorry to be difficult, could someone just give us the reference for the DSU document again?

MISS SIMOR: Yes. I can probably actually give it to you because it is Annex----

LORD JUSTICE STUART-SMITH: We can come back to it.

MISS SIMOR: All right. Okay. So I am saying, and actually that is a different issue from the stranded asset assessment, is you would expect a proper stranded asset assessment, and it is not there.

LORD JUSTICE STUART-SMITH: I think your submission on this point was if you have a stranded asset problem, that may contribute to Mozambique because it is guaranteeing the debt----

MISS SIMOR: Yes.

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LORD JUSTICE STUART-SMITH: -- going into debt distress.

MISS SIMOR: Yes. Well, there are – there are two issues. One is the UK taxpayer and the other is the UK's – I am trying to focus back on the----

LORD JUSTICE STUART-SMITH: I have got that.

MISS SIMOR: -- UK and the UK's obligation vis-à-vis Mozambique. And I just want to refer you to the fact that both Mr Caldecott pointed this out and Mr Murton, and that is at CB2, p.293, and they raised all of this.

So I am now going to turn to my fourth point, which is Scope 3. My learned friend said that the fact that Mr – Oh, this is an important point. My learned friend sought to argue that Mr Taylor's consideration of the calculation of Scope 3, done for the Prime Minister in twenty-four hours, from 29 to 30 June, which he received one hour before signing the final document or agreement, was taken into account by him, and relied on, and I believe he gave LT103, core bundle 338. And I will have a couple of points to make on this.

First of all, the decisions with which this court is concerned are the decisions of the Chancellor of 12 June 2020, which is a requirement of s.1 of the Act – s.4 of the Act, and the decision of the Secretary of State of 10 June. When we saw this statement, because, of course, in the summary grounds – the summary grounds, the defendants stated that they did not quantify Scope 3, and we got permission on that basis, and the first we heard about this

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quantification was when we got some disclosure and the witness statement of Mr Taylor. So we sent a Part 18 request to ask what was going on because we rather predicted that this argument might be made. And if we can go to that, it is at supplementary----

LORD JUSTICE STUART-SMITH: Part 18?

MISS SIMOR: Yes. Supplementary bundle 2, 1579.

LORD JUSTICE STUART-SMITH: 1579?

MISS SIMOR: Yes. And you will see the question at D:

> "Please state whether the Defendants now contend"----

LORD JUSTICE STUART-SMITH: I will not yet. Hold on.

MISS SIMOR: Sorry. 1579, para.17. It is the second supplementary bundle.

LORD JUSTICE STUART-SMITH: I have it. Thank you.

MISS SIMOR: Have you found it? Yes? So it is para.17, we said:

> "Please state whether the Defendants now contend, contrary to their previous stated position in the Summary Grounds of Defence and skeleton argument for permission …".

Because at that stage they were just clear that there was no Scope 3 quantification.

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> "… that a quantification of Scope 3 emissions was taken into account in the Decision …".

And then we have:

> "Louis Taylor has confirmed that he was aware of a 'highly indicative estimated range …' … He stated that he had these estimates 'in mind'. The estimates …".

And then we say:

> "If such an argument is now being made:
> (a) please explain why the Defendants stated that the Decision to agree funding was taken on the basis of only a 'qualitative assessment' and without any quantitative assessment of Scope 3 emissions in their Summary Grounds of Defence and skeleton argument at permission stage, as well as orally."

And then if you look at the second paragraph below, it says:

> "It remains the position that the Defendants, including UKEF, considered Scope 3 emissions in qualitative terms, and did not undertake a quantitative assessment of Scope 3 emissions, as explained in the Climate Change Report. Whilst Louis Taylor had seen the estimated figures for Scope 3 emissions before he took his decision, the Defendants do not

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suggest that this amounted to a quantitative assessment of Scope 3 emissions."

Now, that rather begs the question and the question is, is it now being contended that Louis Taylor's decision of 30 April was, in fact, the decision of the Secretary of State, not the decision of the Secretary of State of 10 June?

Now, my Lord, the first point to make is you could ignore all this because the Chancellor's decision was required and the Chancellor is not Louis – Louis Taylor cannot, even under *Carltona*, be the Chancellor. But as regards the Secretary of State for Trade and Industry, and this is why I emphasised this in my opening submissions, it is clear that she had made it clear on 12 March 2020 that she would take decisions on hydrocarbon projects. You will perhaps recall that because I took you to three places in the documents where it says it. And, indeed, it may even say it in the submission to her – the submission to ministers.

So it is clear also from Mr Taylor's submission to her that she was being asked to give him delegated authority to take a decision. So she had said, "I am taking hydrocarbon project decisions", and he wrote to her and said, "Please give me delegated authority to agree this project", and she went and did that. But he could only exercise that delegated authority on the basis of what she had seen, for obvious reasons, and I am just going to take you to – because I feared that this argument might be made – it is in AB1, tab 21. No, it is not tab

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21. It is the back, 22 – tab 22. And an attempt was made to make a similar kind of argument in this case, so it is a reverse *Carltona* in a sense, and it was rejected. And if you could just read 72 to 74 of Keene LJ, at the back. (After a pause): And then if my Lord and my Lady could mark up 23-37 of Sedley LJ, and I just want to emphasise para.26.

LORD JUSTICE STUART-SMITH: So that is 72 to 74?

MISS SIMOR: Yes, of Keene LJ.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And then Sedley LJ, it is quite an extended analysis of this problem, it is 23 through to 37, but if you could just read para.26 now that will, I hope, resolve the issue. In a sense, it is a common sense issue. She had not given her delegated authority for him to go and consider something else. (After a pause):

The decision you are reviewing is the decision of 10 and 12 June. Those are the material decisions for the purposes of the statute and Mr Taylor had no delegated power to take a further decision subsequent to the Secretary of State's. So you can ignore that argument by my learned friend.

The fourth point on this is that somehow it is difficult to asses Scope 3 and the GHG protocol is not appropriate or, I do not know, difficult or something. Well, I think – I have got the words "not useful" from my learned friend but, first of all, they used it for Scopes 1

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and 2. Secondly, they use it now and, crucially, if you go to our skeleton at para.76, you will see that the defendants tried to make this argument the year before to the Environmental Audit Committee in Parliament. And on 10 June 2019, the Environmental Audit Committee advised UKEF that quantification of Scope 3 emissions was not only essential to assess the climate change impacts of the project but could also be done using the protocol. And if you see the underlined bit in 148:

> "UKEF claim that there is no universally accepted measure for Scope 3 emissions. However, Scope 3 emissions are already being used in many private sector companies using the GHG Protocol …".

And then the first – all the underlined bit:

> "UKEF should report the Scope 3 emissions of all projects … The GHG Protocol provides a methodology for calculating Scope 3 emissions, and the TCFD recommendations provide a readily-available source of guidance for this work."

And, in fact, they are going to do that, they want to do that, because they are now reporting on that basis. UKEF reports on that basis and, indeed, is encouraging the private sector through the Green Finance Strategy to do it through the TCFD and Scope 3, greenhouse gas protocol.

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Also Total produces Scope 3 figures for all its projects, and it does that annually. It does it under a different standard. It does it under something called the IPIECA. We have put that in tabs 26 and 27 of the supplementary bundle. And you find the annual reporting by Total in the supplementary bundle at tabs 23 to 25. Now, why do they do this? Because, like most of these companies----

LORD JUSTICE STUART-SMITH: Are those references in your skeleton?

MISS SIMOR: They may not be.

LORD JUSTICE STUART-SMITH: So tabs 26 and 27 of the supplementary authorities bundle?

MISS SIMOR: Yes, it is another standard that Total uses, because this is obviously----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- not a mandated standard.

LORD JUSTICE STUART-SMITH: Yes, I have got that much.

MISS SIMOR: And then 23 to 25 are Total – some examples of Total reporting. They report the Scope 3 of their projects.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: Why do they do that? Because all of these companies are now professing to aim for net zero and, therefore, they need to go beyond – they need to actually assess what is going on in order to establish and show reduction, and certainly the French law actually requires that Total report, the European standards do, the TCFD does and the UK is now doing it and is going to do it in its annual report as well. And it is going to do it for Scope 3 of its

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projects, so it will take responsibility for the emissions, at least in accounting terms, of third parties. My----

LORD JUSTICE STUART-SMITH: Say that again?

MISS SIMOR: It will take responsibility, at least in emission accounting terms, for the emissions caused by the use of its products, or projects it invests in.

LORD JUSTICE STUART-SMITH: The United Kingdom?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Or UKEF?

MISS SIMOR: UKEF.

LORD JUSTICE STUART-SMITH: UKEF. So it will track----

MISS SIMOR: It will track – that is----

LORD JUSTICE STUART-SMITH: -- every – That is amazing. It will track----

MISS SIMOR: And all the banks are doing this.

LORD JUSTICE STUART-SMITH: -- every emission from projects it is----

MISS SIMOR: Yes, and you will find that the banking stance, so the green finance strategy, which was 2019, is trying to make banks do this. The pensions regulator is doing it. It is now across the industry and the reason is because industry itself – it is all about 2(1)(c) – it is all about getting the private sector and the public sector to move its money in a way that gets to net zero. It is an astonishing development and it is something that the United Kingdom has actually been at the forefront of. And that is also why it was so important to the Chancellor,

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and to the Foreign Secretary – you have seen the letter of the Foreign Secretary – because they are trying to persuade other countries to do this.

So my fifth point is the approach to assessment generally, and my learned----

LORD JUSTICE STUART-SMITH: So have you finished Scope 3 or is this fifth point on Scope 3?

MISS SIMOR: I have finished Scope 3.

LORD JUSTICE STUART-SMITH: Thank you.

MISS SIMOR: My learned friend says that it was all----

MRS JUSTICE THORNTON: So what is the heading of this submission?

MISS SIMOR: Sorry. The head is the assessment generally, the approach to assessing the whole thing. And he said simply it was all done rationally. There was Wood Mackenzie expertise and, in response to that, I would say actually Wood Mackenzie's findings were effectively rejected because they did not conclude that you could not know; they concluded you could choose – you could proceed on the basis of a choice, so you could decide on the balance of probabilities it was going to have a net reduction or in terms of going forward, and there is an argument about what that actually means. But, in any sense, Wood Mackenzie said you cannot do it, you cannot actually make that prediction, and the CCR said, "We are going to". So they concluded, on the balance of probability, that despite their expert saying that is not possible, that it would more likely than not lead to a net – lead to a lower level of emissions than would happen if the project did not take place even though that might be –

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that might not be a net reduction; it might just be a smaller reduction than would happen otherwise. So not a net reduction of the global carbon emissions. An increase in global carbon emissions but not an increase that is as big as they would have expected.

So as far as I understand the submission being made now – I am really sorry but let me – I am sorry, I am not being – I am not being clear.

LORD JUSTICE STUART-SMITH: It is not your most perfectly clear submission so far, if I can put it like that.

MISS SIMOR: Okay. I am going to start again, if I may.

LORD JUSTICE STUART-SMITH: Can we start again?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: You are talking about the issue of whether there is any form of net reduction because of displacement or are you talking about something else?

MISS SIMOR: I made a classic advocacy mistake because I got distracted into something which I should just deal with separately.

LORD JUSTICE STUART-SMITH: You assumed that the judge knew what you were talking about!

MISS SIMOR: I want to – let me make my first point, which is that Wood Mackenzie said you cannot work out whether there will – what the impact will be.

LORD JUSTICE STUART-SMITH: Yes.

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MISS SIMOR: You can say it might be this or it might be that but what you cannot do is say, "On the balance of probabilities, it will be this". They say you cannot do that. But the CCR nevertheless does it. That is my first point. So it does not have expertise that says that; it actually contradicts the expertise that it has been given.

It relies then – the second thing that they rely on is the AFD. Well, AFD equally did not actually reach a conclusion but, anyway, the AFD is based on Wood Mackenzie as well. And thirdly, they say, "Well, okay, those experts from EGAC, Mr Caldecott and Mr Heath, they told us something different. Mr Murton told us something different. Mr Critchlow told us something different. But we had our own expert in-house, Mr Griffin". And there are two answers to that. First of all, they did not have him, as far as I understand, because he was not there but, secondly, in the minutes of their meetings they say, "We do not have the expertise", which is why they went to Wood Mackenzie.

LORD JUSTICE STUART-SMITH: And that is the document you took us to last time out?

MISS SIMOR: Yes. "We do not have in-house expertise and, by the way, we have not got time to go and get – out – external expertise".

LORD JUSTICE STUART-SMITH: Just help me, is that the 7 May meeting?

MISS SIMOR: It is, as far as I recall. And the references to the EGAC points by Mr – are at 70 and 73 of our skeleton. The reference to Mr Murton's criticism is at core bundle 2, tab 24,

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p.293. Anyway, it is in the skeleton at 73, Mr Critchlow's, but I will give you the – So that is my point on that. You cannot just----

LORD JUSTICE STUART-SMITH: 293 is that horrid note which makes two-thirds of sense because it is a note taken while on the telephone.

MISS SIMOR: Yes, it is that terrible, terrible note.

LORD JUSTICE STUART-SMITH: Yes, horrible.

MISS SIMOR: Which is a shocking note actually because it was an important person making extremely important points, who was the Africa COP26 person and a highly, highly experienced person. If you look up the CVs of these people, who I have, the ones with real profound expertise in this area have been ignored.

And then I am going to turn now to my sixth point, which is tenability. My learned friend relied on an article by then Philip Sales, urging the limiting of *Launder* and *Kebilene* and, in fact, with great respect to Lord Sales, now in the Supreme Court and no doubt, well, I know, a brilliant man, having worked with him, in fact, *Launder* and *Kebilene* have been upheld by Green LJ in *Heathrow* and were not questioned in *Corner House* or *ICO*, whose reasoning on tenability in both cases, by the way, in both of those cases, I say is *obiter* in *Corner House* and *ICO*. This case is closest to the *Heathrow* case because here we are concerned not with a mere taking into account of a relevant international standard – and, for example, in the *Corner House* case it was established it would not have made a difference.

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It was not a very important consideration in the whole thing. And that applies equally to Dove and *Elliott* – here – where they were not even necessarily material to the decision – here we are concerned with a case, as in the *Heathrow* case, where there was a clear finding that granting this funding was compatible with the United Kingdom's international obligations in this case under the Paris Agreement.

The defendants have been asked whether they would have taken the same decision had the financing not been compatible with the United Kingdom's obligations under the Paris Agreement and have declined to say that they would. It was plainly material. It was plainly essential. The United Kingdom was president of the COP. Indeed, it is still president of the COP. It was urging other states to align their finance flows with the Paris Agreement and it is highly doubtful, in my respectful submission, that had the Chancellor of the Exchequer and the Secretary of State for Trade been told that financing was not, or indeed may not, be in alignment with the Paris Agreement obligations, and had to respond to questions in Parliament on that issue, this financing would not have been agreed. And this – that, my Lord, my Lady, is a constitutional issue.

The Executive cannot claim compliance with UK international law, for which it answers to Parliament, with the cover that no one can question whether they are right about that. It is only courts ultimately that can determine legality and it is no answer for Sir James to say

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that courts should not carry out that role because the consequence of them doing so might be to dissuade the Executive in the future from considering its international obligations. The judiciary has a duty to apply the law. For it to decide whether to do so by reference to what potential effect its judgments might be on how the Executive behaves in the future would not be a judicial but a political decision. It is of no concern to you, my Lord, my Lady, how the Executive behaves provided it behaves lawfully. And despite Sir James' dulcet and persuasive tone, he is not in fact asking you to uphold a high constitutional principle but, rather, to break one.

The Executive is answerable to Parliament for how it chooses to behave. It is Parliament that holds the Executive to account. It is for Parliament to ask and demand that the Executive comply with international law. It is for you to ensure that that law is applied correctly.

Here the Executive answer to Parliament for this decision and defended its compatible with UK obligations. Lord Sumption, in *Benkharbouche* and Green LJ in *Heathrow*, where the Government made exactly the same submission as it is making in front of you today, or perhaps yesterday, those judges emphasised your duty and obligation to apply the law.

There is one further point on this----

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LORD JUSTICE STUART-SMITH: Did you take us to the relevant passage of Lord Sumption in your opening submissions?

MISS SIMOR: No, but it is in the skeleton. The references are in the skeleton.

LORD JUSTICE STUART-SMITH: Okay. Thank you.

MISS SIMOR: There is one further point on this. Ministers are entitled to know whether they are right or not on the law. They are entitled to know whether they have been properly directed on the law and they are entitled to be given the chance to retake their decision on the basis of a proper understanding of the law. If the decision is quashed, they will be able to take it again with the benefit of a correct understanding of the law.

Now, just turning to the second stage of my submissions on tenability, for the purposes of what the obligation – so this submission relates to the question of the purposes of what the obligation entails and the reasonableness of the implementation of that obligation. So my learned friend said that there were two questions. That was, again, not clear. I am going to be clear now. My learned friend said that there were two questions. First, he said you have to ask yourself what is the obligation and did the defendants have a tenable or reasonable – he accepted that "tenable" meant "reasonable" – did the defendants----

LORD JUSTICE STUART-SMITH: Rational. Rational.

MISS SIMOR: Rational.

LORD JUSTICE STUART-SMITH: It is different, I think.

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MISS SIMOR: Public lawyers have started to us "reasonable" rather than "rational". It is a sort of – it has now become – but, I mean, it may----

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: Generally, we have started to say----

LORD JUSTICE STUART-SMITH: So we have now got three words in play, tenable, rational and reasonable?

MISS SIMOR: Yes, but I think, my Lord, I would submit that "rational" and "reasonable", for public law purposes, mean the same thing.

LORD JUSTICE STUART-SMITH: Okay. Thank you.

MISS SIMOR: So the first question was what is the obligation? Did the defendants have a tenable or reasonable view of what it entailed? This is his explanation. And the second question is, did the Executive – did the defendants implement that obligation reasonably? Now, we agree with that. However, we remain without any explanation as to what the defendants' view is of its obligations under the Paris Agreement. In truth, having made that two-stage test, Sir James' submissions elided the two questions. He answered the question as to what the obligation entailed, the first question, by reference to implementation, the second question. What he did was argue that overall the decision was reasonable, looked at in the round and having regard to development needs, and on that basis said it could not be prohibited by the Paris Agreement. That is not a defensible position and it begs the question as to whether the defendants could articulate what Paris does prohibit. One could put it like

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this; what is the threshold test under Article 2(1)(c) read with Article 3, that allows developed country parties to finance an increase in global emissions by a developing country party, such as to reduce the likelihood of the temperature goals in 2(1)(a) being met? Put another way, put in a more short form, in what circumstances can a developed country party undermine the temperature goals?

So we need – we have not been given a positive statement of what the obligation is. We have been told this project is not prohibited. So I put out the question, what exactly is prohibited? What do the defendants say is prohibited? What is the threshold test that allows a developed country party to finance an increase in emissions in a developing country party which would make----

LORD JUSTICE STUART-SMITH: I think – forgive me, I am struggling a bit here. I think the answer is nothing is prohibited.

MISS SIMOR: That is where I am going. That is exactly where I am going.

LORD JUSTICE STUART-SMITH: So Paris – that Paris includes a number of irreconcilable objectives----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- which do not impose absolute obligations. I think that is where we are.

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MISS SIMOR: Well, that is exactly where I was going. So, if we put it another way, what is the threshold test that allows a developed country party to finance an increase in emissions in a developing country party which would make it more difficult for the developing country to meet its NDC and pursue increasingly ambitious NDCs? So these questions, we say, need to be answered if the position is taken by the United Kingdom that the Paris Agreement actually allows parties to increase global emissions and so undermine the attainment of the temperature goals.

Now, we say it is not possible to ascertain what the UK thinks its obligations are under the Paris Agreement if all we are told is that this decision is permissible; in the round, it is reasonable. Now, if the court has no interpretation before it, the court cannot decide either whether the defendants' interpretation was correct or whether it was tenable. That, we say, is enough for you to say that the defendants did not properly address their mind to what Paris Agreement obligations entail and that too we say constitutes an error of law.

Well, my Lord definitely disagrees with me.

LORD JUSTICE STUART-SMITH: No. I am shaking my head because at the moment I do not fully understand or accept the full power of your submission. Let us leave it like that. But at the moment, I am not entirely convinced by the submission that we do not know the Secretary of State's position because I think we do. It just does not happen to coincide

either with your conclusion or your approach, and we will have to make up our minds about it. But I think we do understand – well, I think we have been told what the Government's approach is (a) as to the status of Paris and (b) as to the nature of the features that appear in Paris. I am just using an entirely neutral term. So I do not – and I am not particularly thrilled by the prospect of, at half-past three on day three, entering into a completely different rationality challenge.

MISS SIMOR: Well, my Lord, if the submission is basically anything was permissible, even if it undermines the temperature goal, it is for the Secretary of State to weigh up all the things and say, "Look, it is better for Mozambique" or maybe even not. So, you know, that is why I am talking about a threshold test. What is the threshold test that makes it permissible? If the answer is there is not a threshold test, actually none of this means anything and that you can undermine the temperature objective in Article 2, you can, that is perfectly lawful, then, my Lord, my Lady, you are going to have to deal with that and you are going to have to decide whether that is right and/or tenable. I have no hesitation in saying it is wrong and untenable.

LORD JUSTICE STUART-SMITH: If we agree with you then the door is open for the rest of your case. You do not need to – Then maybe you were not starting a new hare running but----

MISS SIMOR: No, no, I was not asking – I was not saying – I was using this – I was using these questions to demonstrate that we did not have an explanation. I perhaps did not need to do that because you have already understood a particular explanation. I had not understood

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that the bold submission was being made that really – I know it was made at permission stage because the skeleton at permission literally said, "Paris does not actually mean anything", but they rowed back a bit from that. So if you are content that you understand and that is what is being said, well, it is very simple for me to say that that is not – this is an important----

LORD JUSTICE STUART-SMITH: We have never----

MISS SIMOR: -- legally binding international treaty.

LORD JUSTICE STUART-SMITH: We have never met before but if we had you would know that I am never sure that I have understood, ever, but we will make up our minds in due course.

MISS SIMOR: I just----

LORD JUSTICE STUART-SMITH: But I think I – I think I understand----

MISS SIMOR: -- I put those questions----

LORD JUSTICE STUART-SMITH: -- the submission.

MISS SIMOR: -- to try and – I put those questions to try and open the door to what is the test, what is the question, what is – that is why I did it because I was struggling to understand, well, at what point is it not permissible to increase emissions? At what point is it not permissible to undermine the temperature objectives? Or actually----

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: -- can you just undermine----

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LORD JUSTICE STUART-SMITH: But I think – I think this is a – I think this is a mismatch between your submissions and their submissions, which sometimes happens, because yours is much more hard lines, whereas their approach is much more balancing of things, looking at things in the round. I am not doing them justice now but I hoped that I have reasonably fairly summarised the two positions.

MISS SIMOR: Well----

LORD JUSTICE STUART-SMITH: So when you say, at what point can you no longer do it, the answer is going to come back when the balance – the balancing of all these objectives says do not do it.

MISS SIMOR: Yes, and I would say that that would be – that would make----

LORD JUSTICE STUART-SMITH: Well, I think----

MISS SIMOR: -- that would totally negate Paris.

LORD JUSTICE STUART-SMITH: Yes, well, I think we understand your submission on that.

MISS SIMOR: Yes, yes. And also the duty of good faith that is in Paris itself but also in the Vienna Convention. This is a legally binding treaty with meaningful provisions and a dispute resolution procedure between States.

So following the lack of explanation in Mr Taylor's statement, because usually in a case like this you would get an explanation as to the test that was being applied, or the meaning that was being given, we wrote to the defendants and asked for the legal advice on the issue.

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You will see that all the legal advice is redacted. So we actually do not know what they were advising themselves. And the response we received is, "We did not need to get legal advice", so we do not know and we were not – they were certainly not going to waive any privilege on that issue.

The summary grounds of defence and the detailed grounds of defence both proceeded on the basis that the project resulted in a net reduction in global emissions, and if that was the test being applied then all well and good. That was potentially a correct test under Article 2(1)(c) of Paris. But now we are told the position was not, in fact, as set out in the summary grounds of defence and detailed grounds of defence and, in fact, it was accepted that the project would result in a net increase in global emissions. Now, if that is correct then the case has been litigated on a fallacious basis. The defendants should never have signed off the summary grounds of defence and the detailed grounds of defence because they were not true. And since, presumably, they were signed off by Her Majesty's Treasury, potentially the Department of Trade, FCO – well, it would have been – and also would have gone through the normal Cabinet process because there are other interested departments, including BEIS and the COP26 department, which would have wanted to see these grounds – that is the normal process when you are talking about a state, United Kingdom, obligation. Interested departments, even in the tax case, all get to look at what is being said for very obvious reasons. It is a really very serious issue that we should hear----

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LORD JUSTICE STUART-SMITH: It is but if – I am sorry to interrupt you again, but let us assume the concession had not – or the change had not taken place, and let us assume that we considered, which is not a given, that the CCR, in particular, was saying with crystal clarity there will be net increases in emissions both of Scope 1 and 2 and of Scope 3, albeit that Scope 3 may be mitigated to some extent by – if there is offsetting or if there is displacement. What should the court do then? Because----

MISS SIMOR: My Lord, I do not know what this court should do because I have never come across this situation before, and, to be quite frank, I read the CCR as saying that it will result in a net increase in Scope 1 and 2 Mozambique emissions and a net reduction – I know it does not – of Scope 3. That was then translated through to the summary grounds and the detailed grounds. I do not know what is the position of the departments – Trevelyan Thomas is now in COP26 department – she is Trade. She was DFID. She objected to this project on climate reasons when she was in DFID. So when she was Development Minister, she objected to this project. The Foreign Secretary objected to this project----

LORD JUSTICE STUART-SMITH: Is this Ms Trevelyan?

MISS SIMOR: Yes. She is now in Trade.

LORD JUSTICE STUART-SMITH: All right. Who was Foreign Secretary at the time?

MISS SIMOR: Foreign Secretary would have been Raab.

LORD JUSTICE STUART-SMITH: It was Mr Raab.

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MISS SIMOR: The same Foreign Secretary, who objected for climate reasons and COP26. BEIS also objected for the same reasons. Now, I do not know what the – it is not my – in a sense, it is not my problem, I am afraid, but it is a problem.

LORD JUSTICE STUART-SMITH: I think we can agree about that. I think we can agree about that.

MISS SIMOR: And----

MRS JUSTICE THORNTON: And where do you say it takes us if we are looking at lawfulness?

MISS SIMOR: Well, I am going to say – I am going to take you to the fact that, for the purposes of our case ironically, it does not actually matter. That is the irony. But it is nonetheless a problem that you have in terms of what you say the United Kingdom says. Because the United Kingdom saying to a court, and obviously I will be corrected, that it is okay to undermine the temperature goals in Article 2(1), in a judgment that will be read globally, is of significance and importance.

Now, crucially, in either situation our submission is that we succeed on ground 1(a). If it is said that Article 2(1)(c) prohibits finance that leads to an increase in global emissions, so preventing the attainment of the temperature goals, the claimant succeeds because that is what this project will do. So if – we say that 2(1)(c) prohibits finance that leads to an increase in global emissions, and we say that that is what this project will do for the reasons set out by our experts and, as we understood from the pleadings, was accepted – No, as we

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understood from yesterday, is now – is now said. So it is now accepted. The defendants now accept that this will lead to an increase in global emissions and we say that is in breach of 2(1)(c) because it means that this project, and the financing of this project, undermines the temperature goals. The finance flows are necessarily not consistent with a low emissions pathway in 2(1)(c) and will lead to an increase in global temperatures.

If it is said that the Paris Agreement allows developed countries parties to finance an increase in global emissions to prevent the attainment of temperature goals – so if it is said, in fact, that the Paris Agreement allows the United Kingdom to finance an increase in global emissions to prevent an attainment of the temperature goals in 2(1)(a), i.e., undermining the Paris Agreement and the UNFC objectives, we say that that is a misdirection in law. So if that is the defendants' position, that in fact it was perfectly lawful for the UK to undermine the temperature goals by granting this financing, we say that is a misdirection of law.

LORD JUSTICE STUART-SMITH: Have you not just made the same point twice? I mean, in both of those limbs you are saying 2(1)(a) prohibits investment in a project that leads to an increase in global emissions so, whatever they are saying, given that they are now saying that it does lead to gross and net increases, they are scuppered?

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: I am using very technical terms.

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MISS SIMOR: Yes, one of our arguments is factual, based on the expert evidence, so they were wrong to say it would reduce emissions – global emissions. But – so the----

LORD JUSTICE STUART-SMITH: But that is now – but that is now accepted.

MISS SIMOR: Well----

LORD JUSTICE STUART-SMITH: It is now accepted in qualitative terms----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- that this project will increase global emissions under Scope 1 and 2 and domestic Scope 3, and that it will lead to an in aggregate increase in Scope 3 emissions.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: Even if it is reduced to somewhat – even if that aggregate increase is lessened to some extent.

MISS SIMOR: Exactly. And we say that undermines the Paris Agreement temperature goals.

LORD JUSTICE STUART-SMITH: Yes.

MISS SIMOR: And therefore it is inconsistent with 2(1)(c). So seven, the interpretative process. We agree about the *Al-Malki* case, paras.10-12. However, 2(1)(c), the normal words do accord, we say, with the object and purpose read in context. So what do the defendants argue? How do they argue that our interpretation is wrong? All they can say is that the court has to assume there was some compromise and that the parties to this agreement cannot have meant what is said, despite the 2(1)(c) being in accordance with the object and

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purpose of the agreement read in context. So their submission is simply, "Look, you, the court – it cannot be the case that parties to this agreement agreed to forego this funding and, therefore, you have to interpret it on the basis that they cannot have meant it." And we say this is a novel and unworkable approach. It is contrary to the Vienna Convention on Treaties, and that you should follow Lord Sumption in *Al-Malki*. And the standing committee on finance was clear as to what 2(1)(c) means, and it is set out in our skeleton. It is a Paris Agreement institution. The UK Government practice prior to the decision in relation to overseas development aid funding, and post decision on 1 July in relation to CDC and now all UK financing, was that this kind of project was not being financed in order to align the United Kingdom with the Paris Agreement, and the UK, as I have said, is trying to persuade other countries to adopt that approach. It is somewhat surprising then for the United Kingdom, which is still president of the COP, to make the opposite argument in this court.

So the standing committee on finance reference is at para.26 of our skeleton, and it says – it makes it clear – you do not have to finance always to improve climate, of course not, but you must not undermine the Paris Agreement objectives.

My eighth point----

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LORD JUSTICE STUART-SMITH: Just as a matter of interest, would you submit that a project which reduced a country's emissions but was not consistent with either well below 2 degrees or 1.5, was prohibited?

MISS SIMOR: No. No.

LORD JUSTICE STUART-SMITH: Why not?

MISS SIMOR: It is difficult to think of an example. As long as you were helping a – as long as emissions are going down, you are moving towards down, as long as you are going down that is the right trajectory. So----

LORD JUSTICE STUART-SMITH: So if, say – all right. Well, let us assume for the purposes of this case that because Mozambique has a very messy economy – and I make it clear that I am just talking entirely hypothetically – this project would have reduced Mozambique's overall emissions. Say it had been producing filthy, dirty oil and this project was intended to displace, this very same project, would this project then have been investable?

MISS SIMOR: Yes. And, in fact, that is the UK's policy.

LORD JUSTICE STUART-SMITH: Because it is not an absolute.

MISS SIMOR: No, the UK's policy – well, you will see, it says – I mean, subject to things like transition, so you are still heading to net zero. So you do not want to lock a country into fossil fuels but subject to an analysis of that, the current UKEF policy, which I took you to, is exactly that, is to say – I do not actually think it would be – well, it would not be fundable by UKEF now because they are not funding any opening up of new projects. But say you

were talking about a power station, a gas power station or something like that, under UKEF's policy, that you could do. But we do not anyway say that you could not do it if it was national and reduced emissions.

LORD JUSTICE STUART-SMITH: Okay. And let me give you one different example. I know you do not accept this but I want to accept for the purposes of the question that this project is necessary and is the only way that Mozambique can make its way to a carbon free economy. I know that your expert, who has done really well recently, does not agree with that but I want you to ask – I want you to take it on that basis. So it is the only way that Mozambique can get to a carbon free or carbon zero economy. If that were right, would this project be acceptable for investment? (After a pause):

MISS SIMOR: You see, the difficulty – and I really appreciate that you want me to accept a premise and I know it is very irritating when people do not accept the premise of the question – but the problem is that what we are essentially saying in that question is that the money from the 95 per cent exports is what will enable Mozambique to get to renewables and Paris deals with that, is supposed to deal with that. What Paris is not supposed to do is enable developing countries to go into – because there are vast reserves out there still, so Angola, Mozambique----

LORD JUSTICE STUART-SMITH: So, okay, fine. So----

MISS SIMOR: So should all of these incredibly poor countries, who really need the money, be allowed to open up all these projects?

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LORD JUSTICE STUART-SMITH: So on your view, Paris mandates that a country – a developing country, with these reserves, shall not be supported under any circumstances because the developed world should turn round and say, "We will only support you directly into carbon neutral or carbon reducing projects"?

MISS SIMOR: Paris mandates, obliges developed countries to assist developing countries. It obliges them to do so.

LORD JUSTICE STUART-SMITH: That is----

MISS SIMOR: Yes. So, yes----

LORD JUSTICE STUART-SMITH: -- I think that is what I was----

MISS SIMOR: -- the answer is----

LORD JUSTICE STUART-SMITH: The answer is that the developed world has to go to Mozambique and say, "We will not support you but we will invest in a carbon free economy or a carbon reducing economy"?

MISS SIMOR: Yes. And that is a consequence of two things. First, the – well, it is essentially a consequence of the production gap, because online already, in train already is – and I hope I am going to have time to take you to the production gap before – is – so it was 120 per cent more fossil fuels on train than can be used within the available remaining carbon budget, if we are going to hit----

LORD JUSTICE STUART-SMITH: I understand.

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MISS SIMOR: -- that. So it is a scientific physical chemical problem. We have too much fossil fuels in train to meet----

LORD JUSTICE STUART-SMITH: And the commitments still lead us----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- horribly awry.

MISS SIMOR: Yes, and the same with the NDCs. The NDCs do not meet it. So we have this problem. We have poor countries with vast reserves. They obviously want to take them up. How does Paris deal with that? It should be dealing with that by the obligations that the developed world is under to finance development and renewables in those countries. And it does take us – I am going to get to the sort of poverty problem but it does go back to this issue of – it has been put as a sort of charity project that this is being done for Mozambique. It does get back to that as well but there is also a vast economic interest in companies like the interested parties also in opening up those reserves.

LORD JUSTICE STUART-SMITH: Investors will always have an economic interest.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: It does not matter what----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- what framework you put them in. Investors are always going to look to their economic interests and, for example, as you said yourself about twenty minutes ago, the Chancellor has to look at the----

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MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- economic interests of the----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- British people.

MISS SIMOR: And one of the purposes in making finance flows consistent with that low emissions pathway is also to alter the global market for renewables because that itself creates new investments and new markets that would not otherwise exist. And if you invest in fossil fuels you effectively subsidise the development of climate change. If you say, "No, I am not going to do that", and the public money moves towards renewables, the private money follows. And that is the entire idea behind it.

LORD JUSTICE STUART-SMITH: I understand the concept of it and that is why there are subsidies for electric cars and there are subsidies for----

MISS SIMOR: Exactly.

LORD JUSTICE STUART-SMITH: -- heat source pumps and everything else. Of course, I would like to think I have sort of understood it.

MISS SIMOR: Yes, and there is the urgency which is behind it. I think we should not forget the urgency because----

LORD JUSTICE STUART-SMITH: We understand.

MISS SIMOR: -- it was said, "Well, the NDCs do not meet it, but parties can agree again to something else". No, they cannot. There is not any time. I mean, we are talking 2030. If

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you look at the IPCC, we are talking 2030 and actually the report the court may wish to look at, is the EIA net zero report, because that is the standard one.

Okay, I have only got a couple more points, you will be glad to know.

LORD JUSTICE STUART-SMITH: Oh, I do not know, it is just getting interesting!

MISS SIMOR: So I think I have dealt with it but I will just quickly – I was going to say my learned friend – So we say that the position taken by the defendants effectively negates the Paris Agreement and it means the United Kingdom undermining the temperature goals. And it is obviously a matter for the defendants to clarify as to what it wants recorded in the judgment, but we do remind the court that the United Kingdom is still today president of the COP. And if the United Kingdom is saying that states can do things – developed country parties can do things that they know will result in increased global emissions, we say that that is an astonishing submission. And I want just to take you to the UNEP report. First, if I can refer perhaps most easily actually in my skeleton, para.31.

LORD JUSTICE STUART-SMITH: Forgive me, I was just trying to get a note of----

MISS SIMOR: Sorry.

LORD JUSTICE STUART-SMITH: -- just trying to give myself a note for the last five minutes or so. Where have you gone?

MISS SIMOR: I am now in my skeleton at para.31.

LORD JUSTICE STUART-SMITH: Thank you.

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MRS JUSTICE THORNTON: Just before you get there, how do you say we use the UNEP report if we are forming some sort of interpretation of the Paris Agreement?

MISS SIMOR: So we say----

MRS JUSTICE THORNTON: Can we use it?

MISS SIMOR: Yes, you can use it because everything in Paris – I hope that when I went through Paris – has to be informed by the best available science and the current science, and there is a line between the IPCC and the UNEP report. The UNEP report is based on the IPCC report, which it says at the beginning of it. So it is – everything has to be informed by the science and this is part of it.

MRS JUSTICE THORNTON: So that means the interpretation of Paris may change over the years?

MISS SIMOR: Yes, and----

MRS JUSTICE THORNTON: So the same wording in Article 2(1)(c) at 2010 may have different meaning to 2022 and the development of (inaudible).

MISS SIMOR: Exactly, and it is – yes, and it did change because before IPCC 1.5 it was believed that there was a bigger carbon budget remaining and that we could move more slowly, and it was IPCC 1.5 that said we have got to hit net zero by 2050 or we can overshoot but these are consequences and these are the costs. So it is a dynamic process and the treaty, both the UNFCCC and the Paris Agreement, say that.

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So if we just go to where it is quoted, p.4 in the fourth paragraph now. Well, maybe the third and fourth paragraphs:

> "Oil and gas are also on track to exceed carbon budgets, as countries continue to invest in fossil fuel infrastructure that 'locks in' oil and gas use. The effects of this lock-in widen the production gap over time, until countries are producing 43% … more oil [per day] … 47% … more gas by 2040 than would be consistent with a 2^{o}C pathway.
>
> This global production gap is even larger than the already significant global emissions gap, due to minimal policy attention on curbing fossil fuel production. Collectively, countries' planned fossil fuel production not only exceeds 1.5^{o}C and 2^{o}C pathways, it also surpasses production levels consistent with the implementation of the national climate policies and ambitions in … NDCs."

So even – if surpasses even the commitments by countries.

> "As a consequence, the production gap is wider than the emissions gap …".

The emissions gap governs the gap between the commitments and the needed reductions and it is also in your bundle. And just so you know where it is, I hope it is in the authorities bundle – I do not think I took you to it – in tab----

LORD JUSTICE STUART-SMITH: 5.

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MISS SIMOR: -- tabs 5 and 6, and you will see under – so you see the reference to the IPCC report and then you have this analysis on p.174. We have not given you the whole report. Of course, like everything, you can actually access all of this on the internet if you find yourself very interested in the numbers.

> "In aggregate, countries' planned fossil fuel production by 2030 will lead to the emission of 39 billion tonnes … of carbon dioxide. This is 13 $GtCO_2$, or 53%, more than would be consistent with a 2°C pathway, and … 120% more than would be consistent with a 1.5°C pathway. This gaps widens significantly by 2040."

And then the next – the following bullet on the following side:

> "Oil and gas are also on track to exceed carbon budgets …".

I think we have set this out. It is the one I read to you. And then on the next page, well, you will probably want to read this whole little insert we have put. And then on page – just the final page, it has got a (i), second paragraph:

> "Last year, the … (IPCC) put new numbers to what has long been known. CO_2 emissions from fossil fuels will need to decline rapidly, by approximately 6% per year to remain on the 1.5°C-compatible pathway, and by roughly 2% per year to remain on a 2°C-compatible pathway.

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> Barring dramatic, unexpected advances in carbon capture and storage technology, these declines mean that most of the world's proven fossil fuel reserves must be left unburned."

And that is the 2019 report. The current report – so the two further reports, 2020 and 2021, look just as bad if not worse – I think worse, if I remember rightly. We did not want to trouble you with that. This was the one that we said that the defendants should have looked at and which they say was of no relevance to their consideration, and we say that that was wholly irrational.

Turning to my ninth point, act of state. This court is not examining the legality of anything that Mozambique is doing, or may do or will do. It is examining compliance by the United Kingdom with the United Kingdom's obligations under – and I am going to now take you through those obligations in the Paris Agreement. If we go to authorities bundle 1, tab 3, and then if we go straight to the agreement which starts at p.53. If we start at Article 3:

> "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement."

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And that is they **are** to undertake. It is a directive provision. It is a mandator provision. If we then move to Article 4(5), and let us start – 4(5) is where I want to go next:

> "Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions."

And then if we go back to 4(3):

> "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.
>
> 4. Developed country Parties should continue taking the led by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time toward economy-wide emission reduction or limitation targets in the light of different national circumstances."

But what we rely on, my Lord, my Lady, is Article 4(5). It is an obligation on developed country parties to assist developing country parties to meet the obligation under this Article, and those obligations, if I could just take you to two of them, if you go also to 9(1):

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> "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention."

And then 2:

> "Other Parties are encouraged to provide or continue to provide such support …
>
> 3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts.
>
> 4. The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation [so all climate], taking into account country-driven strategies"----

LORD JUSTICE STUART-SMITH: What does that – excuse me, what does that mean "adaptation and mitigation"?

MISS SIMOR: So mitigation is reduction.

LORD JUSTICE STUART-SMITH: And adaptation?

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MISS SIMOR: And adaptation means dealing with the consequences of climate change. So, as we have already discussed, it is the developing world that is going to suffer most from climate change and so the funds should go both to help them reduce emissions and develop and to adapt to the consequences of climate change that is already happening, "and have significant capacity" – so:

> "… especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints [Mozambique], such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation."

That is Mozambique. And then if we go to 9(5):

> "Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis."

Now, it is – so this case is concerned entirely with whether the UK is doing, has done and will do that. It has nothing to do with Mozambique. And I note that the United Kingdom has communicated its efforts under Article 9(5). I believe I took you to that document. It is

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the supplementary authorities bundle, tab 11, and in that communication you find the United Kingdom claiming for reductions in emissions that it has done. So you will see, "We reduced X million tonnes of carbon dioxide in Tanzania by solar panels", or whatever. So they claim the reduction. What they do not report is the increases. Now, the increases in this project dwarf the efforts to reduce and assist countries to reduce emissions. And it cannot be the case that the obligation to report on 9(5) is only an obligation to report the good stuff, but that it can be completely wiped out by the bad stuff. And we note, in that regard, that the climate change report states that renewables will be a better way to achieve Mozambique's Paris Agreement – or achieve Paris Agreement obligations.

LORD JUSTICE STUART-SMITH: Would BE?

MISS SIMOR: Would be, yes. So it would be better, if you like, to do it that way, both for Mozambique and for the world, and I do not think I need to go to that. So no one is saying----

LORD JUSTICE STUART-SMITH: I think we are conscious of that and we are also conscious of what comes after.

MISS SIMOR: We are not at all concerned with what is going on in Mozambique, and if we just go to the authority relied on – it has all the quotes in it – the easiest one, AB3, tab 41, para.52. Now, my learned friend said that we are in the third rule.

LORD JUSTICE STUART-SMITH: 72?

MISS SIMOR: 52. 52, p.2119.

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LORD JUSTICE STUART-SMITH: Got it.

MISS SIMOR: We are certainly not in the first and second rule and he does not attempt to rely on those. Those are set out in para.51. But he says we are in the third rule, so let us see what the third rule says. It says:

> "The third rule had more than one component, but each involved 'issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it'. Thus, 'the courts of this country will not interpret or question dealings between sovereign states' …".

There is no dealing here with any sovereign state.

> "… of which obvious examples were 'making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory'. Similarly, they would not 'determine the legality of acts of a foreign government in the conduct of foreign affairs'."

Not us.

> "Another aspect of the third rule was that 'international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts', since domestic courts 'should not

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> normally determine issues which are only really appropriate for diplomatic or similar channels'."

Well, we are in *Kebilene* and *Launder* territory here and it is accepted that this issue is justiciable. So that is not us either.

And then if you go to the examples at 64, again none, we say, apply to us. And insofar as we are concerned with (e), we are concerned with whether there was an error of law and the defendants have accepted that that is a justiciable issue.

SIR JAMES EADIE: My Lord, I am sorry, I do not want unduly to shorten my learned friend's reply, but I would not mind ten minutes at the end to re-join on at least two cases that have been cited for the first time in her reply----

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: -- if that could possibly be borne in mind?

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: I am coming to the end, I really am.

LORD JUSTICE STUART-SMITH: You said a few minutes ago.

MISS SIMOR: So, we say that there is no illegality by Mozambique in any event, because the NDC is conditional and that is perfectly permissible under Article 4(6) of the Paris Agreement. There is no question of any breach and there is no question of you even having to consider that. You need to consider whether the United Kingdom is complying with 4(5), 3, 4(5).

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LORD JUSTICE STUART-SMITH: It is a mad world, is it not, if people – I do not mean this – I am sorry, it is too late and I have used inexact words – but it is a strange world if a country like Mozambique can act entirely lawfully in wanting to develop its resources but the developed world cannot invest in it.

MISS SIMOR: Well, that is the – that is the position under the NDC system. It is a very – it is a kind of revolutionary system that does not really work but you could not get any better because you do not have to make any commitment at all really. You should, you should make some commitment, but there is no – You could commit too little and actually countries have committed too little.

LORD JUSTICE STUART-SMITH: Yes. Well, you may be right.

MISS SIMOR: And, of course, Mozambique is – So it is a very – there are two different – they are coming at it from two different points. The question is whether the UK is doing its best and it cannot, and it admits in the CCR, it is not. And I should finally say that the relationship here is not between Mozambique and the United Kingdom; it is between the United Kingdom and Total Energies.

The loan is not to Mozambique. Mozambique – the EMH, which is the Mozambique company, has – (after a pause) – we think it is – I am told it is 15 per cent, but most of this is nothing to do with Mozambique in terms of the investment. The investment is an

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international corporate investment and a very small part of it is even a Mozambique company. So it is not an act of state issue.

Now, leading to my final point about poverty, it is not true that this is about an irreconcilable conflict, and I am afraid I am going to hand you up, because of what was put before you – raised this afternoon by the interested parties, I am going to put these papers for you to read. I am not going to make – (after a pause): So we agree with----

LORD JUSTICE STUART-SMITH: What is this?

MISS SIMOR: This is E3G, which is a highly reputable organisation. It is – we were taken to the Tony Blair. This is an organisation that is involved also in the UNEP reports, you will see. It is a highly reputable organisation and it puts a different perspective. I am only giving it to you because an argument is being made that we are somehow kicking the ladder from under Mozambique's feet.

LORD JUSTICE STUART-SMITH: And you want us to read this entire document?

MISS SIMOR: Well, I – I read – it is very----

LORD JUSTICE STUART-SMITH: My enthusiasm is inexhaustible – almost!

MISS SIMOR: I have to say, it came to our attention very late in the day. I read it on the bus yesterday on my phone.

LORD JUSTICE STUART-SMITH: Never mind that. Never mind when you read it. Never mind where I am going to read it. You would like us to read the document?

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MISS SIMOR: If you are going to take this argument that somehow this is all about development, and I am going to make submissions as to why it is not, I think it is something that it is best you look at it.

LORD JUSTICE STUART-SMITH: Okay. Let us hear your submissions.

MISS SIMOR: The Blair report has problems with it in terms of independence, which I am not going to raise here. So----

LORD JUSTICE STUART-SMITH: So you are going to bash Tony Blair?

MISS SIMOR: No, I am not going to say anything about that report but I am not----

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: -- I am saying it is not something that you can rely on as independent. That is as far as I am going to go.

LORD JUSTICE STUART-SMITH: Okay.

MISS SIMOR: So a new case seems to have been made yesterday that this decision was about alleviating poverty, that one had to rob Peter to pay Paul, i.e., that emissions would have to increase and temperatures to go up correspondingly – you will recall that I showed you that scientifically they are directly related – in order to alleviate poverty and that this was what was happening in Mozambique and the reason the UK considered its financing in alignment with 2(1)(c), it was said that 2(1)(c) contains two competing and contradictory demands. And there is a lot wrong with that submission.

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First, it has nothing to do with the decision here. The decision here was taken on the basis (i) that the project would go ahead anyway. So had this financing been material to whether the project would or would not go ahead, a different decision might well have been taken. Secondly, that the UK therefore might as well fund it because it will get some jobs. It is going to happen anyway, let us fund it because we will get some jobs. And then the third reason given was that the UK would then potentially be able to influence Mozambique more in persuading it to move to renewables. So those were the three reasons.

It is that decision that has to be defended and you will see, if you look at the submission to, for example, the Chancellor, you will see those points. Not some fictional decision made up here in court. The submission to the Chancellor is at core bundle 2, p.29, and it suggests that funding might have been refused if, in fact, this finance itself would have been material in the decision as to whether or not it happened at all.

Secondly, it plainly was not a decision taken for the purposes of assisting Mozambique to achieve its development ends, including increasing its wealth. DFID, which is the development department and charged with development, was against the project. And that is at core bundle 2, p.62, the letter of April 2020.

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The UK had decided in 2019 that overseas development funding should not be used to fund fossil fuel development, so as to align that funding with Paris. So there is no contradiction in 2(1)(c). On the contrary, to fund fossil fuels would undermine the temperature goals and undermine sustainable development. And the UK communicated that position to the UN under Article 9(5) of the Convention in the document I mentioned just a moment ago. In light of that policy, UKEF argues that it could nevertheless fund this project precisely because it was not development funding. So the Government has said – the defendants have said, "We can fund this. It is not against the policy, which says no development funding for fossil fuels, because it is not development funding", whilst at the same time trying to argue that it was allowed to do so under 2(1)(c) because it was for development. And it is incoherent. It cannot have it both ways.

Thirdly, another reason why we know it is not actually true is that there was no analysis of the development risks and benefits, save by DFID which was against the funding. Any analysis would have shown that the finance put Mozambique at serious debt risk, ENH debt service undertaking, and the fact that Mozambique will not obtain revenue for fifteen years. And you will find all that in the report that I have handed up to you, which is actually about Mozambique.

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Finally, and most – so effectively DFID was right. Finally, and most importantly, such an approach, had it been taken, would have involved a fundamental misunderstanding of Paris and 2(1)(c). If correct, it would be impossible for the temperature goals in Article 2 and the overriding objective in Article 2 of the UNFCC to be reached, and the consequence of that is to cause vast increases in poverty and debt. The states would be able to exploit and invest fossil fuel reserves if that was to create wealth for poor countries. Now, we know from the UNEP production gap report that if this happens the temperature goals will not be met and we know the consequences of that. As I am sure the court is aware, these are the wholesale disappearance of the small island states and low coastal areas, including low-lying areas in Mozambique, food shortages, extreme weather events, droughts, mass migration and all that goes with it. As I showed you in the IPCC report, there is a direct relationship between every gram or kilogram of carbon dioxide that enters the atmosphere and temperature rising, and each semi-degree of temperature change affects global outcomes, most importantly for the very poor. And the IPCC has specifically set out in its report the difference in terms of consequences between 1.5 degrees and 2 degrees, and it says:

> "… limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050 (*medium confidence*)
> …
> …

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> Exposure to multiple and compound climate-related risks increases between 1.5°C and 2°C …, with greater proportions of people both so exposed and susceptible to poverty in Africa and Asia (*high confidence*) …".

And you will find all that in the IPCC report.

As Alok Sharma made clear, the consequences of missing 1.5 degrees are vast in terms of environmental cost and human cost, and he said every fraction of a degree makes a difference. At 1.5 degrees warming 700 million people would be at risk of extreme heatwaves.

LORD JUSTICE STUART-SMITH: I am not entirely sure this is the best use of a reply.

MISS SIMOR: I have finished nearly. If I can literally----

LORD JUSTICE STUART-SMITH: Well, you may have finished.

MISS SIMOR: I----

LORD JUSTICE STUART-SMITH: I have to say that since you got to the point about the submission to the Chancellor, I have been struggling to keep up and to follow the argument, and I would appreciate, as I know you are going from a speaking note, if you could strip down your speaking note to bullet points and references only from the moment where you said, "Not taken to enable Mozambique to achieve", whatever it was. You then went CB2/62, April 2020, and you drew the distinction between development and non-development and said it was all irreconcilable. And I am – it is my fault entirely----

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MISS SIMOR: Not at all.

LORD JUSTICE STUART-SMITH: -- but I was not taking that in and I would not be able to do the argument justice in the future.

MISS SIMOR: Did you – did you – I am just trying to work out where I am – did you take my points about----

LORD JUSTICE STUART-SMITH: I got your----

MISS SIMOR: -- DFID having been – having----

LORD JUSTICE STUART-SMITH: I got your submission that the decision was taken on three grounds.

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: And then you talked about the submission to the Chancellor, which I know about and I can go to. You then said something along the lines of this was not a decision taken to enable development or because the developmental----

MISS SIMOR: Yes.

LORD JUSTICE STUART-SMITH: -- agencies were against it or something like that.

MISS SIMOR: Yes. Okay. I will----

LORD JUSTICE STUART-SMITH: Do not – do not give it to me again now because I will not get it but I would value, if tomorrow or the next day, someone could strip it down and just send me the references and I will check the references.

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MISS SIMOR: Fine, fine. I can – I have basically finished. My submission is essentially that this was not a development funding decision.

LORD JUSTICE STUART-SMITH: I understand.

MISS SIMOR: And the second, more important, point is that there is not a contradiction. That is really the key point.

LORD JUSTICE STUART-SMITH: That is what I am struggling with and it is just because of information overload.

MISS SIMOR: Yes, well, I understand. This is a very, very heavy case in terms of information and, I mean, I appreciate that. I have been doing this case for two years.

LORD JUSTICE STUART-SMITH: Unless anyone objects, I am asking the claimants to do that. Right. So have you essentially finished?

MISS SIMOR: I have finished.

LORD JUSTICE STUART-SMITH: Good. Thank you very much. It is a heroic effort and, for the most part, your submissions have been extremely clear. I just began to suffer a few minutes ago.

MISS SIMOR: Thank you.

LORD JUSTICE STUART-SMITH: Sir James, you wanted to come back?

SIR JAMES EADIE: My Lord, I want to come back, if I may, on – on the----

LORD JUSTICE STUART-SMITH: Do you want to come back now or do you want to put in a note?

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SIR JAMES EADIE: I can do it now. It will be very short.

LORD JUSTICE STUART-SMITH: Okay.

SIR JAMES EADIE: If I may?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: And then you can----

LORD JUSTICE STUART-SMITH: Any objections? No. Right, go ahead.

SIR JAMES EADIE: Authorities bundle 1, tab 22, the *National Association of Health Stores* case.

LORD JUSTICE STUART-SMITH: Yes. Do you want us to open it?

SIR JAMES EADIE: Can I ask you to do that?

LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: I just invite you to side line some passages. My learned friend effectively suggested that this was authoritative of a proposition that if information comes to the decision-maker or to the Secretary of State who is a prior decision-maker, after the Secretary of State has viewed it, it can be ignored. This authority sits in a context of legislation, namely s.13 of the 1991 Act, which makes the decision-maker UKEF. You know the sequence of decision-making in terms of the Secretary of State and the Chancellor's involvement but the decision-maker is UKEF here. So anything that UKEF sees is relevant. The question that is thrown up is, if – to take the example that was used – rough and ready quantification information was produced between the Secretary of State seeing it and the final decision-maker seeing it, do you just ignore that? The answer to that

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is you do not because the decision-maker is UKEF under the statute. But you also do not, even if you treat UKEF as the decision-maker and the Secretary of State as a decision-maker also, because this authority was considering essentially a submission, as you see from para.26 and indeed the final sentence of para.27 – if you just cast an eye down those two – that, in effect, whatever the civil servant knows is imputed to the minister, and they rejected that submission. What they did instead was to identify, as the relevant principle, a test of whether something is in public law terms legally relevant. So if and to the extent that it is legally relevant, the minister ought to have a summary or have sight of it or whatever. And I take that concept----

LORD JUSTICE STUART-SMITH: The decision-maker should see it?

SIR JAMES EADIE: The decision-maker should see it and obviously here we have got a slightly strange decision-making set-up, but if you were just dealing with civil service to minister, to make the principle easier. And you see why I emphasise "legally relevant" because they specifically confronted what "relevance" means for this purpose, and they applied the very well-established approach, initially from President Cooke in *CREEDNZ*, as you see from para.63. That was an authority which you will recall was then cited in all of those later cases, including *Plantagenet Alliance*, and it effectively draws a distinction between something which is relevant in the sense that the minister or the decision-maker could take it into account and another matter, which is so relevant that the actual decision could not be taken without it. You see the distinction but the distinction is described by reference to

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CREEDNZ in para.63. And what they ultimately decide is that it is the latter which is the relevant test for present purposes, in other words, the matter is so relevant that no rationally minded minister could take the decision without sight of it.

And ultimately, therefore, when they come to dispose of and to deal with the facts, the question is not a binary one. The question is one of degree, judged against that legal standard. And so it is, we say, that if you get to a place, as Mr Taylor did, where having done the back of the envelope rough and ready calculation of quantification, he concludes that it does not actually materially add to whatever has gone before in terms of the CCR and the qualitative assessments that have been made, then that would plainly fail that *CREEDNZ* test. That is all I wanted to say about that case.

I wanted to alert you to----

LORD JUSTICE STUART-SMITH: Would you just give me that last sentence? If you get to the position of Taylor, that he gets the information----

SIR JAMES EADIE: He gets the information.

LORD JUSTICE STUART-SMITH: -- and decides it does not make a difference?

SIR JAMES EADIE: He decides it does not effectively make a difference between it really confirms the qualitative reasoning that is already appearing in the CCR, then you do not need to reinform, and that is assuming that Mr Taylor is to be treated like a civil servant----

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LORD JUSTICE STUART-SMITH: Yes.

SIR JAMES EADIE: -- for this purpose, where the decision-maker is a Secretary of State, which he is not because of s.13, but assume that just for the sake of argument. So that is the submission on that.

I wanted to simply refer you to one other case, which was the *Benkharbouche* case, which my learned friend referred to, did not open and then referred to, and said it was in her skeleton, in reply. The relevant paragraph – I do not invite you to turn it up now, it is behind tab 33 of bundle 3 – but the relevant paragraph is 35/

MRS JUSTICE THORNTON: What tab is it?

SIR JAMES EADIE: 33.

LORD JUSTICE STUART-SMITH: Paragraph?

SIR JAMES EADIE: 35, on p.1618.

LORD JUSTICE STUART-SMITH: Thank you.

SIR JAMES EADIE: And you will see, in a nutshell, that what Lord Sumption does is to acknowledge precisely the run of case law that I took you through; *Corner House*, the Sales article and all of that. The critical feature that you need to bear in mind in relation to this paragraph and the analysis of Lord Sumption is that what he was considering, and what he was dealing with, were principles of customary international law and, as you are probably well aware, the transposition or reliance upon principles of customary international law, in

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other words those principles of international law that are so well-established that almost all the states sign up to them and recognise they have to as a matter of law – torture, cannot torture, that sort of thing – that those principles have a very different set of rules attaching to them when the court is considering whether they are part of domestic law. So he was not dealing here with treaty obligations. He was dealing here with rules of customary international law in this context to do with immunities and so on, for the purpose of the State Immunity Act. And that is a critical distinction.

So two points really; (1) bear that in mind when you come to the latter part of para.35. The second point, first part of para.35 is essentially reciting the cases I took you to.

MISS SIMOR: Yes, and it is the end of 35, on p.1619, just above 36, that we rely on. Indeed, having considered those cases, he rejects the concept that that means tenability applies.

SIR JAMES EADIE: Well, I am not going to engage in ping-pong with my learned friend----

LORD JUSTICE STUART-SMITH: No.

SIR JAMES EADIE: -- but you will see the two references which are critical to the analysis, to customary international law, in that second half.

LORD JUSTICE STUART-SMITH: Yes. Thank you.

SIR JAMES EADIE: I am grateful.

LORD JUSTICE STUART-SMITH: Yes.

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MR HEPPINSTALL: My Lord asked the question about the SPAs and the off-taker arrangements. If I could give you, burden you, with one reference?

LORD JUSTICE STUART-SMITH: Yes.

MR HEPPINSTALL: CB2/189.

LORD JUSTICE STUART-SMITH: CB2/189.

MR HEPPINSTALL: Yes. It is the RAD report. It is, as my learned friend for the claimant said, take or pay. You either take the gas away and pay for it or you leave it but you still pay for it over the lifetime of the lending. So thirteen and a half years. You will see over the page, at 190, that there are some buyer-friendly clauses, so you can reduce the amount sometimes that you can take away in any one year, but it still is take or pay and no termination rights.

LORD JUSTICE STUART-SMITH: Which paragraph is this take or pay?

MR HEPPINSTALL: So 189, the first – you see that there is a sub-heading "Offtake Contract/ Terms".

LORD JUSTICE STUART-SMITH: I have it.

MR HEPPINSTALL: 172 gives you the "take or pay". 173 gives you the length of those obligations and then over the page, at 176, there is some flexibility and, crucially, four lines down, middle of that line, "cargo diversion rights", which are the very rights that cause the uncertainties because you can divert the gas.

LORD JUSTICE STUART-SMITH: Okay. Thank you very much. Well, it will come as no surprise to you to know that we are going to reserve our judgment. You have given us a lot of work

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to do and, although provision has been made for both of us to have some time to write judgments, I would not wish to give an undertaking about how soon you are going to get a judgment but it will be as soon as we can reasonably manage without endangering life or limb on our part. May I – then you will get a draft in the normal way.

I think it is possible that while we are writing the judgment questions may arise which we either cannot immediately identify where the references are, in which case we would send an email copied to all parties requesting further assistance, which will not be an invitation for further argument. It will be, I hope, totally confined.

But can I just say thank you not only to the people in the front row, but it is quite clear that the assistance you have been getting is not limited to the people in the second row either, but to all people who have been concerned with the presentation of this, and we will do our best to do it justice. Thank you very much.

(4.41 p.m.)

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