

BEFORE THE ARBITRATION TRIBUNAL

PCA Case No. 2024-45

IN THE MATTER OF AN ARBITRATION

**PURSUANT TO ARTICLE 739 OF THE TRADE AND
COOPERATION AGREEMENT BETWEEN THE
EUROPEAN UNION AND THE EUROPEAN ATOMIC
ENERGY COMMUNITY AND THE UNITED KINGDOM
OF GREAT BRITAIN AND NORTHERN IRELAND**

- between -

THE EUROPEAN UNION

(“Complainant”)

- and -

THE UNITED KINGDOM OF GREAT BRITAIN AND

NORTHERN IRELAND

**(“Respondent”, and together with the Complainant, the
“Parties”)**

WRITTEN SUBMISSION OF THE EUROPEAN UNION

9 December 2024

Table of Contents

I.	INTRODUCTION	19
II.	PROCEDURAL BACKGROUND	22
III.	FACTUAL BACKGROUND	23
III.1.	Principles governing the sustainable management of fish stocks	23
III.2.	ICES and the relevant fishing zones for the purpose of this dispute	25
III.3.	Principles governing the setting of TACs for jointly managed shared fish stocks in the EU’s and UK’s waters pursuant to the TCA.....	26
III.4.	The phenomenon of fisheries displacement	27
III.5.	Sandeel management areas within the Greater North Sea	28
III.6.	Sandeel in the Greater North Sea	30
III.7.	Sandeel predators in the North Sea.....	35
III.8.	The partial prohibition of sandeel fishing in UK waters of the North Sea prior to the sandeel fishing prohibition	38
III.9.	The public consultations preceding the sandeel fishing prohibition.....	41
III.9.1.	The October 2021 Call for Evidence	42
III.9.2.	The March 2023 public consultation conducted by DEFRA	43
III.9.3.	Consultation on proposals to close fishing for sandeel in all Scottish waters.....	53
III.9.4.	The ICES Technical Service of 28 November 2023.....	63
III.10.	The correspondence between the EU and the UK prior to the sandeel fishing prohibition .	67
IV.	THE DISPUTED MEASURE: THE ‘SANDEEL FISHING PROHIBITION’	71
IV.1.	The sandeel fishing prohibition as given effect to in English waters of the North Sea	72
IV.2.	The sandeel fishing prohibition as given effect to in Scottish waters of the North Sea.....	74
IV.3.	The sandeel fishing prohibition is a single measure	75
IV.4.	The objectives of the sandeel fishing prohibition	79
IV.4.1.	The general objectives of UK fisheries policy.....	79
IV.4.2.	The objectives of the sandeel fishing prohibition	82
V.	THE APPLICABLE LEGAL FRAMEWORK	84
V.1.	Interpretative approach.....	84
V.2.	The objectives and purpose of the TCA	89

V.3.	Heading Five TCA: Fisheries	94
V.3.1.	Article 494 TCA – Objectives and Principles	95
V.3.2.	Article 496 TCA – Fisheries management	99
V.3.3.	Access to waters to fish	117
V.3.4.	Burden of proof	126
VI.OVERVIEW OF THE EU’S CLAIMS		126
VII.CLAIM 1: THE SANDEEL FISHING PROHIBITION IS INCONSISTENT WITH THE UNITED KINGDOM’S OBLIGATIONS UNDER ARTICLES 496(1) AND 496(2) TCA, READ TOGETHER WITH ARTICLE 494(3)(C) TCA		127
VII.1.	Legal standard	128
VII.1.1.	The term “best available scientific advice” in 496(2) and Article 494(3)(c) TCA	128
VII.1.2.	Ordinary meaning of the term “best available scientific advice”	128
VII.1.3.	Object and purpose of the term “best available scientific advice”	129
VII.1.4.	The objectives of the TCA and the structure and content of Heading Five	130
VII.1.5.	Relevant rules of international law	132
VII.1.6.	Conclusion on the meaning of the term “best available scientific advice”	142
VII.2.	Application of the legal standard	143
VII.2.1.	The “scientific advice” that the UK has identified as the base for the sandeel fishing prohibition.	144
VII.2.2.	The “scientific advice” identified by the UK as the base for the sandeel fishing prohibition is not the “best available scientific advice”	147
VII.2.3.	The sandeel fishing prohibition is not “based (...) on” the best available scientific advice	153
VII.3.	Conclusion on Claim 1	163
VIII.CLAIM 2: THE SANDEEL FISHING PROHIBITION IS INCONSISTENT WITH THE UNITED KINGDOM’S OBLIGATIONS UNDER ARTICLES 496(1) AND 496(2) TCA, READ TOGETHER WITH ARTICLE 494(3)(F) TCA		163
VIII.1.	Legal standard	163
VIII.1.1.	A “proportionate (...) measure” in Article 494(3)(f) TCA	166
VIII.1.2.	The ordinary meaning of the term “proportionate (...) measure”	167
VIII.1.3.	Object and purpose of the term “proportionate measure”	168
VIII.1.4.	The objectives of the TCA and the structure and content of Heading Five	169
VIII.1.5.	“Regulatory autonomy” in Article 494(3)(f) TCA	171
VIII.1.6.	The relationship with Article 494(3)(a) TCA	173
VIII.1.7.	The relationship with Article 494(3)(e) TCA	173

VIII.1.8.	Relevant rules of international law	174
VIII.1.9.	Domestic law	186
VIII.1.10.	Conclusion on the meaning of the term “proportionate (...) measure”	192
VIII.2.	The meaning of the term “non-discriminatory measure” in Article 494(3)(f) TCA	194
VIII.2.1.	The ordinary meaning of the term “non-discriminatory measure”	195
VIII.2.2.	Object and purpose of the term “non-discriminatory” measure.....	196
VIII.2.3.	The term “non-discriminatory... measure” in its context.....	196
VIII.2.4.	Conclusion on the meaning of the term “non-discriminatory measure”	202
VIII.3.	Application of the legal standard.....	203
VIII.3.1.	The sandeel fishing prohibition is not a “proportionate measure”	203
VIII.3.2.	The sandeel fishing prohibition is “for the purpose” of a legitimate policy objective and is apt for that purpose	205
VIII.3.3.	The degree of contribution of the sandeel fishing prohibition to the legitimate objectives	208
VIII.3.4.	The economic and social impact and the impairment of rights of full access to waters to fish under the TCA.....	212
VIII.3.5.	The UK did not adequately consider the economic and social impacts of the sandeel fishing prohibition.....	212
VIII.3.6.	The impairment of the right of full access to UK waters of the North Sea to fish.....	218
VIII.3.7.	The UK’s failure to balance the degree of contribution to its regulatory objectives and the economic and social impact.....	218
VIII.3.8.	The UK could have decided on alternative proportionate measures.....	221
VIII.3.9.	The fishing prohibition is a “discriminatory (...) measure” and is inconsistent with Articles 496(1) and 496(2) TCA, read together with Article 494(3)(f) TCA	225
VIII.3.10.	Conclusion.....	227
IX.CLAIM 3: THE UK HAS ACTED INCONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 2(1)(A) OF ANNEX 38 TCA.....		227
IX.1.	Legal Standard.....	227
IX.2.	Application of the legal standard.....	228
IX.3.	Conclusion.....	231
X.RULING SOUGHT.....		232

List of abbreviations

Abbreviation	Description
Call for Evidence	Call for Evidence published by the UK Fisheries Administrations on 22 October 2021 on future management of Sandeels and Norway pout
Cefas	Centre for Environment Fisheries and Aquaculture Science
DEFRA	The Department for Environment, Food and Rural Affairs of the Government of the United Kingdom
EEZ	Exclusive Economic Zone
DEFRA consultation document	DEFRA, “Consultation on Spatial Management Measures for Industrial Sandeel Fishing”, March 2023
English sandeel consultation	Public consultation launched by DEFRA on 6 March 2023 regarding the prohibition of industrial sandeel fishing in English waters of the North Sea
EU	European Union
FAO	Food and Agriculture Organisation
JNCC	Joint Nature Conservation Committee
ICES Technical Service	ICES Technical Service, “EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species”, November 2023
ITLOS	International Tribunal for the Law of the Sea
MMO	Marine Maritime Organisation
Natural England/Cefas/JNCC advice	Natural England, Cefas and JNCC, “What are the ecosystem risks and benefits of full prohibition of industrial sandeel fishing in the UK waters of the North Sea (ICES Subarea 4)?”, March 2023
RFMO	Regional Fisheries Management Organisations
Sandeel fishing prohibition	The prohibition of industrial sandeel fishing in English waters of the North Sea and in all Scottish waters as of 26 March 2024
Scottish consultation document	Scottish Government, “Consultation on proposals to close fishing for sandeel in all Scottish waters”, July 2023
Scottish environmental assessment	Scottish Government, “Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters”, July 2023

Abbreviation	Description
Scottish Order	Sandeel (Prohibition Of Fishing) (Scotland) Order 2024
Scottish partial impact assessment	Scottish Government, “Partial Business and Regulatory Impact Assessment”, July 2023
Scottish sandeel consultation	Public consultation launched by the Scottish Government on 21 July 2023 regarding the prohibition of industrial sandeel fishing in all Scottish waters
Scottish scientific evidence review	Scottish Government, “Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment”, July 2023
STECF	Scientific, Technical and Economic Committee for Fisheries
TAC	Total Allowable Catch
TCA	Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part
UNCLOS	United Nations Convention on the Law of the Sea
UK	The United Kingdom of Great Britain and Northern Ireland
UNFSA	Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks
VCLT	Vienna Convention on the Law of Treaties

List of exhibits

Exhibit number	Title	Date
<u>Exhibit C-0001</u>	Written record of fisheries consultations between the United Kingdom and the European Union for 2021	09/12/2024
<u>Exhibit C-0002</u>	Written record of fisheries consultations between the United Kingdom and the European Union for 2022	09/12/2024
<u>Exhibit C-0003</u>	Written record of fisheries consultations between the United Kingdom and the European Union for 2023	09/12/2024
<u>Exhibit C-0004</u>	Written record of fisheries consultations between the United Kingdom and the European Union for 2024	09/12/2024
<u>Exhibit C-0005</u>	ICES Glossary, “Stock”, “SSB/R”, “F”, “R”	09/12/2024
<u>Exhibit C-0006</u>	Maunder, M. N., Hamel, O. S., Lee, H. H., Piner, K. R., Cope, J. M., Punt, A. E., ... & Methot, R. D. (2023). A review of estimation methods for natural mortality and their performance in the context of fishery stock assessment. Fisheries Research, 257, 106489.	09/12/2024
<u>Exhibit C-0007</u>	Cheilari, A., Ratz, A.J., The effect of natural mortality on the estimation of stock state parameters and derived references for sustainable fisheries management, ICES CM 2009/N:03	09/12/2024
<u>Exhibit C-0008</u>	Brittanica, Species abundance	09/12/2024
<u>Exhibit C-0009</u>	ICES Ecoregions including ICES Statistical Areas, ices.dk. Dec 2017	09/12/2024
<u>Exhibit C-0010</u>	Scottish Government, Good Practice Guidance for assessing fisheries displacement by other licensed marine activities, A303088-S00-REPT-002-A02, June 2022	09/12/2024
<u>Exhibit C-0011</u>	ICES advice of 29 February 2024, Sandeel (Ammodytes spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank)	09/12/2024
<u>Exhibit C-0012</u>	ICES advice of 29 February 2024, Sandeel (Ammodytes spp.) in divisions 4.b-c and Subdivision 20, Sandeel Area 2r (central and southern North Sea)	09/12/2024
<u>Exhibit C-0013</u>	ICES advice of 29 February 2024, Sandeel (Ammodytes spp.) in divisions 4.a–b and Subdivision 20, Sandeel Area 3r (northern and central North Sea, Skagerrak),	09/12/2024
<u>Exhibit C-0014</u>	ICES advice of 29 February 2024, Sandeel (Ammodytes spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea)	09/12/2024
<u>Exhibit C-0015</u>	ICES advice of 28 February 2023, Sandeel (Ammodytes spp.) in Division 4.a, Sandeel Area 5r (northern North Sea, Viking and Bergen banks)	09/12/2024

<u>Exhibit C-0016</u>	ICES advice of 28 February 2023, Sandeel (<i>Ammodytes</i> spp.) in subdivisions 20–22, Sandeel Area 6 (Skagerrak, Kattegat and Belt Sea)	09/12/2024
<u>Exhibit C-0017</u>	ICES advice of 28 February 2023, Sandeel (<i>Ammodytes</i> spp.) in Division 4.a, Sandeel Area 7r (northern North Sea, Shetland)	09/12/2024
<u>Exhibit C-0018</u>	Lynam, C. P., Halliday, N. C., Höffle, H., Wright, P. J., van Damme, C. J., Edwards, M., & Pitois, S. G. (2013). Spatial patterns and trends in abundance of larval sandeels in the North Sea: 1950–2005. <i>ICES Journal of Marine Science</i> , 70(3), 540-553	09/12/2024
<u>Exhibit C-0019</u>	Engelhard, G. H., Peck, M. A., Rindorf, A., Smout, S. C., van Deurs, M., Raab, K., Andersen, K. H., Garthe, S., Lauerburg, R. A. M., Scott, F., Brunel, T., Aarts, G., van Kooten, T., and Dickey-Collas, M. Forage fish, their fisheries, and their predators: who drives whom? – <i>ICES Journal of Marine Science</i> , (2014), 71: 90–104 (2014)	09/12/2024
<u>Exhibit C-0020</u>	Arnott, S. A., & Ruxton, G. D. (2002). Sandeel recruitment in the North Sea: demographic, climatic and trophic effects. <i>Marine Ecology Progress Series</i> , 238, 199-210,	09/12/2024
<u>Exhibit C-0021</u>	Rindorf, A., Henriksen, O., & Van Deurs, M. (2019). Scale-specific density dependence in North Seasandeel. <i>Marine Ecology Progress Series</i> , 619, 97-110.	09/12/2024
<u>Exhibit C-0022</u>	ICES Technical Service, Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023	09/12/2024
<u>Exhibit C-0023</u>	Jensen, H., Rindorf, A., Wright, P. J., & Mosegaard, H. (2011). Inferring the location and scale of mixing between habitat areas of lesser sandeel through information from the fishery. <i>ICES Journal of Marine Science</i> , 68(1), 43-51.	09/12/2024
<u>Exhibit C-0024</u>	Boulcott, P., & Wright, P. J. (2008). Critical timing for reproductive allocation in a capital breeder: evidence from sandeels. <i>Aquatic Biology</i> , 3(1), 31-40.	09/12/2024
<u>Exhibit C-0025</u>	Andersen, J. L., & Nielsen, M. (2024). The economics of the Danish sandeel fishery and fishmeal and fish oil factories. Department of Food and Resource Economics, University of Copenhagen. IFRO Commissioned Work No. 2024/1	09/12/2024
<u>Exhibit C-0026</u>	MacDonald A, Speirs DC, Greenstreet SPR, Boulcott P and Heath MR (2019) Trends in Sandeel Growth and Abundance off the East Coast of Scotland. <i>Front. Mar. Sci.</i> 6:201. doi: 10.3389/fmars.2019.00201	09/12/2024
<u>Exhibit C-0027</u>	ICES (2017). Report of the Benchmark Workshop on Sandeel (WKSand). ICES Expert Group reports (until 2018).	09/12/2024
<u>Exhibit C-0028</u>	ICES (2016). Sandeel (<i>Ammodytes</i> spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank), February 2016	09/12/2024
<u>Exhibit C-0029</u>	ICES (2022). Sandeel (<i>Ammodytes</i> spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank),	09/12/2024

	February 2022	
<u>Exhibit C-0030</u>	ICES (2017) Sandeel (<i>Ammodytes</i> spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), September 2017	09/12/2024
<u>Exhibit C-0031</u>	ICES (2023) Sandeel (<i>Ammodytes</i> spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), March 2023	09/12/2024
<u>Exhibit C-0032</u>	ICES (2018). Sandeel (<i>Ammodytes</i> spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2018	09/12/2024
<u>Exhibit C-0033</u>	ICES (2021). Sandeel (<i>Ammodytes</i> spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2021	09/12/2024
<u>Exhibit C-0034</u>	ICES (2019). Sandeel (<i>Ammodytes</i> spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2019	09/12/2024
<u>Exhibit C-0035</u>	Joint Fisheries Statement, November 2022.	
<u>Exhibit C-0036</u>	ICES (2023) Advice on fishing opportunities. In Report of the ICES Advisory Committee, 2023. ICES Advice 2023	09/12/2024
<u>Exhibit C-0037</u>	ICES. 2024d. Herring Assessment Working Group for the Area South of 62° N (HAWG). ICES Scientific Reports. 6:24	09/12/2024
<u>Exhibit C-0038</u>	Markones, N., Dierschke, V., & Garthe, S. (2010). Seasonal differences in at-sea activity of seabirds underline high energetic demands during the breeding period. <i>Journal of Ornithology</i> , 151, 329-336	09/12/2024
<u>Exhibit C-0039</u>	Waggitt JJ, Evans PGH, Andrade J, et al. Distribution maps of cetacean and seabird populations in the North-East Atlantic. <i>J Appl Ecol.</i> 2020; 57:253–269.	09/12/2024
<u>Exhibit C-0040</u>	Searle, K. R., Regan, C. E., Perrow, M. R., Butler, A., Rindorf, A., Harris, M. P., Newell, M. A., Wanless, S. & Daunt, F. (2023). Effects of a fishery closure and prey abundance on seabird diet and breeding success: Implications for strategic fisheries management and seabird conservation. <i>Biological Conservation</i> , 281, 109990	09/12/2024
<u>Exhibit C-0041</u>	Dierschke, V., Marra, S., Parsons, M., Fusi, M., French, G. 2022. Marine Bird Abundance. In: OSPAR, 2023: The 2023 Quality Status Report for the North-East Atlantic. OSPAR Commission, London	09/12/2024
<u>Exhibit C-0042</u>	Burthe, S. J., Wanless, S., Newell, M. A., Butler, A., & Daunt, F. (2014). Assessing the vulnerability of the marine bird community in the western North Sea to climate change and other anthropogenic impacts. <i>Marine Ecology Progress Series</i> , 507, 277-295	09/12/2024
<u>Exhibit C-0043</u>	Call for Evidence on future management of Sandeels and Norway pout published by the UK Fisheries Administrations on 22 October	09/12/2024

	2021	
<u>Exhibit C-0044</u>	“Consultation on Spatial Management Measures for Industrial Sandeel Fishing” (‘DEFRA consultation document’), DEFRA, March 2023	09/12/2024
<u>Exhibit C-0045</u>	“What are the ecosystem risks and benefits of full prohibition of industrial sandeel fishing in the UK waters of the North Sea (ICES Subarea 4)?” (‘Natural England/Cefas/JNCC advice’), March 2023	09/12/2024
<u>Exhibit C-0046</u>	Natural England, GOV.UK	09/12/2024
<u>Exhibit C-0047</u>	Centre for Environment Fisheries and Aquaculture Science (CEFAS)	09/12/2024
<u>Exhibit C-0048</u>	Joint Nature Conservation Committee (JNCC)	09/12/2024
<u>Exhibit C-0049</u>	Consultation on proposals to close fishing for sandeel in all Scottish waters, July 2023 (‘Scottish consultation document’)	09/12/2024
<u>Exhibit C-0050</u>	Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment”, July 2023 (‘Scottish scientific literature review’)	09/12/2024
<u>Exhibit C-0051</u>	Partial Business and Regulatory Impact Assessment” (‘Scottish partial impact assessment’), July 2023	09/12/2024
<u>Exhibit C-0052</u>	“Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters” (‘Scottish environmental assessment’), July 2023	09/12/2024
<u>Exhibit C-0053</u>	Joint request to ICES “on ecosystem considerations in the provision of single-stock advice for forage fish species”, 5 June 2023	09/12/2024
<u>Exhibit C-0054</u>	ICES, Technical Guidelines, Technical Services meaning	09/12/2024
<u>Exhibit C-0055</u>	Letter of Directorate-General for Maritime Affairs and Fisheries of the European Commission to DEFRA in response to the English sandeel consultation, of 30 May 2023	09/12/2024
<u>Exhibit C-0056</u>	Letter of the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands sent to a letter to the Directorate-General for Maritime Affairs and Fisheries of the European Commission, of 24 July 2023	09/12/2024
<u>Exhibit C-0057</u>	Letter from Directorate-General for Maritime Affairs and Fisheries of the European Commission to the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands of 1 August 2023	09/12/2024
<u>Exhibit C-0058</u>	Letter from UK Secretary of State Environment, Food & Rural Affairs to the European Commissioner for the Environment, Oceans and Fisheries of 30 January 2024	09/12/2024
<u>Exhibit C-0059</u>	Letter from the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands to the Directorate-General for Maritime Affairs and Fisheries of the European Commission, of 2 February 2024	09/12/2024

<u>Exhibit C-0060</u>	UK notification of the sandeel fishing prohibition to the EU pursuant to Article 496(3) TCA, 8 February 2024	09/12/2024
<u>Exhibit C-0061</u>	Letter from the Directorate-General for Maritime Affairs and Fisheries of the European Commission – reply to the letter of the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands, 16 February 2024	09/12/2024
<u>Exhibit C-0062</u>	Letter from European Commissioner for the Environment, Oceans and Fisheries – reply to the letter of the UK Secretary of State Environment, Food & Rural Affairs, 22 February 2024	09/12/2024
<u>Exhibit C-0063</u>	Explanation on Fishing vessel licence variations	09/12/2024
<u>Exhibit C-0065</u>	Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36	09/12/2024
<u>Exhibit C-0066</u>	The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024: Business and Regulatory Impact Assessment – final, January 2024.	09/12/2024
<u>Exhibit C-0067</u>	DEFRA, “Nature recovery to be accelerated as the government delivers on measures to protect land and sea”, 31 January 2024	09/12/2024
<u>Exhibit C-0068</u>	Scottish government, “Sandeel fishing to be banned in Scottish waters”, 31 January 2024	09/12/2024
<u>Exhibit C-0069</u>	DEFRA, Marine Strategy Part One: UK updated assessment and Good Environmental Status, October 2019	09/12/2024
<u>Exhibit C-0070</u>	DEFRA, Marine Strategy Part Two: UK updated monitoring programmes, October 2022	09/12/2024
<u>Exhibit C-0071</u>	DEFRA Press Release, “Flagship Fisheries Bill becomes law”, 24 November 2020	09/12/2024
<u>Exhibit C-0072</u>	Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 12 November 2019	09/12/2024
<u>Exhibit C-0073</u>	ITLOS, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (UK written statement), 16 June 2023.	09/12/2024
<u>Exhibit C-0074</u>	Report of the ICES Working Group on the Assessment of Demersal Stocks in the North Sea and Skagerrak (WGNSSK), ICES WGNSSK REPORT 2011, ICES CM 2011/ACOM:13	09/12/2024

List of Legal authorities

Legal Authority No.	Description	Date
Exhibit <u>CLA-0001</u>	Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.	09/12/2024
Exhibit <u>CLA-0002</u>	Trade and Cooperation Agreement Partnership Council Decision number 1 for 2021 (23 February 2021)	09/12/2024
Exhibit <u>CLA-0003</u>	Council Regulation (EU) 2024/1015 of 26 March 2024 amending Regulation (EU) 2024/257 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters (OJ L, 2024/1015, 27.03.2024, ELI: http://data.europa.eu/eli/reg/2024/1015/oj)	09/12/2024
Exhibit <u>CLA-0004</u>	Sandeel (Prohibition Of Fishing) (Scotland) Order 2024 ('Scottish Order')	09/12/2024
Exhibit <u>CLA-0005</u>	Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22, ELI: http://data.europa.eu/eli/reg/2013/1380/oj)	09/12/2024
Exhibit <u>CLA-0006</u>	UK Fisheries Act, 2020	09/12/2024
Exhibit <u>CLA-0007</u>	Council Regulation (EU) No 57/2011 of 18 January 2011 fixing for 2011 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters (OJ L 24, 27.1.2011, p. 1, ELI: http://data.europa.eu/eli/reg/2011/57/oj)	09/12/2024
Exhibit <u>CLA-0008</u>	Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194 (OJ L, 2024/257, 11.01.2024, ELI: http://data.europa.eu/eli/reg/2024/257/oj)	09/12/2024
Exhibit <u>CLA-0009</u>	Council Regulation (EC) No 1298/2000 of 8 June 2000 amending for the fifth time Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (OJ L 148, 22.6.2000, p. 1, ELI: http://data.europa.eu/eli/reg/2000/1298/oj)	09/12/2024
Exhibit <u>CLA-0010</u>	Council Regulation (EC) No 2341/2002 of 20 December 2002 fixing for 2003 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels,	09/12/2024

	in waters where catch limitations are required (OJ L 356, 31.12.2002, p. 12, ELI: http://data.europa.eu/eli/reg/2002/2341/oj)	
Exhibit <u>CLA-0011</u>	Council Regulation (EC) No 43/2009 of 16 January 2009 fixing for 2009 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (OJ L 22, 26.1.2009, p. 1, ELI: http://data.europa.eu/eli/reg/2009/43/oj)	09/12/2024
Exhibit <u>CLA-0012</u>	Council Regulation (EC) No 1288/2009 of 27 November 2009 establishing transitional technical measures from 1 January 2010 to 30 June 2011 (OJ L 347, 24.12.2009, p. 6, ELI: http://data.europa.eu/eli/reg/2009/1288/oj)	09/12/2024
Exhibit <u>CLA-0013</u>	Regulation (EU) No 227/2013 of the European Parliament and of the Council of 13 March 2013 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1434/98 specifying conditions under which herring may be landed for industrial purposes other than direct human consumption (OJ L 78, 20.3.2013, p. 1, ELI: http://data.europa.eu/eli/reg/2013/227/oj)	09/12/2024
Exhibit <u>CLA-0014</u>	Statutory guidance setting out the variations relevant to the sandeel fishing prohibition. Variation to UK Foreign Vessel Licence Effective 00_01hrs 26 March 2024	09/12/2024
Exhibit <u>CLA-0015</u>	Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 (OJ L 198, 25.7.2019, p. 105, ELI: http://data.europa.eu/eli/reg/2019/1241/oj)	09/12/2024
Exhibit <u>CLA-0016</u>	Vienna Convention on the Law of Treaties (VCLT)	
Exhibit <u>CLA-0017</u>	Sea Fish (Conservation) Act 1967	09/12/2024
Exhibit <u>CLA-0018</u>	Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008, p. 19, ELI: http://data.europa.eu/eli/dir/2008/56/oj)	09/12/2024
Exhibit <u>CLA-0019</u>	ICJ, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994.	09/12/2024
Exhibit <u>CLA-0020</u>	ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003	09/12/2024

Exhibit <u>CLA-0021</u>	ITLOS, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion, 21 May 2024	09/12/2024
Exhibit <u>CLA-0022</u>	WTO, Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3	09/12/2024
Exhibit <u>CLA-0023</u>	United Nations Convention on the Law of the Sea (UNCLOS)	09/12/2024
Exhibit <u>CLA-0024</u>	ICJ, Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009	09/12/2024
Exhibit <u>CLA-0025</u>	ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011	09/12/2024
Exhibit <u>CLA-0026</u>	WTO, Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R , WT/DS169/AB/R , adopted 10 January 2001, DSR 2001:I, p. 5	09/12/2024
Exhibit <u>CLA-0027</u>	ITLOS, Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Report 1999	09/12/2024
Exhibit <u>CLA-0028</u>	United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA)	09/12/2024
Exhibit <u>CLA-0029</u>	ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010	09/12/2024
Exhibit <u>CLA-0030</u>	Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008 (OJ L 83, 25.3.2019, p. 1, ELI: http://data.europa.eu/eli/reg/2019/472/oj)	09/12/2024
Exhibit <u>CLA-0031</u>	WTO, Panel Report, Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging, WT/DS458/R , Add.1 and Suppl.1, adopted 27 August 2018, DSR 2018:VIII, p. 3925	09/12/2024
Exhibit <u>CLA-0032</u>	WTO, Appellate Body Report, United States – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/AB/R , adopted 14 November 2008, DSR 2008:X, p. 3507	09/12/2024

Exhibit <u>CLA-0033</u>	FAO Code of Conduct for Responsible Fisheries	09/12/2024
Exhibit <u>CLA-0034</u>	Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries	09/12/2024
Exhibit <u>CLA-0035</u>	Convention for the Conservation of Salmon in the North Atlantic Ocean establishing the North Atlantic Salmon Conservation Organization (NASCO)	09/12/2024
Exhibit <u>CLA-0036</u>	Convention on Cooperation in the Northwest Atlantic Fisheries establishing the Northwest Atlantic Fisheries Organization (NAFO)	09/12/2024
Exhibit <u>CLA-0037</u>	Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean establishing the South East Atlantic Fisheries Organisation (SEAFO)	09/12/2024
Exhibit <u>CLA-0038</u>	ITLOS, Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Joint declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson	09/12/2024
Exhibit <u>CLA-0039</u>	WTO, Agreement on Technical Barriers to Trade (TBT)	09/12/2024
Exhibit <u>CLA-0040</u>	WTO, Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R / WT/DS401/AB/R , adopted 18 June 2014, DSR 2014:I, p. 7	09/12/2024
Exhibit <u>CLA-0041</u>	WTO, Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)	09/12/2024
Exhibit <u>CLA-0042</u>	WTO, Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 3243	09/12/2024
Exhibit <u>CLA-0043</u>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135	09/12/2024
Exhibit <u>CLA-0044</u>	WTO, Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R , adopted 10 December 2003, DSR 2003:IX, p. 4391	09/12/2024
Exhibit <u>CLA-0045</u>	WTO, Panel Report, <i>European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels</i> , WT/DS600/R and Add.1, adopted 26 April 2024	09/12/2024
Exhibit <u>CLA-0046</u>	ICJ, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3	09/12/2024
Exhibit <u>CLA-0047</u>	ICJ, Maritime Delimitation in the Black Sea (Romania v Ukraine) [2009] ICJ Rep 61	09/12/2024

Exhibit <u>CLA-0048</u>	Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Final Transcript) PCA Case No 2011-03, Award of 18 March 2015	09/12/2024
Exhibit <u>CLA-0049</u>	The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), PCA Case No. 2013-19, 2086	09/12/2024
Exhibit <u>CLA-0050</u>	General Agreement on Tariffs and Trade 1994 (GATT 1994)	09/12/2024
Exhibit <u>CLA-0051</u>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305	09/12/2024
Exhibit <u>CLA-0052</u>	WTO, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755	09/12/2024
Exhibit <u>CLA-0053</u>	WTO, Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R , adopted 24 April 2012, DSR 2012:XI, p. 5751	09/12/2024
Exhibit <u>CLA-0054</u>	WTO, Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R , adopted 13 June 2012, DSR 2012:IV, p. 1837	09/12/2024
Exhibit <u>CLA-0055</u>	WTO, Appellate Body Reports, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/AB/R / WT/DS386/AB/R , adopted 23 July 2012, DSR 2012:V, p. 2449	09/12/2024
Exhibit <u>CLA-0056</u>	Regulation (EU) No 579/2011 of the European Parliament and of the Council of 8 June 2011 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1288/2009 establishing transitional technical measures from 1 January 2010 to 30 June 2011 (OJ L 165, 24.6.2011, p. 1, ELI: http://data.europa.eu/eli/reg/2011/579/oj)	09/12/2024
Exhibit <u>CLA-0057</u>	WTO, Appellate Body Report, Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131	09/12/2024
Exhibit <u>CLA-0058</u>	WTO, Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R , adopted 17 December 2007, DSR 2007:IV, p. 1527	09/12/2024
Exhibit <u>CLA-0059</u>	WTO, Appellate Body Report, India – Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827	09/12/2024

Exhibit <u>CLA-0060</u>	UK Equality Act 2010	09/12/2024
Exhibit <u>CLA-0061</u>	UK Supreme Court, R (on the application of Lumsdon and others) (Appellants) v Legal Services Board (Respondent). [2015] UKSC 41, 24 June 2015.	09/12/2024
Exhibit <u>CLA-0062</u>	UK Supreme Court, Kennedy (Appellant) v The Commission (Respondent) [2014] UKSC 20, 26 March 2014.	09/12/2024
Exhibit <u>CLA-0063</u>	UK Supreme Court, R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6, 25 February 2015.	09/12/2024
Exhibit <u>CLA-0064</u>	UK Supreme Court, Bank Mellat v Her Majesty's Treasury, [2013] UKSC 38 & [2013] UKSC 39	09/12/2024
Exhibit <u>CLA-0065</u>	EU, Treaty on the European Union and Treaty on the Functioning of the European Union.	09/12/2024
Exhibit <u>CLA-0066</u>	Judgment of the Court (Fifth Chamber) of 13 November 1990. The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others. Case C-331/88. ECLI:EU:C:1990:391	09/12/2024
Exhibit <u>CLA-0067</u>	UK Supreme Court, Secretary of State for Work and Pensions (Appellant) v Gubeladze (Respondent) [2019] UKSC 31. 19 June 2019.	09/12/2024
Exhibit <u>CLA-0068</u>	Judgment of 12 July 2001, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij, C-189/01, ECLI:EU:C:2001:420	09/12/2024
Exhibit <u>CLA-0069</u>	Judgment of 5 June 2007, Klas Rosengren and Others v Riksåklagaren, C-170/04, ECLI:EU:C:2007:313	09/12/2024
Exhibit <u>CLA-0070</u>	Judgment of 19 June 2008, Commission of the European Communities v Grand Duchy of Luxemburg, C-319/06, ECLI:EU:C:2008:350	09/12/2024
Exhibit <u>CLA-0071</u>	Judgment of 4 October 2018, Legatoria Editoriale Giovanni Olivotto (L.E.G.O.) SpA v Gestore dei servizi energetici (GSE) SpA and Others, C-242/17, ECLI:EU:C:2018:804	09/12/2024
Exhibit <u>CLA-0072</u>	Judgment of 20 September 2007, Commission of the European Communities v Kingdom of the Netherlands, C-297/05, ECLI:EU:C:2007:531	09/12/2024
Exhibit <u>CLA-0073</u>	Judgment of 1 October 2019, Criminal proceedings against Mathieu Blaise and Others, C-616/17, ECLI:EU:C:2019:800	09/12/2024
Exhibit <u>CLA-0074</u>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R , adopted 27 September 2004, DSR 2004:VI,	09/12/2024

	p. 2739	
Exhibit <u>CLA-0075</u>	Panel Report, <i>European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products</i> , WT/DS492/R and Add.1, adopted 19 April 2017, DSR 2017:III, p. 1067	09/12/2024
Exhibit <u>CLA-0076</u>	WTO, Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133	09/12/2024
Exhibit <u>CLA-0077</u>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW , DSR 2015:IV, p. 2019	09/12/2024
Exhibit <u>CLA-0078</u>	UK, Marine Coastal Access Act 2009	09/12/2024

I. Introduction

1. Prior to 2021, the European Union ('EU') and the United Kingdom of Great Britain and Northern Ireland ('UK') jointly managed shared fish stocks in their waters pursuant to the EU's Common Fisheries Policy.
2. Following the UK's withdrawal from the EU, on 30 December 2020, the EU and the UK concluded the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ('TCA').¹ The TCA applied provisionally as of 1 January 2021 and entered into force on 1 May 2021.²
3. As part of the TCA, the EU and the UK agreed on a new framework for the joint management of shared fish stocks in their waters³. This framework is defined in Heading Five of the TCA on "Fisheries", included in Part Two and entitled 'Trade, transport, fisheries and other arrangements'.
4. Pursuant to that framework, the EU and the UK agree to hold annual consultations with the objective of agreeing total allowable catches ('TACs'⁴) for jointly managed shared fish stocks in their waters.

¹ [Exhibit CLA-0001](#).

² Trade and Cooperation Agreement, Partnership Council Decision number 1 for 2021 (23 February 2021), [Exhibit CLA-0002](#).

³ "Waters" is a defined term under Article 495(1)(g) TCA and means: "(i) in respect of the Union, by way of derogation from Article 774(1), the EEZs of the Member States and their territorial seas; (ii) in respect of the United Kingdom, its EEZ and its territorial sea, excluding for the purposes of Articles 500 and 501 and Annex 38 the territorial sea adjacent to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man."

⁴ "TAC" is a defined term under Article 495(1)(d) TCA and means: "the total allowable catch, which is the maximum quantity of a stock (or stocks) of a particular description that may be caught over a given period".

5. The TCA guarantees the EU and the UK specific shares of any such agreed TACs and, until 30 June 2026, grants vessels of each Party full access to the other Party's waters to fish stocks at a level that is reasonably commensurate with the other Party's specific shares of those TACs.
6. Sandeel is an example of a jointly managed shared fish stock in EU and UK waters of the North Sea.
7. Since 2021, the EU and the UK have annually agreed TACs for sandeel, most recently on 8 March 2024.⁵
8. The Parties are free in how to allocate their respective shares of the agreed TACs. Since 2021, the EU has essentially allocated its share of the sandeel TACs to Denmark,⁶ which in turn has allocated that share to Danish vessels. By contrast, since 2021, the UK has not allocated its share of the sandeel TACs to any UK fishing vessel.⁷
9. Despite the agreement concerning the 2024 TAC for sandeel, as of 26 March 2024 the UK has unilaterally prohibited industrial sandeel fishing ('sandeel fishing'⁸) in English waters of the North Sea and in all Scottish

⁵ For 2021, the TAC for sandeel in the North Sea was agreed as part of the overall annual consultations. See written record of fisheries consultations between the United Kingdom and the European Union for 2021 ([Exhibit C-0001](#)). In 2022 ([Exhibit C-0002](#)), 2023 ([Exhibit C-0003](#)) and 2024 ([Exhibit C-0004](#)), the TAC for sandeel in the North Sea was agreed as part of annual consultations specific only to sandeel.

Given that, since 2011, the management of sandeel in the Greater North Sea is divided into seven management areas (see paragraphs 47-55 below), the EU and the UK agree on both an overall TAC covering all EU and UK waters of the North Sea and on seven sub-TACs, one per management area.

⁶ See, most recently, Council Regulation (EU) 2024/1015 of 26 March 2024 amending Regulation (EU) 2024/257 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union water, [Exhibit CLA-0003](#). In 2024, the Council of the EU allocated to Denmark 96.3% of the EU sandeel TAC (158 096 out of 164 142 tonnes).

⁷ The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024: business and regulatory impact assessment - final. [Exhibit C-0066](#).

⁸ All references to "sandeel fishing" and the "sandeel fishery" in the remainder of the EU's written submission should be understood as references to "industrial sandeel fishing" and the "industrial sandeel fishery".

waters. Whilst the prohibitions in English waters of the North Sea and in all Scottish waters have been implemented through distinct legal instruments, they are referred to by the EU as the ‘sandeel fishing prohibition’⁹ and are challenged by the EU as a single measure.¹⁰

10. For the reasons explained below, the EU considers that the sandeel fishing prohibition is inconsistent with the UK’s commitments under the TCA.
11. In bringing this dispute, the EU does not call into question the right of the UK to adopt fisheries management measures in pursuit of legitimate conservation objectives. Like the UK, the EU is fully committed to the conservation of marine living resources and the management of fisheries resources.
12. Rather, this dispute is about the UK’s failure to abide by its commitments under the TCA to apply evidence-based, proportionate and non-discriminatory measures when restricting the right granted to EU vessels of full access to UK waters to fish sandeel.
13. The EU’s submission is structured as follows:
 - Section II summarises the procedural background of the proceedings.
 - Section III summarises the factual background relevant to the matters in dispute.
 - Section IV describes the measure.
 - Section V describes the applicable legal framework.
 - Sections VI to IX set out the EU’s claims; and
 - Section X identifies the ruling sought by the EU.

⁹ Regarding the scope of the measures, see Section IV below.

¹⁰ See further Section IV.3 below.

II. Procedural background

14. The TCA includes provisions governing the resolution of disputes between the Parties. These provisions are set down in Part Six of the TCA.
15. On 16 April 2024, the EU launched dispute settlement proceedings under Part Six of the TCA by requesting consultations pursuant to Article 738 TCA.
16. The consultations took place in May 2024 with the objective of reaching a mutually agreed solution. Unfortunately, those consultations did not lead to a mutually agreed solution of the dispute.
17. On 25 October 2024, the EU requested the establishment of an arbitration tribunal pursuant to Article 739 TCA.
18. The arbitration tribunal was requested to examine the sandeel fishing prohibition with the standard terms of reference set out in Article 743(1) TCA.
19. On 31 October and 4 November 2024, the EU and the UK consulted with a view to agreeing on the composition of the arbitration tribunal pursuant to Article 740(2) TCA.
20. On 6 November 2024, the EU and the UK appointed the Permanent Court of Arbitration to assist in the organisation and conduct of the dispute pursuant to Rule 10 of Annex 48 TCA.
21. On 13 November 2024, the EU notified the three individuals selected by the EU and the UK of their appointment as arbitrator.
22. On 18 November 2024, the last of the three arbitrators notified the acceptance of his or her appointment in accordance with Annex 48 TCA. As a result, the arbitration tribunal was established on that date.
23. The arbitration tribunal is composed of:

Chairperson: Dr. Penelope Jane Ridings

Members: Prof. H el ene Ruiz Fabri

Hon. Justice Mr. David Unterhalter.

24. On 18 November 2024, an initial organisational meeting took place via videoconference.
25. On 18 November 2024, the Tribunal asked the Parties to reply to certain questions.
26. On 20 November 2024, the Parties replied to those questions.
27. On 22 November 2024, a further organisational meeting took place via videoconference.
28. On 22 November 2024, the Tribunal adopted Procedural Order No 1.

III. Factual background

III.1. Principles governing the sustainable management of fish stocks

29. Pursuant to the TCA, the EU and the UK have committed to the sustainable management of shared fish stocks in their waters. In particular, the EU and the UK “share the objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield” (Article 494(2) TCA).
30. The EU therefore considers it useful to describe briefly certain notions that are relevant to the sustainable management of fish stocks.
31. First, a fish stock is a part of a fish population with a particular migration pattern, specific spawning grounds, and subject to a distinct fisher.¹¹ For

¹¹ ICES Glossary, “Stock”, [Exhibit C-0005](#).

each species of fish, there may be multiple fish stocks in a geographic area, depending on genetic differences or differences in spawning areas. Each fish stock is managed separately.

32. Second, the assessment of a fish stock relies on two main indicators:

- spawning stock biomass or ‘SSB’.¹² This is the total weight of all sexually mature fish in the stock i.e. adults. This is also referred to as ‘stock size’; and

- fishing mortality or ‘F’.¹³ Fishing mortality is a measure of the amount of fish removed by fishing from the harvestable portion of a stock over a given period of time. This therefore includes both sexually mature adults and sexually immature juveniles.

33. Fish stocks are also affected by natural mortality, which is caused by factors other than fishing.¹⁴ Such factors include predation, starvation, disease, senescence and human-induced mortality not associated directly or indirectly with fishing.¹⁵

34. The combination of fishing mortality and natural mortality gives the total mortality of a given fish stock.¹⁶

¹² ICES Glossary, “SSB/R”, [Exhibit C-0005](#).

¹³ ICES Glossary, “F”, [Exhibit C-0005](#).

¹⁴ Maunder, M. N., Hamel, O. S., Lee, H. H., Piner, K. R., Cope, J. M., Punt, A. E., Inanelli, J. N., Castillo-Jordan, C., Kapur, M. & Methot, R. D. (2023). A review of estimation methods for natural mortality and their performance in the context of fishery stock assessment. *Fisheries Research*, 257, 106489, [Exhibit C-0006](#).

¹⁵ Cheilari, A., & Rätz, H. J. (2009). The effect of natural mortality on the estimation of stock state parameters and derived references for sustainable fisheries management. ICES CM 2009/N:03. pp.1-12 <https://www.ices.dk/sites/pub/CM%20Documents/CM-2009/N/N0309.pdf>, [Exhibit C-0007](#).

¹⁶ Maunder, M. N., Hamel, O. S., Lee, H. H., Piner, K. R., Cope, J. M., Punt, A. E., Inanelli, J. N., Castillo-Jordan, C., Kapur, M. & Methot, R. D. (2023). A review of estimation methods for natural

35. Third, the notion of maximum sustainable yield or ‘MSY’ refers to the highest theoretical equilibrium yield that can be continuously taken on average from a fish stock under existing environmental conditions without significantly affecting its reproduction process. The EU Common Fisheries Policy and the UK Fisheries Act 2020 both define MSY in essentially the same manner.¹⁷
36. Fourth, the notion of recruitment or ‘R’¹⁸ refers to the amount of fish added to the harvestable stock each year due to growth or migration into the fishery.
37. Fifth, the notion of abundance refers to the total number of fish in an area.¹⁹

III.2. ICES and the relevant fishing zones for the purpose of this dispute

38. ICES is an intergovernmental organisation of nearly 6,000 scientists from over 700 institutes in 20 member countries, including certain EU Member States and the UK.
39. ICES issues scientific advice on the state of fish stocks in, *inter alia*, the Greater North Sea. For the purposes of that advice, ICES divides the Greater North Sea into fishing zones known as ICES (statistical) areas. English waters are located within ICES areas 4b, 4c, 7d and 7e and

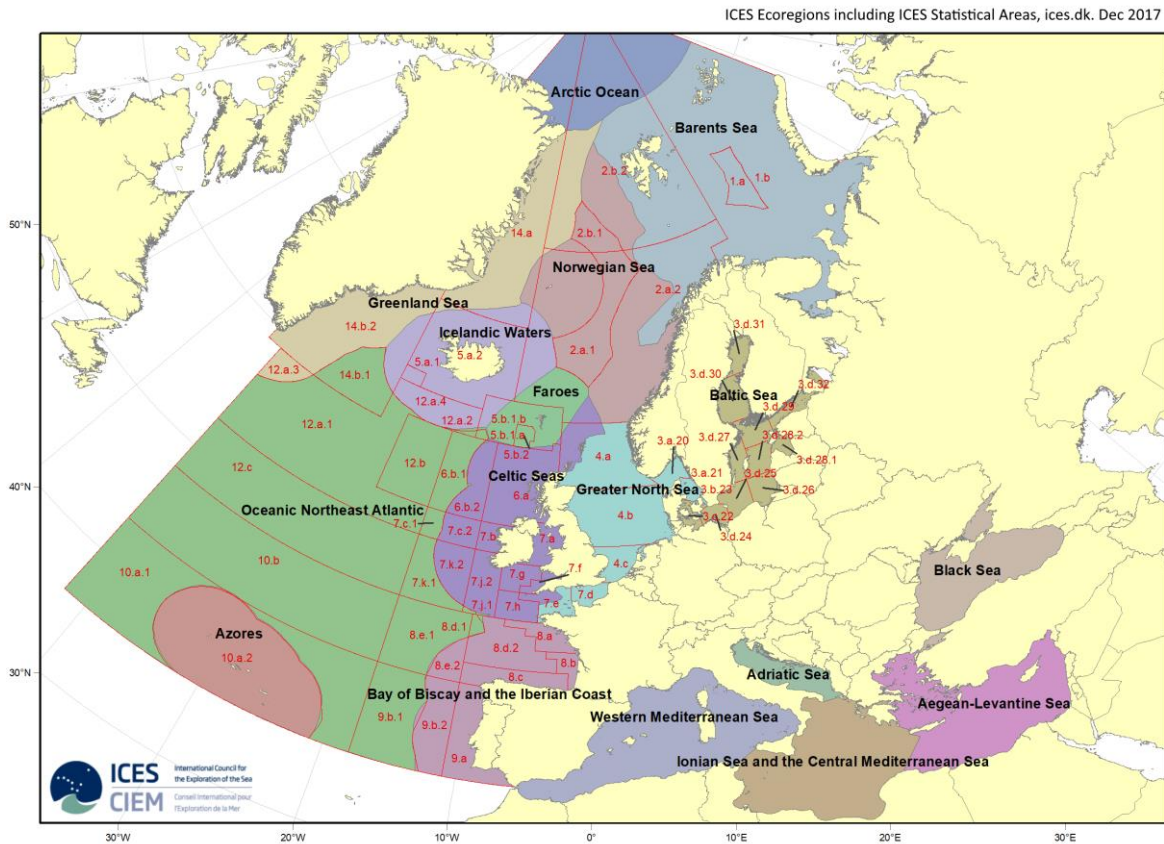
mortality and their performance in the context of fishery stock assessment. Fisheries Research, 257, 106489, [Exhibit C-0006](#).

¹⁷ Compare: (i) Article 4(7) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, [Exhibit CLA-0005](#); and (ii) Section 52 of the UK Fisheries Act 2020, [Exhibit CLA-0006](#).

¹⁸ ICES Glossary, “R”, [Exhibit C-0005](#).

¹⁹ Britannica, Species abundance, [Exhibit C-0008](#).

Scottish waters are located within ICES areas 4a and 4b. This is illustrated by the following figure.²⁰



40. The EU and the UK base themselves on ICES scientific advice when agreeing TACs for jointly managed shared stocks in their waters.

III.3. Principles governing the setting of TACs for jointly managed shared fish stocks in the EU’s and UK’s waters pursuant to the TCA

41. Annex 35 TCA contains a list of jointly managed shared fish stocks in EU and UK waters (‘Annex 35 stocks’).
42. Article 498 TCA requires the Parties to hold consultations annually to agree TACs for Annex 35 stocks.

²⁰ ICES Ecoregions including ICES Statistical Areas, ices.dk, Dec 2017, [Exhibit C-0009](#).

43. For Annex 35 stocks where ICES issues its scientific advice between June and October, the EU and the UK hold consultations in November, with the objective of reaching agreement on TACs for those stocks by 10 December.
44. For Annex 35 stocks where ICES issues its scientific advice between November and May, the EU and the UK hold in-year consultations to agree on TACs for stocks after the issuing of the relevant advice and before the opening of the relevant fishery season or seasons. This is the case for sandeel in the North Sea, where ICES typically issues its scientific advice in the second half of February and the EU and the UK hold consultations in March.
45. The outcomes of consultations are documented in “written records”.²¹

III.4. The phenomenon of fisheries displacement

46. Fisheries displacement refers to the relocation of fishing activities when management decisions prohibit or restrict access to certain fishing areas.²² Displacement may lead vessels to fish other stocks in the same area or to move to other areas to fish that same stock.

²¹ See Article 498(6) TCA: “A written record documenting the arrangements made between the Parties as a result of consultations under this Article shall be produced and signed by the heads of delegation of the Parties.”

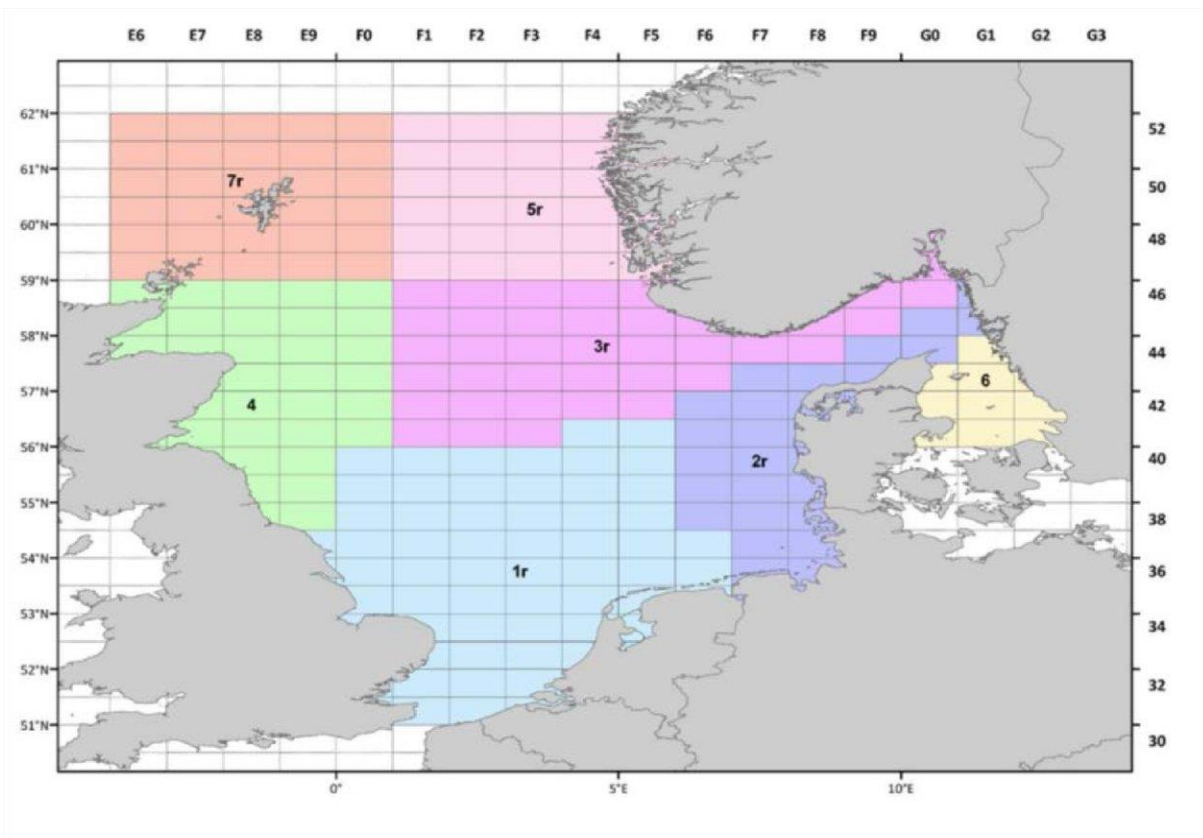
²² Scottish Government, Good Practice Guidance for assessing fisheries displacement by other licensed marine activities, page 13: “displacement of commercial fishing activity (or commercial fisheries displacement) refers to the relocation of fishing activity (effort) from an area where that fishing activity typically occurs into other area(s) as a result of other licensed marine activities and associated infrastructure”. [Exhibit C-0010](#).

III.5. Sandeel management areas within the Greater North Sea

47. Since 2011, ICES divides the management of sandeel in the Greater North Sea into seven areas: 1r, 2r, 3r, 4, 5r, 6 and 7r.²³
48. Area 1r is the largest area and is located between the east coast of England and the northwest coasts of Belgium and the Netherlands.
49. Area 2r extends along the west coast of Denmark.
50. Area 3r mostly falls within the Exclusive Economic Zone ('EEZ') of Norway, bordering the south of that country.
51. Area 4 falls entirely within the EEZ of the UK and extends from the northeast of England to Orkney.
52. Area 5r mostly falls within the EEZ of Norway along its west coast.
53. Area 6 is in the Skagerrak, Kattegat, and Great Belt.
54. Area 7r is located around the Shetland Islands.
55. The seven management areas are illustrated in the figure below.²⁴

²³ See Council Regulation (EU) No 57/2011 of 18 January 2011 fixing for 2011 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters, recital 13: "It is necessary, following the advice from the ICES, to maintain and revise a system to manage sandeel in EU waters of ICES divisions IIa and IIIa and ICES subarea IV". [Exhibit CLA-0007](#).

²⁴ Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194, Appendix to Annex III. [Exhibit CLA-0008](#).



56. ICES issues separate advice for each of the seven sandeel management areas.²⁵ Each sandeel management area is thus managed under a separate

²⁵ On 29 February 2024, ICES published its advice for sandeel management areas 1r, 2r, 3r and 4 for 2024. See: (i) Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), [Exhibit C-0011](#); (ii) Sandeel (*Ammodytes* spp.) in divisions 4.b-c and Subdivision 20, Sandeel Area 2r (central and southern North sea), [Exhibit C-0012](#); (iii) Sandeel (*Ammodytes* spp.) in divisions 4.a–b and Subdivision 20, Sandeel Area 3r (northern and central North Sea, Skagerrak), [Exhibit C-0013](#); and (iv) Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea), [Exhibit C-0014](#).

On 28 February 2023, ICES published its advice for sandeel management areas 5r, 6 and 7r for 2023 and 2024. See: (i) Sandeel (*Ammodytes* spp.) in Division 4.a, Sandeel Area 5r (northern North Sea, Viking and Bergen banks), [Exhibit C-0015](#); (ii) Sandeel (*Ammodytes* spp.) in subdivisions 20–22, Sandeel Area 6 (Skagerrak, Kattegat and Belt Sea), [Exhibit C-0016](#); and (iii) Sandeel (*Ammodytes* spp.) in Division 4.a, Sandeel Area 7r (northern North Sea, Shetland), [Exhibit C-0017](#).

TAC. The TAC agreed for one sandeel management area cannot be used in a different sandeel management area.

III.6. Sandeel in the Greater North Sea

57. Sandeels belong to the *Ammodytes* genus of the *Ammodytidae* family and consist of small eel-like fish.²⁶
58. Sandeels are a type of forage or “prey” fish. Other forage fish in the Greater North Sea include Norway pout, sprat and herring.²⁷
59. Sandeels prey on plankton. Sandeels are in turn preyed upon by certain fish, marine mammals and seabirds.²⁸
60. Sandeels differ from other forage fish in their strong site attachment, patchy distribution and high habitat specificity for specific sandy sediments²⁹, into which they bury themselves.³⁰
61. Once sandeels settle, there is limited exchange between even close fishing grounds.³¹

²⁶ Lynam, C. P., Halliday, N. C., Höffle, H., Wright, P. J., van Damme, C. J., Edwards, M., & Pitois, S. G. (2013). Spatial patterns and trends in abundance of larval sandeels in the North Sea: 1950–2005. *ICES Journal of Marine Science*, 70(3), 540-553, [Exhibit C-0018](#).

²⁷ Engelhard, G. H., Peck, M. A., Rindorf, A., Smout, S. C., van Deurs, M., Raab, K., Andersen, K. H., Garthe, S., Lauerburg, R. A. M., Scott, F., Brunel, T., Aarts, G., van Kooten, T., and Dickey-Collas, M. Forage fish, their fisheries, and their predators: who drives whom? – *ICES Journal of Marine Science*, 71: 90–104, [Exhibit C-0019](#).

²⁸ Arnott, S. A., & Ruxton, G. D. (2002). Sandeel recruitment in the North Sea: demographic, climatic and trophic effects. *Marine Ecology Progress Series*, 238, 199-210. [Exhibit C-0020](#).

²⁹ Rindorf, A., Henriksen, O., & Van Deurs, M. (2019). Scale-specific density dependence in North Seasandeel. *Marine Ecology Progress Series*, 619, 97-110. [Exhibit C-0021](#).

³⁰ ICES Technical Service, Greater North Sea Ecoregion, 28 November 2023, page 3: the specific habitat requirements of sandeel “means that sandeel are potentially vulnerable to non-fisheries pressures”. [Exhibit C-0022](#).

62. During the summer months, sandeels leave the seabed to feed during the day in pelagic schools near the sandbank, burying back into the sediment at night. After the feeding season, sandeels rarely leave the seabed between September and March, remaining buried in the sediment, except to spawn in December to January.³²
63. Sandeels lay their eggs on the sand in the winter. After hatching, larvae are found in the water until May, upon which they settle into the seabed.³³
64. Sandeel recruitment is principally environmentally driven and sensitive to the synchronisation of the period of hatching with the peak in specific zooplankton abundance.³⁴
65. Sandeels in the Greater North Sea are located only within the EEZs of the EU, the UK and Norway.³⁵
66. The sandeel fishery in the North Sea mainly focusses on the lesser sandeel³⁶ (*Ammodytes marinus*). Once caught, sandeel are processed for their oil and fish meal for use in animal feed.³⁷

³¹ Jensen, H., Rindorf, A., Wright, P. J., & Mosegaard, H. (2011). Inferring the location and scale of mixing between habitat areas of lesser sandeel through information from the fishery. *ICES Journal of Marine Science*, 68(1), 43-51, [Exhibit C-0023](#).

³² Boulcott, P., & Wright, P. J. (2008). Critical timing for reproductive allocation in a capital breeder: evidence from sandeels. *Aquatic Biology*, 3(1), 31-40. [Exhibit C-0024](#).

³³ Arnott, S. A., & Ruxton, G. D. (2002). Sandeel recruitment in the North Sea: demographic, climatic and trophic effects. *Marine Ecology Progress Series*, 238, 199-210, [Exhibit C-0020](#).

³⁴ ICES Technical Service, page 3: the correlation between larval abundance and zooplankton abundance suggests “a localized bottom-up control on recruitment success”, [Exhibit C-0022](#).

³⁵ Engelhard, G. H., Peck, M. A., Rindorf, A., Smout, S. C., van Deurs, M., Raab, K., Andersen, K. H., Garthe, S., Lauerburg, R. A. M., Scott, F., Brunel, T., Aarts, G., van Kooten, T., and Dickey-Collas, M. Forage fish, their fisheries, and their predators: who drives whom? – *ICES Journal of Marine Science*, 71: 90–104, [Exhibit C-0019](#).

67. The sandeel fishery in the North Sea is seasonal and permitted only between 1 April and 31 July.³⁸ The fishery thus takes place outside the winter spawning period, during the post-hatching period when sandeels feed in pelagic schools and before they return to the seabed.³⁹
68. The sandeel fishery in the North Sea targets adult sandeel aged 1 year or over and not juvenile sandeel under the age of 1.⁴⁰
69. Sandeels are a short-lived species, with fish below the age of 3 dominating the stock.⁴¹

³⁶ ICES advice, 29 February 2024, Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea) [Exhibit C-0014](#).

³⁷ Andersen, J. L., & Nielsen, M. (2024). The economics of the Danish sandeel fishery and fishmeal and fish oil factories. Department of Food and Resource Economics, University of Copenhagen. IFRO Commissioned Work No. 2024/1, [Exhibit C-0025](#).

³⁸ Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194, Exhibit [CLA-0008](#).

“Article 15

Closed fishing seasons for sandeels

Commercial fishing for sandeels (*Ammodytes* spp.) with demersal trawl, seine or similar towed gears with a mesh size of less than 16 mm shall be prohibited in ICES divisions 2a and 3a and in ICES subarea 4 from 1 January to 31 March 2024 and from 1 August to 31 December 2024.”

³⁹ Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194, recital 56, [Exhibit CLA-0008](#).

“(56) Seasonal closures for sandeel fisheries with certain towed gear in ICES divisions 2a, 3a and ICES subarea 4 should continue to allow for the protection of spawning grounds and limitation of juvenile catches”.

⁴⁰ MacDonald A, Speirs DC, Greenstreet SPR, Boulcott P and Heath MR (2019) Trends in Sandeel Growth and Abundance off the East Coast of Scotland. *Front. Mar. Sci.* 6:201. [https://doi:10.3389/fmars.2019.00201](https://doi.org/10.3389/fmars.2019.00201). [Exhibit C-0026](#).

70. Like other short-lived species, sandeel stock sizes can vary considerably from one year to the next, with marked interannual variability of the recruitment of new sandeel.⁴² A larger sandeel stock size can therefore result in a lower recruitment and stock size the following year, and conversely, a lower sandeel stock size can result in a larger recruitment and stock size the following year. For example:

- in 2016⁴³ and 2022⁴⁴, ICES advised that there should be zero catches of sandeel in certain North Sea management areas whereas, in 2017⁴⁵ and 2023⁴⁶, ICES advised that there could be significant catches of sandeel in those same areas; and
- conversely, in 2018⁴⁷ and 2021⁴⁸, ICES advised that there could be significant catches of sandeel in certain North Sea management areas

⁴¹ ICES (2017). Report of the Benchmark Workshop on Sandeel (WKSand). ICES Expert Group reports (until 2018), <https://doi.org/10.17895/ices.pub.7718>. **Exhibit C-0027**.

⁴² Arnott, S. A., & Ruxton, G. D. (2002). Sandeel recruitment in the North Sea: demographic, climatic and trophic effects. *Marine Ecology Progress Series*, 238, 199-210. **Exhibit C-0020**.

⁴³ ICES (2016). Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank), February 2016, **Exhibit C-0028**.

⁴⁴ ICES (2022). Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2022. **Exhibit C-0029**.

⁴⁵ ICES (2017) Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), September 2017. **Exhibit C-0030**.

⁴⁶ ICES (2023) Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), March 2023. **Exhibit C-0031**.

⁴⁷ ICES (2018). Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2018, **Exhibit C-0032**.

⁴⁸ ICES (2021). Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2021, **Exhibit C-0033**.

whereas, in 2019⁴⁹ and 2022⁵⁰, ICES advised that there should be low or zero catches of sandeel in those same areas.

71. Since the introduction in 2011 of the current system of management⁵¹, sandeel in the Greater North Sea has been managed according to an escapement strategy. Such a strategy, while consistent with the aim of achieving MSY, seeks to prioritise ecosystem needs over the fishery. A specific amount of sandeel (known as $B_{\text{escapement}}$) is left in the North Sea so that there is a less than 5% risk of negatively affecting the recruitment of new sandeel the following year (known as B_{lim})⁵² Pressure on sandeel due to fishing mortality is therefore reduced in years where the stock size is lower.
72. The escapement strategy ensures that the North Sea sandeel fishery is exploited in a sustainable manner. Thus, since 2010⁵³:
- a. the biomass of adults in sandeel management area 1r has been above B_{lim} in every year since 2010 apart from 2014; and
 - b. the biomass of adults in sandeel management area 4 has been above B_{lim} in every year since 2010.
73. To ensure that ecosystem needs are given priority, the specific amount of sandeel left in the North Sea seeks to account for the total consumption of

⁴⁹ ICES (2019). Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2019, [Exhibit C-0034](#).

⁵⁰ ICES (2022). Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank), February 2022, [Exhibit C-0029](#).

⁵¹ See paragraphs 47-55 above.

⁵² ICES (2023) Advice on fishing opportunities. In Report of the ICES Advisory Committee, 2023. ICES Advice 2023, [Exhibit C-0036](#).

⁵³ ICES. 2024d. Herring Assessment Working Group for the Area South of 62° N (HAWG). ICES Scientific Reports. 6:24, [Exhibit C-0037](#).

sandeel by all predators. However, the amount does not, and indeed cannot, ensure that the North Sea sandeel fishery does not impact on localised sandeel abundance within a management area.⁵⁴

III.7. Sandeel predators in the North Sea

74. Sandeel predators in the North Sea include seabirds, marine mammals and fish.
75. Sandeels comprise a substantial proportion of the diet of certain seabirds, marine mammals and fish.⁵⁵ For seabirds, these include sandwich tern, European shag ('shag'), Great skua, Atlantic puffin, common guillemot, black-legged kittiwakes ('kittiwakes') and gannet. For marine mammals, these include minke whale, harbour seal, grey seal, and striped dolphin. For fish, these include saith, horse-mackerel, whiting, starry ray, grey gunnard, cod and haddock.
76. While marine mammals and fish have a higher degree of mobility and can generally forage over larger distances, seabirds that rear chicks ('chick-

⁵⁴ ICES Technical Service, page 1: "ICES advice framework distinguishes between stocks with relatively stable biomass for which advice is based on a target fishing mortality (herring) and those with variable biomass for which advice is based on an escapement strategy (sandeel, Norway pout, sprat). In both cases, the advice is consistent with the maximum sustainable yield approach, the aim of which is to have high stock sizes producing pretty good yields. It is possible that exploitation levels consistent with this framework would result in a high enough biomass required to sustain ecosystem services. However, it is also possible that the resulting biomasses may be too low. Although the ICES advice framework includes a provision to keep the stocks above a given precautionary level, there is no analysis of whether this precautionary level is sufficient to provide adequate food levels for individual predator populations. Such an analysis would need to take account of the interplay between ICES advice, national management measures, and the dynamics of a given predator population". [Exhibit C-0022](#).

⁵⁵ Engelhard, G. H., Peck, M. A., Rindorf, A., Smout, S. C., van Deurs, M., Raab, K., Andersen, K. H., Garthe, S., Lauerburg, R. A. M., Scott, F., Brunel, T., Aarts, G., van Kooten, T., and Dickey-Collas, M. Forage fish, their fisheries, and their predators: who drives whom? – ICES Journal of Marine Science, 71: 90–104. [Exhibit C-0019](#).

rearing seabirds’) are more limited in their feeding ranges. During breeding season, chick-rearing seabirds must travel between their nests on the coast and feeding areas at sea to feed themselves, and to feed and raise their chicks⁵⁶. Chick-rearing seabirds therefore require sufficient sandeel to be available within their feeding range.

77. The feeding range of chick-rearing seabirds varies greatly among species.⁵⁷ Because of the need to feed their chicks, chick-rearing seabirds also require sufficient sandeel of the right age to be available within their feeding range.⁵⁸
78. The breeding season of chick-rearing seabirds is in the spring and the summer.⁵⁹ There is therefore a temporal overlap between the breeding season of seabirds and the sandeel fishery season, which takes place between April and July.

⁵⁶ Markones, N., Dierschke, V., & Garthe, S. (2010). Seasonal differences in at-sea activity of seabirds underline high energetic demands during the breeding period. *Journal of Ornithology*, 151, 329-336. **[Exhibit C-0038](#)**.

⁵⁷ Waggitt JJ, Evans PGH, Andrade J, et al. Distribution maps of cetacean and seabird populations in the North-East Atlantic. *J Appl Ecol*. 2020;57:253–269. <https://doi.org/10.1111/1365-2664.13525>, **[Exhibit C-0039](#)**.

⁵⁸ Searle, K. R., Regan, C. E., Perrow, M. R., Butler, A., Rindorf, A., Harris, M. P., Newell, M. A., Wanless, S. & Daunt, F. (2023). Effects of a fishery closure and prey abundance on seabird diet and breeding success: Implications for strategic fisheries management and seabird conservation. *Biological Conservation*, 281, 109990, **[Exhibit C-0040](#)**.

⁵⁹ Dierschke, V., Marra, S., Parsons, M., Fusi, M., French, G. 2022. Marine Bird Abundance. In: OSPAR, 2023: The 2023 Quality Status Report for the North-East Atlantic. OSPAR Commission, London, **[Exhibit C-0041](#)**.

79. There is a limited spatial overlap between the feeding range of chick-rearing seabirds for which sandeel comprises a substantial proportion of their diet and the sandeel fishery.⁶⁰
80. Of chick-rearing seabirds for which sandeel comprises a substantial proportion of the diet, the only two species declining in abundance are kittiwakes and shag, with kittiwakes also showing a decline in breeding success and currently not meeting the OSPAR threshold for breeding success.⁶¹
81. The breeding success of chick-rearing seabirds is also impacted by factors other than fishing, including introduced land predators, oil pollution, contaminants, plastics, human disturbance in breeding colonies and wind farms⁶².
82. The removal of sandeel from the North Sea by predatory fish alone, greatly exceeds that of fisheries, seabirds, and marine mammals combined.⁶³

⁶⁰ This can be seen by overlaying: (i) the map showing the location of the sandeel fishing grounds in Figure 1 of Jensen, H., Rindorf, A., Wright, P. J., & Mosegaard, H. (2011). Inferring the location and scale of mixing between habitat areas of lesser sandeel through information from the fishery. *ICES Journal of Marine Science*, 68(1), 43-51, [Exhibit C-0023](#); and (ii) the maps showing the distribution of Atlantic puffin, common guillemot, great skua, kittiwake, northern gannet and razorbill in Figure 4b of Waggitt JJ, Evans PGH, Andrade J, et al. Distribution maps of cetacean and seabird populations in the North-East Atlantic. *J Appl Ecol*. 2020;57:253–269. <https://doi.org/10.1111/1365-2664.13525>, [Exhibit C-0039](#).

⁶¹ Dierschke, V., Marra, S., Parsons, M., Fusi, M., French, G. 2022. Marine Bird Abundance. In: OSPAR, 2023: The 2023 Quality Status Report for the North-East Atlantic. OSPAR Commission, London, [Exhibit C-0041](#).

⁶² Burthe, S. J., Wanless, S., Newell, M. A., Butler, A., & Daunt, F. (2014). Assessing the vulnerability of the marine bird community in the western North Sea to climate change and other anthropogenic impacts. *Marine Ecology Progress Series*, 507, 277-295, [Exhibit C-0042](#).

⁶³ Engelhard, G. H., Peck, M. A., Rindorf, A., Smout, S. C., van Deurs, M., Raab, K., Andersen, K. H., Garthe, S., Lauerburg, R. A. M., Scott, F., Brunel, T., Aarts, G., van Kooten, T., and Dickey-Collas, M.

III.8. The partial prohibition of sandeel fishing in UK waters of the North Sea prior to the sandeel fishing prohibition

83. Since 2000, sandeel fishing has been prohibited in an area within English waters of ICES area 4b and Scottish waters of ICES areas 4a and 4b.
84. The prohibition was first contained in Regulation (EC) No 1298/2000.⁶⁴ Recital 2 of that regulation explained that “[r]ecent scientific advice indicates that quantities of sand eels within an area off the northeast coast of England and the east coast of Scotland are currently insufficient to support both fisheries upon them and the requirements of various species for which sand eels are a major component of their diet and that a closure of fisheries for sandeels in this area is therefore required.”
85. Reflecting that explanation, Regulation (EC) No 1298/2000 established the following prohibition on fishing:

“Restrictions on fishing for sand eels

1. During the years 2000, 2001 and 2002, it shall be prohibited to land or retain on board sand eels caught within the geographical area bounded by the east coast of England and Scotland, and a line sequentially joining the following coordinates:

— the east coast of England at latitude 55° 30’N,

— latitude 55° 30’N, longitude 1° 00’W,

— latitude 58° 00’N, longitude 1° 00’W,

Forage fish, their fisheries, and their predators: who drives whom? – ICES Journal of Marine Science, 71: 90–104, [Exhibit C-0019](#).

⁶⁴ Council Regulation (EC) No 1298/2000 of 8 June 2000 amending for the fifth time Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms, [Exhibit CLA-0009](#).

— latitude 58° 00'N, longitude 2° 00'W,

— the east coast of Scotland at longitude 2° 00'W.

2. Before 1 March 2001 and again before 1 March 2002, the Commission will report to the Council on the effects of the provision contained in paragraph 1. On the basis of the said reports, the Commission may propose appropriate amendments to the conditions indicated in paragraph 1.”

86. Between 2003⁶⁵ and 2009⁶⁶, the same prohibition on fishing was established each year by the Council of the EU in its annual regulations fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Union waters.

87. Between 2010 and 2012, the same prohibition on fishing was established in Regulation (EC) No 1288/2009,⁶⁷ as amended by Regulation (EU) No 579/2011.⁶⁸

⁶⁵ Council Regulation (EC) No 2341/2002 of 20 December 2002 fixing for 2003 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, Article 9 and point 10 of Annex V. [Exhibit CLA-0010](#).

⁶⁶ Council Regulation (EC) No 43/2009 of 16 January 2009 fixing for 2009 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, Article 13 and point 4 of Annex III. [Exhibit CLA-0011](#).

⁶⁷ Article 1(1) of Council Regulation (EC) No 1288/2009 of 27 November 2009 establishing transitional technical measures from 1 January 2010 to 30 June 2011. [Exhibit CLA-0012](#).

⁶⁸ Article 2(1)(a) of Regulation (EU) No 579/2011 of the European Parliament and of the Council of 8 June 2011 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1288/2009 establishing transitional technical measures from 1 January 2010 to 30 June 2011. [Exhibit CLA-0056](#).

88. Between 2013 and 2018, the same prohibition on fishing was established in Regulation (EU) No 227/2013.⁶⁹ Recital 9 of that regulation explained that “[i]n the light of advice from STECF linking low sand eel availability to the poor breeding success of kittiwakes, an area closure in ICES sub-area IV should be maintained, except for a limited fishery each year to monitor the stock”.
89. Reflecting that explanation, Regulation (EU) No 227/2013 established the following prohibition on fishing:

“Closure of an area for sand eel fisheries in ICES sub-area IV

It shall be prohibited to land or retain on board sand eels caught within the geographical area bounded by the east coast of England and Scotland, and enclosed by sequentially joining with rhumb lines the following coordinates, which shall be measured according to the WGS84 system:

- The east coast of England at latitude 55°30' N,
- latitude 55°30' N, longitude 01°00' W,
- latitude 58°00' N, longitude 01°00' W,
- latitude 58°00' N, longitude 02°00' W,
- the east coast of Scotland at longitude 02°00' W.

Fisheries for scientific investigation shall be allowed in order to monitor the sand eel stock in the area and the effects of the closure”.

⁶⁹ Regulation (EU) No 227/2013 of the European Parliament and of the Council of 13 March 2013 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1434/98 specifying conditions under which herring may be landed for industrial purposes other than direct human consumption, [Exhibit CLA-0013](#).

90. As of 2019, the same prohibition on fishing was established in Part C of Annex V to Regulation (EU) 2019/1241⁷⁰ and, following its withdrawal from the EU, the UK retained that prohibition in UK law.

91. The sandeel fishing prohibition is therefore additional to the existing prohibition on fishing in part of English waters of the North Sea and in part of Scottish waters.

III.9. The public consultations preceding the sandeel fishing prohibition

92. Prior to the sandeel fishing prohibition, the UK conducted three public consultations:

- (a) on 22 October 2021, the UK Fisheries Administrations launched a call for evidence on the future management of sandeel and Norway pout ('Call for Evidence');

⁷⁰ Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005, [Exhibit CLA-0015](#):

“1. Closure of an area to protect sandeel in ICES divisions 4a and 4b

1.1. Fishing for sandeel with any towed gear with a codend mesh size less than 32 mm shall be prohibited within the geographical area bounded by the east coast of England and Scotland, and enclosed by sequentially joining with rhumb lines the following coordinates, which shall be measured according to the WGS84 system:

- the east coast of England at latitude 55°30' N
- 55°30' N, 01°00' W
- 58°00' N, 01°00' W
- 58°00' N, 02°00' W
- the east coast of Scotland at longitude 02°00' W.

1.2. Fisheries for scientific investigation shall be allowed in order to monitor the sandeel stock in the area and the effects of the closure.”

(b) on 6 March 2023, the Department for Environment Food and Rural Affairs ('DEFRA') launched a public consultation regarding the prohibition of sandeel fishing in English waters of the North Sea ('English sandeel consultation'); and

(c) on 21 July 2023, the Scottish Government launched a public consultation regarding the prohibition of sandeel fishing in all Scottish waters ('Scottish sandeel consultation').

93. The EU summarises below those three public consultations.

III.9.1. The October 2021 Call for Evidence⁷¹

94. The Call for Evidence noted that there were "already a number of restrictions in place to protect sandeel stocks within UK waters:

- a closure in UK waters of sandeel area 4
- the exclusion of waters within 6 nautical miles of the United Kingdom baselines at Shetland, Fair Isle and Foula
- a restriction on the mesh sizes that may be used in the fishery⁷².

95. The Call for Evidence sought "evidence on the effects of these existing restrictions"⁷³ and whether "[a]dditional management measures to restrict sandeel fishing in the North Sea may be needed to improve the resilience of the North Sea sandeel stocks and the wider ecosystem"⁷⁴.

96. In particular, the Call for Evidence sought "to understand any benefits of further restrictions on fishing for sandeels within UK waters. In addition,

⁷¹ Call for Evidence, [Exhibit C-0043](#).

⁷² Ibid, page 8.

⁷³ Ibid.

⁷⁴ Ibid.

considerations are currently being made around possible management measures in the Fisheries Administrations' own waters. We are particularly looking for evidence in relation to different types of restriction, the geographical scope of restrictions and the timing of restrictions. For example, a ban on sandeel fishing in UK waters, a phased reduction in sandeel fishing in UK waters or additional area closures of the sandeel fisheries".⁷⁵

III.9.2. The March 2023 public consultation conducted by DEFRA

97. The March 2023 public consultation conducted by DEFRA or 'English sandeel consultation' consisted of two documents:

- (a) a document prepared by the Department for Environment, Food and Rural Affairs and entitled "Consultation on Spatial Management Measures for Industrial Sandeel Fishing" ('DEFRA consultation document')⁷⁶; and
- (b) a document requested by DEFRA and prepared by Natural England, Cefas and JNCC entitled "What are the ecosystem risks and benefits of full prohibition of industrial sandeel fishing in the UK waters of the North Sea (ICES Subarea 4)?" ('Natural England/Cefas/JNCC advice')⁷⁷.

III.9.2.1. The DEFRA Consultation on Spatial Management Measures for Industrial Sandeel Fishing

98. The DEFRA consultation document started by noting that "[s]andeels are an important forage fish in the North Sea, contributing to the marine

⁷⁵ Ibid.

⁷⁶ DEFRA consultation document, [Exhibit C-0044](#).

⁷⁷ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#).

ecosystem and forming a large component of the diets of marine mammals, seabirds, and predatory fish including commercially valuable species”⁷⁸.

99. The DEFRA consultation document continued by further noting that:

(a) “[s]andeels increased availability is hence linked to the increase in abundance and health of commercial fish species. They are also an important food source for many seabird species and marine mammals, such as seals, toothed whales, and baleen whales. Declines in the abundance of sandeels due to industrial fishing has shown to impact the breeding success of UK seabirds, most notably in kittiwakes”⁷⁹; and

(b) “[s]andeels are highly sensitive to changing environmental conditions and the increased effects of climate change can negatively impact the health of the North Sea sandeel stocks. This pressure combined with the continued removal of sandeels through industrial fishing methods risks further declines of threatened and vulnerable species in the wider marine environment, which rely on sandeels as a food source”⁸⁰.

100. After recalling the existing prohibition of sandeel fishing in part of the English waters of the North Sea⁸¹, the DEFRA consultation document identified four categories of possible further management measures: (i) a prohibition of sandeel fishing in all English waters of the North Sea⁸²; (ii) technical measures such as gear configuration or increased mesh sizes⁸³;

⁷⁸ DEFRA consultation document, paragraph 1, [Exhibit C-0044](#).

⁷⁹ Ibid, paragraph 2.

⁸⁰ Ibid, paragraph 3.

⁸¹ Ibid, paragraph 13.

⁸² Ibid, paragraph 13.

⁸³ Ibid, paragraphs 14-16

(iii) a prohibition of sandeel fishing in all English waters of the North Sea for part of the fishing season⁸⁴; and (iv) a voluntary prohibition of the sandeel fishery in all English waters of the North Sea⁸⁵.

101. The DEFRA consultation document indicated that a prohibition of sandeel fishing in English waters of the North Sea was the “preferred option”⁸⁶. The DEFRA consultation document also noted the following regarding the other three categories of measures:

(a) technical measures, such as gear configuration or increased mesh sizes, would not “increase the resilience of sandeel stocks”⁸⁷ because they would either “not increase the abundance of sandeels available to other marine creatures which are dependent on them as a food source”⁸⁸ or “render the fishery unviable”⁸⁹ and “uneconomical”⁹⁰;

(b) a prohibition on sandeel fishing in all English waters of the North Sea for part of the fishing season would only “serve to concentrate fishing activity and removals; and not reduce sandeel mortality”⁹¹; and

⁸⁴ Ibid, paragraphs 17-20.

⁸⁵ Ibid, paragraphs 21-25.

⁸⁶ Ibid, paragraphs 13, 26 and 40.

⁸⁷ Ibid, paragraph 19.

⁸⁸ Ibid, paragraph 14.

⁸⁹ Ibid, paragraph 15.

⁹⁰ Ibid, paragraph 16.

⁹¹ Ibid, paragraph 19.

(c) the benefits of a voluntary prohibition of the sandeel fishery in English waters would be too complex and uncertain⁹².

102. The DEFRA consultation document noted that the objective of the prohibition of sandeel fishing in English waters of the North Sea is “[t]o increase the biomass of sandeel stocks and therefore increase the food availability for higher trophic level predators such as seabirds within the wider ecosystem within English waters of the North Sea”⁹³.

103. The DEFRA consultation document noted that the prohibition of sandeel fishing in English waters of the North Sea would essentially affect EU vessels and the EU fishmeal and fish oil sectors, while the cost on UK registered vessels and UK businesses would be “relatively low”⁹⁴:

(a) “[t]he proposed measures will impact EU registered vessels, mostly from Denmark. Over 99% of the total UK and EU value of sandeel landed from English waters has historically been landed by EU vessels, worth around £41.2m each year (2015 – 2019 average)”⁹⁵;

(b) “The loss of access to fisheries in English waters could affect relations with the EU, including Denmark, as they are likely to lead to employment and business losses overseas”⁹⁶; and

(c) “EU vessels landed 240,000 tonnes of sandeels from English waters on average between 2015 and 2019, worth £41.2 million a year in 2021 prices. Using the worst-case scenario that 100% of

⁹² Ibid, paragraphs 23-24.

⁹³ Ibid, paragraph 10.

⁹⁴ Ibid, page 73.

⁹⁵ Ibid, paragraph 65.

⁹⁶ Ibid, paragraph 66.

these landings are lost, and applying a discount rate of 3.5%, the net present cost over the 10-year appraisal period to non-UK vessels is estimated to be £354 million⁹⁷;

(d) “It is important to note these costs are based on values of landed fish, rather than operating profit. The costs to non-UK vessels are therefore considerably overestimated as the costs are based solely on revenue. Furthermore, as per UK vessels, non-UK vessels are likely to offset some of their lost revenue by fishing in other areas⁹⁸; and

(e) “During the Call for evidence from October to November 2021, Defra received figures from international fish processing businesses suggesting there will indirect costs to their businesses. The figures detailed that 66% (€37 million) of average annual Danish export value of fishmeal and fish oil, made from sandeels, was from sandeels caught in UK waters (2016 – 2020). The Danish fishmeal and fish oil factories also directly employ ~500 workers in coastal communities and derive additional economic activity in the local communities. This employment and economic activity may be heavily reduced if fish processing businesses don’t find alternative input sources⁹⁹.”

104. Regarding the environmental benefits of a prohibition of sandeel fishing in all English waters of the North Sea, the DEFRA consultation document noted the following:

⁹⁷ Ibid, Annex 1.

⁹⁸ Ibid, Annex 1.

⁹⁹ Ibid, Annex 1.

- (a) “[r]educing exploitation by prohibiting fishing in English waters may increase sandeel resilience”¹⁰⁰; and
- (b) “[s]andeel availability has been linked to seabird breeding success and survival. Ecosystem model simulations predict a full prohibition in UK waters could lead to an increase in seabird biomass of 4-8%. Benefits to commercially important predators (e.g., cod, whiting, saithe, and haddock) are expected to be more limited and complex, with a mixture of responses to full prohibition of sandeel fishing in UK waters”¹⁰¹. While the DEFRA consultation document did not indicate the relevant timeframe in which such simulated increases could occur, the Natural England/Cefas/JNCC advice¹⁰² indicated that the relevant timeframe is “around 10 years”.¹⁰³

105. Regarding the risk of displacement of fishing activity, the DEFRA consultation document noted that “[t]here is a small risk that displacement of industrial fishing to other areas and other species could reduce the overall ecosystem benefits and fishing industry benefits. This is a small risk as Scotland are also considering the closure of industrial sandeel fishing in Scottish waters. If this is put in place, it is unlikely industrial sandeel fishing activity would be displaced within the UK. It is likely that sandeel fishing effort will be displaced into EU waters of the sandeel management areas. If the total allowable catch (TAC) is not reduced, as we

¹⁰⁰ DEFRA consultation document, Table 3, [Exhibit C-0044](#).

¹⁰¹ Ibid, paragraph 61.

¹⁰² Natural England/Cefas/JNCC advice, [Exhibit C-0045](#).

¹⁰³ “Ecosystem model simulations predict that a full prohibition of sandeel fishing in the UK waters of the North Sea would lead to an increase in seabird biomass of 7% in around 10 years, albeit under constant prevailing environmental conditions”, Ibid, page i.

have witnessed previously, then overall removals of sandeels may remain the same the impact merely shifts”¹⁰⁴.

III.9.2.2. The Natural England/Cefas/JNCC advice

106. Natural England is an executive non-departmental public body, sponsored by DEFRA. It advises the UK Government on the natural environment in England.¹⁰⁵

107. Cefas (Centre for Environment, Fisheries and Aquaculture Science) is an executive agency, sponsored by DEFRA. It collects, manages and interprets data on the aquatic environment, biodiversity and fisheries.¹⁰⁶

108. The JNCC (Joint Nature Conservation Committee) is an executive non-departmental public body, sponsored by DEFRA. It advises the UK Government and the devolved administrations in Northern Ireland, Scotland and Wales on UK and international nature conservation.¹⁰⁷

109. The Natural England/Cefas/JNCC advice was requested by DEFRA and provided “advice on the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea”¹⁰⁸.

110. The Natural England/Cefas/JNCC advice: (i) reviewed the existing scientific literature¹⁰⁹; (ii) described two ecosystem models “to simulate the full prohibition of sandeel fishing in UK waters of the North Sea to

¹⁰⁴ DEFRA consultation document, paragraph 67, Exhibit C-0044.

¹⁰⁵ Natural England, Exhibit C-0046.

¹⁰⁶ Cefas, Exhibit C-0047.

¹⁰⁷ JNCC, Exhibit C-0048.

¹⁰⁸ Natural England/Cefas/JNCC advice, page i, Exhibit C-0045.

¹⁰⁹ Ibid, pages 6 to 20 and 34 to 42.

better understand the potential ecosystem benefits and risks”¹¹⁰; and (iii) discussed three categories of risks¹¹¹: “1) Risks associated with extraneous factors. 2) Risks associated with the full prohibition of sandeel fishing in UK waters of the North Sea. 3) Risks associated with evidence uncertainty”.

111. When reviewing the existing scientific literature¹¹², the Natural England/Cefas/JNCC advice noted the following:

- (a) “spatially restricted closures to sandeel fishing have been historically introduced, around Shetland and the southeast of Scotland. These closures have been linked to increases in the local sandeel population sizes (Wright and others, 1996; Greenstreet and others, 2006). However, fluctuations in sandeel stocks are driven by both top-down (such as predators and fishing) and bottom up (such as prey availability and hydroclimatic factors) processes”¹¹³;
- (b) “[o]f the multiple species of seabirds studied, the links between sandeels and blacklegged kittiwakes appears to be one of the strongest”¹¹⁴; and
- (c) “[t]he diet ‘flexibility’ and ability of predatory commercial fish to substitute diet shortfalls with other prey species suggests that they

¹¹⁰ Ibid, pages 21 to 34.

¹¹¹ Ibid, pages 42-48.

¹¹² Ibid, pages 6-20.

¹¹³ Ibid, page 11.

¹¹⁴ Ibid, page 13.

are less crucially dependent on local sandeel abundance than, for example, seabird colonies off Scotland”¹¹⁵.

112. Regarding ecosystem models¹¹⁶, the Natural England/Cefas/JNCC advice presented two models that Natural English/Cefas/JNCC used “to simulate the full prohibition of sandeel fishing in UK waters of the North Sea to better understand the potential ecosystem benefits and risks”¹¹⁷.

113. The first model was an “an Ecopath with Ecosim (EwE) model of the North Sea”¹¹⁸, about which the Natural England/Cefas/JNCC advice provided the following information:

- a) the model “was initially built by Mackinson and Daskalov (2007) and subsequently updated and presented to the International Council for the Exploration of the Seas (ICES) Working Group on Multispecies Assessment Methods (WGSAM) to be used as an ICES advice product (ICES, 2013)”¹¹⁹;
- b) Natural England/Cefas/JNCC updated the publicly available 2013 model “for the purpose of this work, bringing simulations to 2020 by updating the underlying time series data (Driver time series: fishing effort and mortality and Calibration time series: catch and biomass)”¹²⁰; and
- c) based on the updated “North Sea Ecopath with Ecosim model”, the Natural England/Cefas/JNCC advice simulated “the biomass

¹¹⁵ Ibid, page 13.

¹¹⁶ Ibid, pages 21-34.

¹¹⁷ Ibid, page 21.

¹¹⁸ Ibid, page 21.

¹¹⁹ Ibid, page 21.

¹²⁰ Ibid, page 21.

response to prohibition of industrial sandeel fisheries in the North Sea” and “to prohibition of industrial fisheries in the UK waters of the North Sea”¹²¹.

114. The results of the simulations generated by the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC were that:

- (a) “[p]rohibiting sandeel fishing in UK waters may reduce sandeel exploitation to somewhere between 5% and 13%, which is estimated to lead to increase in seabird biomass between 4% and 8%”¹²² over a period of “around 10 years”¹²³;
- (b) prohibiting sandeel fishing in UK waters of the North Sea is simulated to lead to an increase in seal biomass of between 2% and 5% over the same period of around 10 years¹²⁴; and
- (c) “[p]rohibiting sandeel fishing in UK waters had limited impacts on the biomasses of toothed whales and baleen whales as their consumption in the model was compensated by increased consumption of other prey (such as whiting and mackerel)”¹²⁵.

115. The second model was an “ensemble model” that Natural England/Cefas/JNCC used “to look at 2 effects of sandeel fishing:

- a. We investigated the effects on 9 commercial stocks, using ICES stock assessments and 4 multispecies models, including EwE.

¹²¹ Ibid, page 27.

¹²² Ibid, page 25.

¹²³ Ibid, page i.

¹²⁴ Ibid, page 29.

¹²⁵ Ibid, page 29.

- b. We used EwE to quantify its predictions of the effects on birds and marine mammals using empirical evidence”¹²⁶.

III.9.2.3. The July 2023 public consultation conducted by the Scottish Government

116. The public consultation conducted by the Scottish Government in July 2023 consisted of four documents:

- a. a document entitled “Consultation on proposals to close fishing for sandeel in all Scottish waters” (‘Scottish consultation document’)¹²⁷;
- b. a document entitled “Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment” (‘Scottish scientific literature review’)¹²⁸;
- c. a document entitled “Partial Business and Regulatory Impact Assessment” (‘Scottish partial impact assessment’)¹²⁹; and
- d. a document entitled “Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters” (‘Scottish environmental assessment’)¹³⁰.

III.9.3. Consultation on proposals to close fishing for sandeel in all Scottish waters

117. The Scottish consultation document indicated that the “preferred option”¹³¹ was to prohibit sandeel fishing in all Scottish waters.

¹²⁶ Ibid, page 30.

¹²⁷ Scottish consultation document, [Exhibit C-0049](#).

¹²⁸ Scottish scientific literature review, [Exhibit C-0050](#).

¹²⁹ Scottish partial impact assessment, [Exhibit C-0051](#).

¹³⁰ Scottish environmental assessment, [Exhibit C-0052](#).

118. The Scottish consultation document stated that the objectives of the prohibition of sandeel fishing in all Scottish waters are the following:

“a) To seek effective protection of sandeel, as a contribution to the wider marine ecosystem. b) To provide the opportunity for wider ecosystem benefits to a range of species, including commercial fish species, seabirds and marine mammals, that will also improve resilience to changes in the marine environment. c) To complement, as far as possible, existing sandeel management measures”¹³².

119. The Scottish consultation document noted that the prohibition of sandeel fishing in all Scottish waters would essentially affect EU registered vessels: “[t]he EU catching sector is expected to be most affected by any management measures introduced for all Scottish waters, with Scottish businesses anticipated to be impacted minimally”¹³³.

120. Regarding the environmental benefits of a prohibition of sandeel fishing in all Scottish waters, the Scottish consultation document noted that:

- a. “[r]estricting sandeel fishing in Scottish waters therefore may benefit the health of the stock, which may lead to an increase in abundance”¹³⁴;
- b. “maximising abundance and availability of sandeel stocks as prey for seabirds in Scotland (by way of removing potential pressure from industrial fishing) remains a key mechanism by which resilience in seabird populations might be achieved”¹³⁵;

¹³¹ Scottish consultation document, [Exhibit C-0049](#), page 23.

¹³² Ibid, page 3.

¹³³ Ibid, page 23.

¹³⁴ Ibid, page 11.

¹³⁵ Ibid, page 11

- c. “[d]eclines in sandeel availability and abundance may negatively impact the survival and reproduction of ecologically important species, therefore closure of the sandeel fishery has the potential to bring about wider ecosystem benefits to a range of species as well as improving resilience to changes in the marine environment”¹³⁶; and
- d. “restricting sandeel fishing may lead to an increase in sandeel abundance, survival and potentially availability, thereby providing benefits to other North Sea top predators, including key whitefish species, seabirds and marine mammals (...) The extent to which these benefits could be realised for predatory fish, seabirds and marine mammals is unpredictable due to variation in sandeel abundance and availability which is driven by fishing mortality and, to a large extent, by natural mortality which is influenced by prevailing environmental conditions (including climate change) and predation”¹³⁷.

121. The Scottish consultation document also noted more generally that:

“Establishing a relationship between industrial sandeel fisheries and seabird demography is challenging. Fishing mortality is only one factor influencing sandeel stock biomass, with natural predation by other fish, marine mammals and seabirds, copepod prey abundance, and wider environmental conditions key factors. Furthermore, lag effects between seabird demography and environmental conditions can increase complexity and uncertainty”¹³⁸.

¹³⁶ Ibid, page 23.

¹³⁷ Ibid, pages 23-24.

¹³⁸ Ibid, page 16.

III.9.3.1. The Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment

122. The Scottish scientific literature review¹³⁹ provided “a review of the available scientific evidence on the potential effects of sandeel fisheries management on the marine environment”¹⁴⁰.

123. Regarding the environmental effects of a prohibition of sandeel fishing in all Scottish waters, the Scottish scientific literature review noted the following:

- a. “the combination of limited adult movements between sandbanks and the patchiness of available suitable habitat indicates that local conditions affecting adult mortality (fishing pressure, food availability and predator abundance) can lead to significant variation in sandeel age and length composition over a relatively fine spatial scale”¹⁴¹;
- b. “predicting the effect of further fishery closures on sandeel abundance and their availability to marine top-predators is difficult, as the effect of the closure could be concealed by other sources of mortality”¹⁴²;
- c. “[c]auses of variation in sandeel abundance are numerous and are driven by fishing mortality and (principally) natural mortality, the latter being influenced by factors such as environmental change (temperature effects, regime shifts) and top-down processes (trophic regulation by marine predators). Evidence shows that causes of variation in natural mortality played a more prominent role than fishing mortality in shaping sandeel abundance in Scottish waters and as these causes of

¹³⁹ Scottish scientific literature review, [Exhibit C-0050](#).

¹⁴⁰ Ibid, page 1.

¹⁴¹ Ibid, page 5.

¹⁴² Ibid, page 20.

variation are rarely accounted for, an effect of fishing pressure on sandeel abundance is seldom observed”¹⁴³;

- d. “complex environmental interactions, including dynamics in predatory fish populations, competition for food sources, cannibalism and climate change may also affect the abundance of sandeel in the North Sea, making prediction of sandeel stock development following a fishery closure difficult”¹⁴⁴;
- e. “[t]he evidence of the effect of a fishery closure on sandeel and related predatory species is currently unclear. As sandeel stock dynamics are driven more by environment and ecosystem effects, rather than by fishing, it is similarly difficult to predict the effect on the sandeel stock of a reduction in fishing mortality”¹⁴⁵; and
- f. “[e]stablishing a relationship between industrial sandeel fisheries and seabird demography is extremely challenging. Only correlative relationships can be established meaning confidence in results can be low, and lag effects between seabird demography and environmental conditions increases complexity and uncertainty. Fishing mortality is only one factor influencing sandeel stock biomass, with natural predation by other fish, marine mammals, and seabirds, copepod prey abundance, and wider environmental conditions key factors”¹⁴⁶.

124. Regarding the environmental benefits for sandeel of a prohibition of sandeel fishing in all Scottish waters, the Scottish scientific literature review noted that “[t]he sandeel fishery is only one driver of sandeel stock biomass, the latter also being determined by top down (natural predation

¹⁴³ Ibid, pages 24-25.

¹⁴⁴ Ibid, page 35.

¹⁴⁵ Ibid, page 36.

¹⁴⁶ Ibid, page 55.

(Furness 2002)) and bottom up (environment and copepod prey abundance (Frederiksen et al. (2004)) regulation. This makes demonstrating a causal relationship between industrial sandeel fishing and seabird demography challenging (Sydeman et al. 2017)¹⁴⁷.

125. Regarding the environmental benefits for chick-rearing seabirds of a prohibition of sandeel fishing in all Scottish waters, the Scottish scientific literature review noted that:

- a. chick-rearing seabirds “generally switch from feeding on older sandeel at the start of breeding (April/May) to juvenile sandeel (for both self-feeding and their young) as the season progresses”¹⁴⁸;
- b. “[o]nly correlative relationships between breeding success and sandeel fishing and/or abundance can be established, meaning confidence in observed results is less than from an experimental manipulation. Also, seabird demography is driven by lag effects and interannual fluctuations that make teasing out effects of a fishery from environmental variation difficult”¹⁴⁹; and
- c. “[p]rey availability, rather than abundance or biomass, plays a key role in the breeding success of some seabirds. Prey need to be within foraging distance of seabird colonies, they need to be within the water column, and they need to be within dive depth (which varies considerably among seabird species). Similarly, prey of the right age or size class must be available at the right time of year for provisioning to chicks”¹⁵⁰.

¹⁴⁷ Ibid, page 46.

¹⁴⁸ Ibid, page 38.

¹⁴⁹ Ibid, page 46.

¹⁵⁰ Ibid, page 55.

126. Moreover, while “[t]he evidence shows negative relationship between presence of a sandeel fishery and kittiwake breeding success, but limited evidence of a negative relationship for the other seabird species studied”¹⁵¹, “improved sandeel availability may generally be of limited benefit to kittiwake breeding success”¹⁵² when that availability is outside of its feeding range. This is because “a typical foraging range [of kittiwakes] would not regularly include foraging outside of the existing closed area (...) Whilst kittiwake are capable of flying further to the wider SA4 area, there would need to be considerably improved foraging opportunities above what is available in the existing closed area to make the longer foraging distance worthwhile”¹⁵³.

127. Regarding the environmental benefits for marine mammals of a prohibition of sandeel fishing in all Scottish waters, the Scottish scientific literature review noted that:

“identifying an effect of the sandeel fishery or a reduction in fishing pressure is difficult as it involves complex interactions between multiple drivers of both sandeel and predator dynamics. Further, data on the effects of sandeel abundance on marine mammal population sizes, foraging ecology and distribution are limited, with few studies able to garner sufficient statistical power to identify significant relationships. However, it seems a reasonable assumption that any increase in sandeel abundance that might result from a reduction in fisheries pressure might be beneficial to several populations of marine mammals given their dependence on sandeel as a prey source”¹⁵⁴.

¹⁵¹ Ibid, page 50.

¹⁵² Ibid, page 53.

¹⁵³ Ibid, page 51.

¹⁵⁴ Ibid, page 74.

128. Regarding the environmental benefits for predatory fish of a prohibition of sandeel fishing in all Scottish waters, the Scottish scientific literature review noted that:

- a. “[p]redatory fish are often generalist feeders, where the diet typically consists of no more than 20% of any species, as predators switch between prey species based on availability”¹⁵⁵;
- b. “the importance of sandeel as a food source is more variable for predatory fish than for seabirds and mammals”¹⁵⁶; and
- c. “complex environmental interactions, including dynamics in predatory fish populations, competition for food sources, cannibalism and climate change may also affect the abundance of sandeel in the North Sea, making prediction of sandeel stock development following a fishery closure difficult”¹⁵⁷.

III.9.3.2. The Partial Business and Regulatory Impact Assessment

129. After recalling the existing prohibition of sandeel fishing since 2000 in part of Scottish waters, the Scottish partial impact assessment¹⁵⁸ identified four categories of possible further management measures: (i) a prohibition of sandeel fishing in all Scottish waters; (ii) a prohibition of sandeel fishing in the entirety whole of ICES area 4; (iii) a prohibition on sandeel fishing in all Scottish waters for part of the fishing season; and (iv) a voluntary prohibition of the sandeel fishery in all Scottish waters.

¹⁵⁵ Ibid, page 35.

¹⁵⁶ Ibid, page 35.

¹⁵⁷ Ibid, page 35.

¹⁵⁸ Partial Business and Regulatory Impact Assessment, [Exhibit C-0051](#).

130. The Scottish partial impact assessment noted that the prohibition of sandeel fishing in all Scottish waters was the “preferred option”¹⁵⁹. The Scottish partial impact assessment also noted the following regarding the other three categories of possible further management measures:

- a. while the prohibition of sandeel fishing in the entirety of ICES area 4 may lead to “a reduction in pressure on the sandeel stock (...) this could be offset by displacement into other areas”¹⁶⁰;
- b. prohibiting sandeel fishing in all Scottish waters for part of the fishing season “could still allow for fishing of sandeel, and there is an environmental risk that the season could change with environmental and biological drivers”¹⁶¹; and
- c. the benefits of a voluntary prohibition of the sandeel fishery in all Scottish waters were too complex and uncertain¹⁶².

131. The Scottish partial impact assessment also further noted that the prohibition of sandeel fishing in all Scottish waters would essentially affect EU registered vessels:

- a. EU registered vessels “will face the largest cost as they are the main catchers of sandeel in Scottish waters”¹⁶³;
- b. “From 2015-2019, vessels catching sandeel from Scottish waters caught on average 17,900 tonnes of sandeel each year, worth £3.8 million in 2021 prices. The net present cost of Option 1 is therefore

¹⁵⁹ Ibid, pages 8,9,11,12 and 14.

¹⁶⁰ Ibid, page 11.

¹⁶¹ Ibid, page 14.

¹⁶² Ibid, pages 8 and 11.

¹⁶³ Ibid page 13.

estimated at £32.8 million, assuming the closure starts in 2024, with a 10-year appraisal period discounted at 3.5%”¹⁶⁴; and

- c. “it should be noted that the above estimation is based on revenue and not profit, and therefore will be an overestimation of business impact. There is also no assessment of the potential for non-UK vessels to move their fishing to other waters and therefore offset the loss of a Scottish waters closure”¹⁶⁵.

III.9.3.3. The Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters

132. The Scottish environmental assessment¹⁶⁶ identified the same four categories of possible further management measures as the Scottish partial impact assessment¹⁶⁷, and also noted that the prohibition of sandeel fishing in all Scottish waters was the “*preferred option*”¹⁶⁸.

133. Regarding the environmental benefits of a prohibition of sandeel fishing in all Scottish waters, the Scottish environmental assessment noted that:

- a. “maximising abundance and availability of sandeel stocks as prey for seabirds in Scotland (by way of removing potential pressure from industrial fishing) remains a key mechanism by which resilience in seabird populations might be achieved”¹⁶⁹;

¹⁶⁴ Ibid, page 13.

¹⁶⁵ Ibid, page 13.

¹⁶⁶ Scottish Environmental Assessment, [Exhibit C-0052](#).

¹⁶⁷ Ibid, pages 26 and 86-87.

¹⁶⁸ Ibid, page 26.

¹⁶⁹ Ibid, section 5.2.13.

- b. “[i]dentifying an effect of the sandeel fishery or a reduction in fishing pressure is difficult as it involves complex interactions between multiple drivers of both sandeel and predator dynamics”¹⁷⁰; and
- c. “the extension of the existing sandeel fishery closure to all Scottish waters (...) has the potential to result in environmental benefits for a range of marine species including sandeel, seabirds, marine mammals and predatory fish”.¹⁷¹

III.9.4. The ICES Technical Service of 28 November 2023

134. In paragraph 6 of the “Written Record of fisheries consultations from 9 to 13 March 2023 between the United Kingdom and the European Union about sandeels in 2023”¹⁷², the EU and the UK “agreed to develop (...) terms of reference for a request to be submitted as soon as practicable requesting ICES to provide further information on how ecosystem considerations, particularly predator-prey interactions and the rebuilding of sensitive higher trophic level species such as certain seabirds, and other ecosystems-based fisheries management aspects are factored in and applied in the provision of single stock advice for forage fish species”.

135. On 5 June 2023, the EU and the UK submitted a joint request to ICES “on ecosystem considerations in the provision of single-stock advice for forage fish species”.¹⁷³ The joint request asked ICES “to clarify and describe how ecosystem considerations are factored in and applied in the provision of single stock advice for forage fish species. Particular reference should be made to the handling of predator-prey interactions and what

¹⁷⁰ Ibid, section 5.2.24

¹⁷¹ Ibid, section 5.6.1

¹⁷² [Exhibit C-0003](#).

¹⁷³ [Exhibit C-0053](#).

considerations/provisions are made for the rebuilding of sensitive higher trophic level species such as certain seabirds”.

136. On 28 November 2023, ICES responded to the joint request through a ‘Technical Service’.¹⁷⁴

137. First, regarding how ICES factors in and applies ecosystem considerations when providing its advice on fish stocks, page 1 of the ICES Technical Service noted the following¹⁷⁵:

- a. ICES does factor in and apply certain ecosystem considerations. Regarding sandeel, those considerations include “ecosystem drivers of larval survival” and “the importance of maintaining diverse stock structure to promote population resilience”;
- b. ICES does not, however, conduct a “specific analysis of whether the forage fish biomass is kept high enough for specific predator requirements. Such an analysis would depend on the specifics of individual predator populations, and overall stock levels of forage fish are only part of the issue”; and

¹⁷⁴ ICES Technical Service, Greater North Sea ecoregion Published 28 November 2023, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species [Exhibit C-0022](#). As ICES has explained ([Exhibit C-0054](#)), “[a] Technical Service is the provision of scientific information, or a process that produces scientific information, for the use of managers and policy-makers. The service may include recommendations made by individual, or groups of, scientists, but it does not include a recommendation on behalf of ICES (except to reiterate a recommendation previously made by ACOM or by former ICES advisory committees). Technical Services thus do not constitute ICES approved advice. They do, however, share the following characteristics: - Scientific objectivity and integrity; - Quality assurance, including peer review as appropriate; - Transparency”.

¹⁷⁵ See also page 4: “The ICES advice does not in itself provide protection to locally important sites at a smaller scale than the assessment areas. The overall quota advice therefore needs to be part of an overall management regime to ensure that local food availability is preserved.” [Exhibit C-0022](#).

- c. “ICES advice on fishing opportunities is given at stock level and cannot function at the level of individual feeding grounds, which goes beyond the detail level of the stock assessment models. Therefore, a large part of the question of whether management is supporting ecosystem functions should occur at the level of national regulations, which is outside the scope of this technical service”.

138. Second, regarding the impact of the sandeel fishery on the stock, the ICES Technical Service noted that:

- a. “ICES quotas for sandeel, Norway pout, sprat, and herring in the North Sea are based on best available scientific assessments. If followed, this advice should ensure healthy levels of these stocks. For sandeel there is a state-of-the-art spatial management system, herring have a known stock structure (though the advice only partially accounts for this)”¹⁷⁶; and
- b. “For sandeel in particular, the spatial structure of the management advice is likely sufficient to ensure that local depletions can be reversed by recruitment from elsewhere in the management region”¹⁷⁷.

139. Third, regarding the extent to which different predators rely on sandeels, the ICES Technical Service noted that “[s]eabirds are the most sensitive predators to changes in sandeel abundance, with terns and kittiwakes the most sensitive among seabirds”¹⁷⁸.

140. Fourth, regarding the local abundance of sandeel, the ICES Technical Service noted that:

¹⁷⁶ ICES Technical Service, [Exhibit C-0022](#), page 2.

¹⁷⁷ Ibid, page 2.

¹⁷⁸ Ibid, page 8.

- a. “[f]or nesting seabirds in particular, the local abundance of forage fish (especially sandeel) at specific times of the year is likely to matter more than the abundance in the North Sea as a whole (or even in a single management area)”¹⁷⁹;
- b. “[n]esting seabirds in particular will be restricted in their feeding range. Engelhard et al.(2014) note a number of seabird species where there is evidence that breeding success is correlated with (local) sandeel abundance. Sandeel are also important prey for seals and minke whales, however, these species can forage over a wider area than nesting seabirds. Minke whales in particular are able to forage over large distances and are unlikely to be seriously affected by local depletion of a particular prey, while seals are likely intermediate between wide-ranging Minkes and locally dependent seabirds. Fish are also important predators on sandeel, but the evidence for their dependence on sandeel is more limited”¹⁸⁰;
- c. “advice which maintains a high overall biomass could still result in local depletion depending on other management measures”¹⁸¹; and
- d. “[o]verall stock levels of forage fish are only part of the issue, local abundance will matter for some predators. Minke whales, for example, can move large distances to find food and are not limited by local abundance, while nesting seabirds have a restricted feeding range”¹⁸².

141. Fifth, regarding possible management measures, the ICES Technical Service noted that because “[i]t is never going to be feasible for ICES to provide catch advice at a sufficiently fine scale to account for this local

¹⁷⁹ Ibid, page 2.

¹⁸⁰ Ibid, page 3.

¹⁸¹ Ibid, page 3.

¹⁸² Ibid, page 7.

food requirement (...) therefore the responsibility to ensure the provision of these local ecosystem services relies on national regulations (for example using permanent or timed closures or setting restricted quotas in given areas)”¹⁸³. The ICES Technical Service also noted that “[t]here are several closed sandeel areas, and this is one possible example of measures to provide ecosystem services that sits alongside the overall quota. However, it would make sense to evaluate the degree to which such closures could be targeted to maximize the benefits while minimizing the costs”¹⁸⁴.

III.10. The correspondence between the EU and the UK prior to the sandeel fishing prohibition

142. On 30 May 2023, the Directorate-General for Maritime Affairs and Fisheries of the European Commission sent a letter to DEFRA in response to the English sandeel consultation.¹⁸⁵ In the letter, the Directorate-General for Maritime Affairs and Fisheries of the European Commission expressed its concerns regarding the compatibility with the TCA of a prohibition of sandeel fishing in English waters of the North Sea.

143. On 24 July 2023, the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands sent a letter to the Directorate-General for Maritime Affairs and Fisheries of the European Commission regarding the Scottish sandeel consultation.¹⁸⁶

144. On 1 August 2023, the Directorate-General for Maritime Affairs and Fisheries of the European Commission replied to the letter of the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands of 24 July

¹⁸³ Ibid, page 7.

¹⁸⁴ Ibid, page 2.

¹⁸⁵ [Exhibit C-0055](#).

¹⁸⁶ [Exhibit C-0056](#).

2023.¹⁸⁷ In the letter, the Directorate-General for Maritime Affairs and Fisheries of the European Commission expressed its concerns regarding the compatibility with the TCA of a prohibition of sandeel fishing in all Scottish waters.

145. On 30 January 2024, the UK Secretary of State Environment, Food & Rural Affairs sent a letter to the European Commissioner for the Environment, Oceans and Fisheries.¹⁸⁸ In that letter, the UK Secretary of State informed the European Commission that the UK Government intended to prohibit sandeel fishing in English waters of the North Sea “effective by 26 March 2024”. The letter noted that:

- a. “[t]he ICES [Technical Service] on 28 November supports the measures we are introducing and made clear that annual ICES advice for sandeel management does not account fully for predator needs. It also advocated for local regulation to ensure sandeel management delivers for ecosystem needs”¹⁸⁹; and
- b. “[o]ur evidence base for this decision was published alongside the consultation, and we are also confident that this – alongside the ICES response to our joint request – supports a more precautionary approach to sandeel management”¹⁹⁰.

146. On 2 February 2024, the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands sent a letter to the Directorate-General for Maritime Affairs and Fisheries of the European Commission.¹⁹¹ In that letter, the Scottish Cabinet Secretary informed the European Commission that the

¹⁸⁷ [Exhibit C-0057](#).

¹⁸⁸ [Exhibit C-0058](#).

¹⁸⁹ Ibid, page 2.

¹⁹⁰ Ibid, page 2.

¹⁹¹ [Exhibit C-0059](#).

Scottish Government intended to prohibit sandeel fishing in all Scottish waters as of 26 March 2024. The letter indicated that:

- a. “[i]n your letter [of 1 August 2023] you made reference to the commitment by the EU and UK (paragraph 6 of the Written Record of fisheries consultation regarding sandeel in 2023) to seek further information from ICES on ecosystem considerations in the provision of single-stock advice for forage fish species. This advice was published on 28 November 2023 and we made sure that it formed part of the scientific evidence base that was used to inform the Scottish Government’s decision-making on this issue”¹⁹²; and
- b. “[i]n reaching this decision, the Scottish Government has applied the precautionary principle to its decision making and has ensured that we are fully aligned with our national and international commitments, which includes the UK-EU Trade and Cooperation Agreement (TCA) to which you refer in your letter of 1 August 2023”¹⁹³.

147. On 8 February 2024, the UK notified the sandeel fishing prohibition to the EU pursuant to Article 496(3) TCA.¹⁹⁴ In a letter accompanying the notification, the UK noted the following:

“Evidence

We note that the response received from ICES on 28 November 2023 to our joint technical request supports the use of national regulation and suggests that the annual single species advice for sandeel from ICES

¹⁹² Ibid, page 1.

¹⁹³ Ibid, page 2.

¹⁹⁴ [Exhibit C-0060](#). Article 496(3) TCA provides that “Each Party shall notify the other Party of new measures as referred to in paragraph 1 that are likely to affect the vessels of the other Party before those measures are applied, allowing sufficient time for the other Party to provide comments or seek clarification.”

should only be part of an overall management regime to ensure that local food availability is preserved. It advocates for local regulation to ensure that sandeel stock management delivers for broader ecosystem needs. This supports a strategy for a more precautionary approach to sandeel management including the introduction of spatial closures.

The public consultation on potential management measures in English waters ran from March-May 2023 and we welcomed the responses received from EU stakeholders. The results showed that over 95% of respondents support some form of prohibition on fishing for sandeel, with a majority favouring the closure of all English waters. UK Ministers have therefore decided to introduce a spatial closure of English waters in the North Sea for all vessels in order to offer improved protection to sandeel and the dependent ecosystem. Our decision takes the consultation responses into consideration alongside the scientific evidence, and is further to the prohibition which has already been in place for UK vessels for the past 3 years.

Evidence from the UK Government's expert advisory bodies, including CEFAS and Natural England, was published alongside the details of the English consultation and can be accessed from this website.

The consultation in relation to sandeel management in Scottish Waters ran from July to October 2023 and resulted in 97% of respondents supporting the option of a full closure of Scottish Waters for sandeel fishing. Further details about the consultation are available here.

The consultation is supported by complementary documents such as "Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment" produced by Marine Directorate in Scottish Government, as well as impact assessments. These documents have been published alongside the consultation document and can be viewed online.

The Scottish Statutory Instrument, associated documents and final assessment can be found here”¹⁹⁵.

148. On 16 February 2024, the Directorate-General for Maritime Affairs and Fisheries of the European Commission replied to the letter of the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands of 2 February 2024¹⁹⁶.

149. On 22 February 2024, the European Commissioner for the Environment, Oceans and Fisheries replied to the letter of the UK Secretary of State Environment, Food & Rural Affairs of 30 January 2024.¹⁹⁷

IV. The disputed measure: the ‘sandeel fishing prohibition’

150. On 26 March 2024, the UK gave effect to the sandeel fishing prohibition. It did so through different legal instruments.

151. In English waters of the North Sea, the UK gave effect to the sandeel fishing prohibition through variations to licences granted to fishing vessels by the Marine Maritime Organisation (‘MMO’) pursuant to its powers under the Marine and Coastal Access Act.¹⁹⁸

152. In all Scottish waters, the UK gave effect to the sandeel fishing prohibition through the Sandeel (Prohibition Of Fishing) (Scotland) Order 2024

¹⁹⁵ [Exhibit C-0060](#), page 2.

¹⁹⁶ [Exhibit C-0061](#).

¹⁹⁷ [Exhibit C-0062](#).

¹⁹⁸ The Marine Management Organisation is responsible for marine licensing in English waters pursuant to the Marine and Coastal Access Act 2009.

(‘Scottish Order’).¹⁹⁹ The Scottish Order was adopted pursuant to Section 5(1)(a) of the Sea Fish (Conservation) Act 1967.²⁰⁰

153. The EU challenges the sandeel fishing prohibition as a single measure. It describes the legal instruments through which it is given effect below.

IV.1. The sandeel fishing prohibition as given effect to in English waters of the North Sea

154. In English waters of the North Sea, the UK gave effect to the sandeel fishing prohibition through variations to licences granted to fishing vessels by the MMO pursuant to its powers under the Marine and Coastal Access Act 2009.²⁰¹

155. Under English law, variations to licences are set down in statutory guidance and are used to “reflect changes in quota limits and closures or openings of sea areas”.²⁰²

156. In accordance with Section 38 of the Marine and Coastal Access Act 2009, the Secretary of State may issue statutory guidance. Section 38(2) of the Marine and Coastal Access Act 2009 provides that the MMO “must have regard to any guidance given to it under this Act by the Secretary of State”. Hence, a variation introduced through statutory guidance sets binding conditions on the grant of all licences by the MMO. Since it is an offence

¹⁹⁹ [Exhibit CLA-0004](#).

²⁰⁰ [Exhibit CLA-0017](#).

²⁰¹ [Exhibit CLA-0078](#).

²⁰² See the explanation on Fishing vessel licence variations, [Exhibit C-0063](#).

to fish without a licence, these conditions apply to all vessels seeking to fish sandeel in English waters of the North Sea²⁰³.

157. The statutory guidance setting out the variations relevant to the sandeel fishing prohibition provides in relevant part:

“1.1 Sandeel Closure To All Vessels In Waters Of ICES Area 4

Affecting all Over 10m and 10m & Under licence categories – A(11), A(Islands)(12), A (Pelagic)(17), B(31), C (41), A(10m & Under) (91), A(10m & Under Limited) (94) & A(10m & Under [PO]).

1.2 In Over 10m Schedules:

10.4 - From 26 March 2024 the fishing of sandeel within English waters of ICES Area 4 (North Sea) is prohibited by all vessels.

1.3 In 10m & Under Schedules:

5.7 - From 26 March 2024 the fishing of sandeel within English waters of ICES Area 4 (North Sea) is prohibited by all vessels.”²⁰⁴

158. As to the scope of the prohibition introduced by this variation:

- a. it applies to both vessels over 10m and those under 10m;
- b. it applies to all vessels irrespective of where they are registered; and
- c. it covers the whole of ICES Area 4 (North Sea).

²⁰³ As described further below, in accordance with Article 497(2) TCA, the Parties have committed to “take all necessary measures to ensure compliance by its vessels with the rules applicable to those vessels in the other Party's waters, including authorisation or licence conditions.”

²⁰⁴ Statutory guidance setting out the variations relevant to the sandeel fishing prohibition, Variation issued: Tuesday 26 March 2024, [Exhibit CLA-0014](#).

IV.2. The sandeel fishing prohibition as given effect to in Scottish waters of the North Sea

159. In all Scottish waters, the UK gave effect to the sandeel fishing prohibition through the Sandeel (Prohibition Of Fishing) (Scotland) Order 2024 ('Scottish Order').²⁰⁵

160. The Scottish Order was adopted pursuant to Section 5(1)(a) of the Sea Fish (Conservation) Act 1967.²⁰⁶ That provision empowers a national authority to make an order prohibiting in any area specified in the order and either for a period so specified or without limitation of time:

“(i) all fishing for sea fish;

(ii) fishing for any description of sea fish specified in the order;

(iii) fishing for sea fish, or for any description of sea fish specified in the order, by any method so specified.”

161. Subsection (b) of the same provision empowers a national authority to restrict as opposed to prohibit fishing.

162. Section 1 of the Scottish Order provides that the order “comes into force on 26 March 2024”. The order does not specify an end date and hence, is to be understood as without limitation of time.

163. Section 2 of the Scottish Order provides that “[f]ishing for sandeel is prohibited within the Scottish zone”.

164. The Scottish Order therefore, covers all Scottish waters including that part of the UK’s EEZ adjacent to Scotland. As set down in the Explanatory Note accompanying the Scottish Order, “the Scottish zone is defined in

²⁰⁵ Scottish Order, [Exhibit CLA-0004](#).

²⁰⁶ Sea Fish (Conservation) Act 1967, [Exhibit CLA-0017](#).

section 22(1) of the Sea Fish (Conservation) Act 1967 (“the 1967 Act”) by reference to a definition in section 126(1) of the Scotland Act 1998: it means the sea adjacent to Scotland up to the 200 nautical miles limit.”²⁰⁷

165. It is an offence under Section 5(1) of the 1967 Act for any person to contravene a prohibition imposed by the Scottish Order carrying a penalty of a fine which, if an offence is indictable, is unlimited in amount.

IV.3. The sandeel fishing prohibition is a single measure

166. The EU challenges the sandeel fishing prohibition as a single measure.

167. Fisheries are a devolved competence in the UK. For this reason, the UK gave effect to the sandeel fishing prohibition through different legal instruments governing English waters of the North Sea and all Scottish waters respectively. The EU challenges the sandeel fishing prohibition as a single measure for the reasons set out below.

168. First, the obligations as regards fisheries set down in the TCA bind the UK and the EU. The shares of the sandeel TAC as set down in Annex 35 TCA are an integral part of that Agreement. The sandeel TACs have systematically been negotiated by the UK and the EU rather than by England or Scotland separately.

169. Second, as the October 2021 Call for Evidence confirms, the UK Fisheries Administrations were from the outset considering additional measures that would apply to sandeel fishing, including “*a ban on sandeel fishing in UK waters*”²⁰⁸.

170. It is also clear from the English and Scottish consultation documents that an objective was to identify a common approach that would apply both in

²⁰⁷ [Exhibit CLA-0004](#).

²⁰⁸ Call for Evidence, page 8, [Exhibit C-0043](#).

English waters of the North Sea and in all Scottish waters.²⁰⁹ This is confirmed by the Natural England/Cefas/JNCC advice²¹⁰, which provided “*advice on the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea*”²¹¹. In other words, the scope of that advice was not limited to English waters of the North Sea. In that sense, the UK designed the sandeel fishing prohibition on the premise that it wished to address sandeel fishing in “UK waters” of the North Sea.

171. Third, while the precise legal mechanisms giving effect to the sandeel fishing prohibition differ, they have the same legal implications for operators and the same temporal scope. In particular, irrespective of whether a vessel wishes to fish sandeel in English waters of the North Sea or in Scottish waters, this is no longer permitted under the applicable requirements. Indeed, those requirements came into effect on the same day and have no expiry date.

172. Fourth, the requirements will impact the same operators.

173. As to the variation of licences, this will affect EU vessels, namely Danish vessels and the Danish fishmeal and fish oil sectors, as is reflected in the English and Scottish consultation documents:

- a. “[t]he proposed measures will impact EU registered vessels, mostly from Denmark. Over 99% of the total UK and EU value of sandeel landed

²⁰⁹ See for instance, Policy Note The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024 SSI 2024/36: “In 2021, Scottish Government officials worked closely with UK counterparts on a call for evidence to gather information to better inform considerations on future management for sandeel”, [Exhibit C-0065](#).

²¹⁰ Natural England/Cefas/JNCC advice, March 2023. [Exhibit C-0045](#).

²¹¹ Ibid, page i.

from English waters has historically been landed by EU vessels, worth around £41.2m each year (2015 – 2019 average)”²¹²;

- b. “The loss of access to fisheries in English waters could affect relations with the EU, including Denmark, as they are likely to lead to employment and business losses overseas”²¹³; and
- c. “EU vessels landed 240,000 tonnes of sandeels from English waters on average between 2015 and 2019, worth £41.2 million a year in 2021 prices. Using the worst-case scenario that 100% of these landings are lost, and applying a discount rate of 3.5%, the net present cost over the 10-year appraisal period to non-UK vessels is estimated to be £354 million”²¹⁴;
- d. “It is important to note these costs are based on values of landed fish, rather than operating profit. The costs to non-UK vessels are therefore considerably overestimated as the costs are based solely on revenue. Furthermore, as per UK vessels, non-UK vessels are likely to offset some of their lost revenue by fishing in other areas”²¹⁵; and
- e. “During the Call for evidence from October to November 2021, Defra received figures from international fish processing businesses suggesting there will indirect costs to their businesses. The figures detailed that 66% (€37 million) of average annual Danish export value of fishmeal and fish oil, made from sandeels, was from sandeels caught in UK waters (2016 – 2020). The Danish fishmeal and fish oil factories also directly employ ~500 workers in coastal communities and derive additional economic activity in the local communities. This employment and economic

²¹² DEFRA consultation document, paragraph 65, [Exhibit C-0044](#).

²¹³ Ibid, paragraph 66.

²¹⁴ DEFRA consultation document, Annex 1, [Exhibit C-0044](#).

²¹⁵ Ibid.

activity may be heavily reduced if fish processing businesses don't find alternative input source"²¹⁶.

174. As to the Scottish Order, the policy note accompanying that Order concluded that “the impact of this policy on business is minimal, as no quota has been issued to UK vessels for sandeel since 2021, and no sandeel has been landed into Scottish ports since 2020.”²¹⁷ Indeed, the Business and Regulatory Impact Assessment accompanying the Scottish Order stated that in the case of UK vessels, “the stock has historically been targeted primarily by one UK vessel.”²¹⁸ Therefore, it is also EU as opposed to UK vessels which are almost exclusively impacted.

175. Fifth, the UK has presented the sandeel fishing prohibition to the public at the same time and with reference to the prohibition in English waters of the North Sea and in all Scottish waters. The variations to the licences affecting English waters of the North Sea and the Scottish Order were announced on the same day - 31 January 2024.²¹⁹

²¹⁶ Ibid.

²¹⁷ See Policy Note The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024 SSI 2024/36, [Exhibit C-0065](#).

²¹⁸ The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024: Business and Regulatory Impact Assessment – final, section 2.1.3, [Exhibit C-0066](#).

²¹⁹ Regarding English waters of the North Sea, see DEFRA, “Nature recovery to be accelerated as the government delivers on measures to protect land and sea”, 31 January 2024 ([Exhibit C-0067](#)). Regarding all Scottish waters, see Scottish Government, “Sandeel fishing to be banned in Scottish waters”, 31 January 2024 ([Exhibit C-0068](#)). The press release of the Scottish Government noted that “The UK Government has today also indicated its intention to close Area 4 of the North Sea in English waters for sandeel fishing.”

IV.4. The objectives of the sandeel fishing prohibition

IV.4.1. The general objectives of UK fisheries policy

176. The EU acknowledges that the UK's fisheries policy in general pursues sustainability objectives. Those sustainability objectives are set out *inter alia* in:

- a. Sections 4 and 5 of the UK Marine Strategy Regulations, which require the UK to take the necessary measures, including the development of a marine strategy, to achieve or maintain good environmental status ('GES')²²⁰ of marine waters by 31 December 2020;

²²⁰ In July 2008, the EU adopted Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy ('Marine Strategy Framework Directive' or MSFD - [Exhibit CLA-0018](#)). The MSFD required Member States to take measures to achieve or maintain Good Environmental Status by 2020. Article 3(5) of the MSFD defined good environmental status as follows:

“‘good environmental status’ means the environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations, i.e.:

(a) the structure, functions and processes of the constituent marine ecosystems, together with the associated physiographic, geographic, geological and climatic factors, allow those ecosystems to function fully and to maintain their resilience to human-induced environmental change. Marine species and habitats are protected, human-induced decline of biodiversity is prevented and diverse biological components function in balance;

(b) hydro-morphological, physical and chemical properties of the ecosystems, including those properties which result from human activities in the area concerned, support the ecosystems as described above. Anthropogenic inputs of substances and energy, including noise, into the marine environment do not cause pollution effects;

Good environmental status shall be determined at the level of the marine region or subregion as referred to in Article 4, on the basis of the qualitative descriptors in Annex I. Adaptive management on the basis of the ecosystem approach shall be applied with the aim of attaining good environmental status”.

- b. the UK's Marine Strategy, which is composed of three parts. The UK's Marine Strategy breaks down GES into 11 qualitative descriptors. On 22 October 2019, the UK updated Part One of its Marine Strategy. Part One, as updated, noted that GES has not yet been achieved for chick-rearing seabirds in the Greater North Sea.²²¹ On 5 August 2022, the UK updated Part Two of its Marine Strategy. Part Two, as updated, also noted that GES has not yet been achieved for chick-rearing seabirds in the Greater North Sea.²²²

177. On 23 November 2020, the UK adopted the Fisheries Act²²³ to give effect to the legal arrangements applicable in the UK following its withdrawal from the EU. At the time that the Fisheries Act was adopted, it was stated to be “underpinned by a commitment to sustainability” and designed to ensure “[f]isheries are managed in a sustainable way - balancing social, economic, and social benefits while preventing the over exploitation of fish stocks.”²²⁴

²²¹ DEFRA, Marine Strategy Part One: UK updated assessment and Good Environmental Status, page 53: “In the Greater North Sea the status of non-breeding waterbirds is consistent with the achievement of GES. The status of breeding seabirds is not consistent with the achievement of GES”. [Exhibit C-0069](#).

²²² DEFRA, “Marine Strategy Part Two: UK updated monitoring programmes”, page 27: “The UK achieved its aim of GES for non-breeding waterbirds in the Greater North Sea but not in the Celtic Seas. Breeding seabirds had not achieved GES”. [Exhibit C-0070](#).

²²³ [Exhibit CLA-0006](#).

²²⁴ DEFRA Press Release, “Flagship Fisheries Bill becomes law”, 24 November 2020, [Exhibit CLA-0071](#). The same press release identifies that the Fisheries Act will ensure “EU vessels’ automatic access right to fish in UK waters is removed” and that “UK fisheries administrations will seek to ensure increased benefits from fish caught by UK boats.”

178. Section 1 of that Act establishes eight objectives of the UK’s Fisheries Policy, including a “sustainability objective”.²²⁵ Section 1(2) defines the “sustainability objective” as that:

“(a) fish and aquaculture activities are—

(i) environmentally sustainable in the long term, and

(ii) managed so as to achieve economic, social and employment benefits and contribute to the availability of food supplies, and

(iii) the fishing capacity of fleets is such that fleets are economically viable but do not overexploit marine stocks.”

179. Under section 2 of that Act, the fisheries policy authorities are required to “prepare and publish a joint fisheries statement” which must contain a list of fisheries management plans that the fisheries policy authorities (or any of them) propose to prepare and publish.²²⁶ The UK fisheries policy authorities adopted the Joint Fisheries Statement in November 2022²²⁷. That statement clarifies that sandeel is already managed through existing conservation management measures and is not covered by a Fisheries Management Plan.²²⁸

²²⁵ Section 1(1) of the Fisheries Act provides: “The fisheries objectives are (a) the sustainability objective, (b) the precautionary objective, (c) the ecosystem objective, (d) the scientific evidence objective, (e) the bycatch objective, (f) the equal access objective, (g) the national benefit objective, and (h) the climate change objective.” [Exhibit CLA-0006](#).

²²⁶ [Exhibit CLA-0006](#), Section 2(1)(b).

²²⁷ Joint Fisheries Statement (JFS), November 2022, [Exhibit C-0035](#).

²²⁸ *Ibid*, section 5.3.5.

IV.4.2. The objectives of the sandeel fishing prohibition

180. To ascertain the objectives of the sandeel fishing prohibition, the EU considers first the wording of the legal instruments through which it is given effect and second, the English and Scottish consultation documents.

181. As regards the legal instrument applicable to the English waters of the North Sea, the EU observes that the statutory guidance gives no explanation but simply records the “closure” of English waters.

182. As regards the Scottish Order, this likewise gives no explanation for the prohibition. However, in January 2024, a document entitled “Policy Note The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024 SSI 2024/36” was published by the Marine Directorate.²²⁹ This policy note describes the objectives in the following terms:

- a. “Given the importance of sandeel to the wider ecosystem and the subsequent benefit provided by the species in aiding long-term sustainability and resilience of the marine environment, it remains an over-arching and long-held Scottish Government position not to support fishing for sandeel in Scottish waters”; and
- b. “The purpose of The Sandeel (Prohibition of fishing) (Scotland) Order 2024 is to prohibit fishing for sandeel in all Scottish waters with the aim of bringing about wider environmental and ecosystem benefits, which include potential benefits to sandeel, seabirds, marine mammals, and other fish species.”

183. As to the English and Scottish consultation documents preceding the adoption of the sandeel fishing prohibition, the DEFRA consultation document states the objective of the prohibition of sandeel fishing in English waters of the North Sea as:

²²⁹ [Exhibit C-0065](#).

“[t]o increase the biomass of sandeel stocks and therefore increase the food availability for higher trophic level predators such as seabirds within the wider ecosystem within English waters of the North Sea”²³⁰.

184. The Scottish consultation document states the objectives of the prohibition of sandeel fishing in all Scottish waters as:

“a) To seek effective protection of sandeel, as a contribution to the wider marine ecosystem. b) To provide the opportunity for wider ecosystem benefits to a range of species, including commercial fish species, seabirds and marine mammals, that will also improve resilience to changes in the marine environment. c) To complement, as far as possible, existing sandeel management measures.”²³¹

185. Section 2(2) of the Business and Regulatory Impact Assessment accompanying the Scottish Order restates these objectives in the same terms.

186. The EU considers that the objectives of the sandeel fishing prohibition should be understood to be those stated in these documents, namely to increase the biomass of sandeel stocks with the aim of bringing about wider environmental and ecosystem benefits, which include potential benefits to sandeel, seabirds, marine mammals, and other fish species.

²³⁰ DEFRA consultation document, paragraph 10, [Exhibit C-0044](#).

²³¹ Scottish Consultation Document, page 3. [Exhibit C-0049](#). The EU understands the objective (c) to be ancillary to objectives (a) and (b).

V. The Applicable Legal Framework

187. In this section, the EU sets out the general legal framework applicable to this dispute. This section is complemented by the EU's submissions on the legal standard applicable to each of its three claims.

V.1. Interpretative approach

188. The issues requiring determination in this dispute require an interpretation of multiple provisions of the TCA. In this section, the EU sets out its position as to the correct interpretative approach when construing those provisions.

189. The EU recalls that the Parties have expressly agreed on the core principles that should guide the interpretation of the TCA.

190. Article 4(1) TCA provides:

“[t]he provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.”

191. Article 4(2) TCA provides:

“[f]or greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.”

192. Article 4(3) TCA further stipulates that “an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party.”

193. The wording of Article 4(1) TCA thus establishes a primary rule of interpretation and indicates that the provisions in the TCA should be interpreted in the light of the specific objectives and purpose of the TCA.

194. The EU considers that the reference to customary international law as codified in the Vienna Convention on the Law of Treaties ('VCLT')²³² should be understood to refer to Articles 31 to 33 VCLT which are the provisions generally recognised to codify the rules of treaty interpretation under customary international law.²³³

195. In relevant part, Article 31 VCLT sets down the “General rule of interpretation” and provides:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

²³² [Exhibit CLA-0016](#).

²³³ ICJ, Territorial Dispute (Libyan Arah Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 6, paragraph 41, [Exhibit CLA-0019](#); ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 161, paragraph 41, [Exhibit CLA-0020](#).

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

196. Article 32 VLCLT provides for supplementary means of interpretation and provides:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

197. Article 33 VCLT is not applicable to the TCA.

198. On the basis of the wording of Article 4 TCA, when interpreting terms used in the TCA, the EU addresses the ordinary meaning of those terms and the context in which those terms are used which includes the objectives and purpose of TCA.

199. The EU observes in this respect that Article 495 TCA provides definitions specific to the interpretation of Heading Five. In that sense it is relevant to consider not only the terms which have been accorded a specific meaning, but also those which have not.

200. In line with the customary international law principles of interpretation, the relevant context for interpreting the terms of a treaty may also include relevant rules of international law applicable to the relations between the Parties.
201. Article 493 TCA affirms “that sovereign rights of coastal States exercised by the Parties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including the United Nations Convention on the Law of the Sea.”
202. Therefore, the Parties expressly contemplated that rules of international law are relevant context for the interpretation of Heading V.
203. Given that the TCA is a "trade and cooperation" agreement and given that the provisions at issue in this dispute are set down in Heading Five on Fisheries, which itself is included in Part Two of the TCA dealing with Trade, Transport, Fisheries and other arrangements, relevant rules in international law include the interpretation of terms and concepts under the covered agreements of the World Trade Organization (‘the WTO Agreements’).
204. Recital 6 of the Preamble to the TCA recognises that the TCA builds on the respective rights and obligations of the Parties under the Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation. Therefore, among the objectives of the TCA as a whole is the respect of the rules of international law reflected in the WTO Agreements.
205. This objective is given further expression in Heading Six of Part Two of the TCA entitled “Other provisions”. This Heading applies to the interpretation of the whole of Part Two.
206. Article 513 TCA defines what should be understood by the term “WTO Agreements” and enumerates those agreements to which this term refers.

207. Article 515 TCA provides:

“The Parties affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which they are party.

Nothing in this Agreement shall be construed as requiring either Party to act in a manner inconsistent with its obligations under the WTO Agreement.”

208. Article 516 TCA expressly accords a role to WTO case law and provides:

“The interpretation and application of the provisions of this Part shall take into account relevant interpretations in reports of WTO panels and of the Appellate Body adopted by the Dispute Settlement Body of the WTO as well as in arbitration awards under the Dispute Settlement Understanding.”

209. Since Article 516 TCA refers to “this Part”, this must be understood as a reference to all obligations under Part Two including those set down in Heading Five.

210. In light of the specific objectives of the commitments on Fisheries and the terms of the Article 493 TCA, relevant rules of international law applicable to relations between the Parties also include the law of the sea, in particular UNCLOS.

211. The terms of Article 493 TCA indicate that relevant international law is not limited to the rules reflected in UNCLOS, as illustrated by the use of the word “including” in that provision. The EU considers that the obligations on the Parties regarding fisheries must therefore, be read in the light of UNCLOS, as well as other relevant and complementary international law of the sea instruments to which both UK and EU are contracting parties. In this respect the EU recalls that under Article 404 TCA, the Parties also committed “*to acting consistently and complying*” with the agreements enumerated in that provision.

212. As to Article 4(2) TCA, on the basis of the wording of that provision, the EU acknowledges that in principle, the meaning accorded to specific terms under the domestic law of either Party does not provide a binding definition of that term for the purposes of applying the TCA. Indeed, the function of that provision is to clarify the Parties' agreement to that effect.

213. Nevertheless, this does not preclude the possibility that domestic law may nonetheless provide additional relevant context within the meaning of customary international law rules of Treaty interpretation. In particular, where a specific term has been construed under the domestic law of both Parties in a similar way, this may be additional relevant context which confirms the "ordinary meaning" to be accorded to that term. Hence, in those circumstances, the meaning ascribed to a term by the Parties under domestic law should also be considered by a treaty interpreter.

214. For this reason, where applicable, the EU has referred to both UK and Union law as additional interpretative guidance that affirms the interpretation of certain key terms, notably the term "proportionate".²³⁴

V.2. The objectives and purpose of the TCA

215. The TCA, as its title implies, is an agreement covering both preferential trade and cooperation arrangements across a number of sectors and policy areas, including fisheries.

216. These dual objectives are reflected in the Preamble to the TCA, which describes the aims of the TCA as being both to seek to establish clear and mutually advantageous rules governing trade and investment between the

²³⁴ See Section VIII.1.9 below.

Parties²³⁵ and to set down a legal framework for cooperation on areas of mutual interest.²³⁶

217. The political objective of the TCA has been expressed as being to preserve a longstanding relationship between the EU and the UK, based on partnership and cooperation.²³⁷

218. In accordance with Article 3(1) TCA, the Parties have committed to assist each other in carrying out tasks that flow from this Agreement and any supplementing agreement “in full mutual respect and good faith”. Article 3(2) TCA stipulates:

“They shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and from any supplementing agreement, and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement or any supplementing agreement.”

219. The TCA includes seven parts and a series of annexes, protocols and declarations which form an integral part of the Agreement. Any future bilateral agreements between the Parties, in accordance with Article 2 TCA, constitute supplementing agreements to the TCA, unless otherwise provided for in those agreements.

220. Part Two TCA sets down the Parties’ commitments on “Trade, transport, fisheries and other arrangements”. Heading V of that Part sets down the principal obligations relevant to “Fisheries”.²³⁸

²³⁵ See TCA, recital (4).

²³⁶ See TCA, recital (24).

²³⁷ The Parties’ objectives in this respect are recorded in the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom 2019/C 384 I/02, OJ C 384I, 12.11.2019, p. 178–193, [Exhibit C-0072](#). This provides supplementary context explaining the objectives pursued by the TCA.

221. The EU considers that two objectives of the TCA inform the interpretation of the provisions at issue in this dispute. The first is the importance of cooperation. The second is the role of regulatory autonomy. Both objectives are reflected throughout the TCA, including in Part Two, Heading Five, on Fisheries.

222. As to the objective of cooperation, a general obligation to cooperate on conservation and trade-related aspects of fishery and aquaculture policies and measures, with the aim of promoting sustainable fishing and aquaculture practices and trade in fish products from sustainably managed fisheries and aquaculture operations, is enshrined in Article 404(3) TCA. This provision addresses cooperation in “the work of relevant international organisations or bodies to which they are members, observers, or cooperating non-contracting parties, including the Regional Fisheries Management Organizations (RFMOs)” and reflects the shared recognition of the Parties expressed in Article 404(1) TCA of the “importance of conserving and sustainably managing marine biological resources and ecosystems as well as of promoting responsible and sustainable aquaculture, and the role of trade in pursuing those objectives”.

223. As indicated above, Article 493 TCA, the very first provision in Heading Five, affirms that the Parties shall exercise their sovereign rights in accordance with rules of international law, including UNCLOS. The duty of cooperation is a fundamental principle of public international law, and is intrinsic to *inter alia* UNCLOS which is a source of relevant rules of international law and hence, provides context for the interpretation of the TCA.²³⁹

²³⁸ As discussed below, Heading V must be read together with certain annexes including Annex 35 and Annex 38 TCA.

²³⁹ For example, the International Tribunal for the Law of the Sea (‘ITLOS’) has on various occasions recognised the fact “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention [UNCLOS] and general international law”.

224. To ensure that the commitment to cooperation is operationalised across the substantive provisions addressing fisheries, the Parties have agreed on mechanisms designed to ensure transparency and consultation in relation to their respective exercise of sovereign activities.

225. In the first place, Article 494(1) TCA provides that the Parties “shall cooperate” with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits.²⁴⁰

226. In the second place, Article 496(3) TCA requires each Party to notify the other Party of new fisheries management measures applicable to its waters that are likely to affect the vessels of the other Party before those measures are applied, allowing sufficient time for the other Party to provide comments or seek clarification. This notification requirement is a means to facilitate consultation and engagement on such measures.

227. In the third place, Articles 498 and 499 TCA establish a duty to cooperate in order to establish agreed TACs, which are an integral part of the arrangements on Access to Waters and Resources as set down under Part Two, Heading Five, Chapter 3 TCA.²⁴¹

228. In the fourth place, Article 507 TCA establishes a very broad data sharing obligation, which requires the Parties to “share such information as is necessary to support the implementation of this Heading, subject to each Party's laws”. This also reflects the importance of information exchange as a mechanism to achieve cooperation.

See ITLOS, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion, 21 May 2024, paragraph 296 and jurisprudence cited, [Exhibit CLA-0021](#).

²⁴⁰ See Section V.3.1.1 below.

²⁴¹ See Section V.3.3 below.

229. Finally, Article 508 TCA establishes a Specialised Committee on Fisheries which “provides a forum for discussion and cooperation in relation to sustainable fisheries management”.

230. A second relevant objective of the TCA is the desire of the Parties to give expression to their regulatory autonomy.

231. “Autonomy” is referred to in several recitals of the Preamble to the TCA. Recital 7 recognises the “Parties’ respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection.”

232. Article TCA, which defines the “Purpose” of the Agreement provides:

“This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, *respectful of the Parties’ autonomy and sovereignty.*”

233. Autonomy has also been accorded a role in the framework of the arrangements on fisheries. Indeed, one of the changes following the withdrawal of the UK from the EU is that it is no longer subject to the EU’s common fisheries policy and one of the functions of Article 493 TCA should be understood as reaffirming that the UK may exercise rights as a sovereign Coastal State.

234. As to the other provisions in Heading Five, Article 494(3)(f) TCA reflects that one of the principles that informs the obligations under Heading Five is:

“applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties”.

235. Moreover, the right to decide on fisheries management measures as set down in Article 496(1) TCA is expressly accorded to “Each Party”.

236. The relevance of “autonomy” to the interpretation of specific provisions relevant to this dispute is discussed in greater detail in the framework of EU’s arguments concerning the applicable legal standard.

V.3. Heading Five TCA: Fisheries

237. Part Two, Heading Five, of the TCA is entitled “Fisheries”. It is divided into four Chapters.

238. Chapter 1 contains “Initial Provisions”. These inform the interpretation and implementation of the remainder of Heading Five.

239. Chapter of Heading Five is entitled “Conservation and Sustainable Exploitation”. This Chapter includes Article 496 TCA which provides the legal basis for the Parties to adopt fisheries management measures.

240. Chapter 3 sets out the arrangements on access to waters to fish. It must be read subject to the terms of Annex 38 TCA.²⁴²

241. Chapter 4 addresses governance.

242. In this section the EU sets out the core legal framework relevant to this dispute and does not, therefore, exhaustively describe every provision in Heading Five TCA. Notably, the EU addresses:

²⁴² See Article 500(8) TCA and section V.3.3.

- a. Article 494 TCA which establishes the objectives and principles which guide the interpretation and implementation of the other commitments in Heading V TCA;
- b. Article 496 TCA which establishes the right to adopt fisheries management measures and establishes conditions with which such measures must comply; and
- c. the commitments pertaining to access to waters to fish and TACs in Articles 498, 500 and Annexes 35 and 38 TCA.

V.3.1. Article 494 TCA – Objectives and Principles

243. Article 494 TCA is one of the “initial provisions” in Chapter 1 of Part Two, Heading Five of the TCA. As affirmed by its locus in that Heading, it sets down overarching “objectives and principles” which the Parties intend to inform all aspects of their cooperation on fisheries as defined in Heading Five.

244. Therefore, these objectives and principles are relevant to the interpretation of the provisions setting out the obligations concerning fisheries management in Article 496 TCA, as well as to the interpretation of the provisions relating to access to waters to fish as defined in Annex 38 TCA which itself derogates from Article 500 TCA.²⁴³ This interrelationship is, as regards Article 496 TCA in particular, confirmed by the explicit renvoi in that provision to Article 494 TCA.

245. Article 494 TCA contains three subparts.

- a. Articles 494(1) and (2) TCA identify “objectives”.

²⁴³ As explained in section 1.a.i)(1)(b) Article 500(8) TCA provides that this provision shall apply “subject to Annex 38” TCA. Therefore, the obligations governing access to waters are currently provided for in Annex 38 TCA.

b. Article 494(3) TCA identifies “principles”.

246. There is a difference between an “objective” which is aspirational and a “principle”, which guides or delimits the pursuit of those objectives by the Parties.

V.3.1.1. Objectives

247. Article 494(1) TCA provides that the Parties “shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States.”

248. In the first place, this provision mandates the Parties to cooperate as indicated by the term “shall”. This flows logically from the aim of this provision which is to address the objectives relevant to “shared” stocks. The management of a “shared stock” necessitates cooperation as fish swim across borders.

249. In the second place, the expression “with a view to ensuring” reflects that the Parties aim at securing a specific outcome: that fishing activities for shared stocks in their waters are “environmentally sustainable in the long term and contribute to achieving economic and social benefits”. This contrasts with the mandatory means through which this aim is to be pursued (i.e. cooperation as illustrated by the term “shall cooperate”).

250. Article 494(1) TCA reflects a duality of objective. The Parties aim to ensure both that (i) “fishing activities for shared stocks in their waters are environmentally sustainable in the long term”; and (ii) that these activities “contribute to achieving economic and social benefits”.

251. Article 494(2) TCA identifies as a separate objective that shared stocks should be exploited “at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield.”

252. The fact that the objective is “shared” flows logically from the fact that this provision addresses “shared stocks”.

253. As to the principles governing the “*sustainable*” management of fish stocks, the EU refers to section III.1 above.

V.3.1.2. Principles

254. Article 494(3) TCA is structured as a chapeau followed by nine principles to which, in line with the terms of the chapeau, the Parties “shall have regard”. The nine principles set down in Article 494(3) TCA are intended to guide the design and delimit the application of any measure taken in pursuit of the objectives described in Articles 494(1) and (2) TCA.

255. The term “shall have regard” should be understood to mean that the Parties must take these principles actively into account. Indeed, according to the Oxford English Dictionary, the meaning of the term “regard” in this context is:

“To heed or take into account in determining action or conduct.”²⁴⁴

256. It is, therefore, clear from the use of the term “shall have regard” in the chapeau of Article 494(3) TCA, that consideration of all the principles set down under points (a) to (i) is not optional but rather mandatory.

257. The principles enumerated in points (a) to (i) of Article 494(3) TCA are not expressed as being in hierarchical order and must, therefore, be considered concurrently.

258. They must each be construed in the light of their specific terms which are not identical. In particular, the verb that is used to denote their function varies. In view of this, it would not be reasonable to suppose that the

²⁴⁴ See Oxford English Dictionary, s.v. “regard (v.), sense I.4.a,” June 2024, <https://doi.org/10.1093/OED/9913621580>.

Parties intended to accord the same relationship to each and every principle.²⁴⁵ For instance, “applying” is to be differentiated from “taking due account”.

259. Of these nine principles, four are of particular relevance to the present dispute.

- Article 494(3)(a) TCA refers to “applying the precautionary approach to fisheries management”;
- Article 494(3)(c) TCA refers to “basing conservation and management decisions for fisheries on the best available scientific advice, principally that provided by the International Council for the Exploration of the Sea (ICES)”;
- Article 494(3)(e) TCA refers to “taking due account of and minimising harmful impacts of fishing on the marine ecosystem and of the need to preserve marine biological diversity”; and
- Article 494(3)(f) TCA provides that among the principles to which the Parties “shall have regard” is “applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties”.

260. The EU addresses the interpretation of the principles set down in the subparagraphs of Article 494(3) TCA under its specific claims.

²⁴⁵ Whilst the EU considers that this is evident from the choice of the Parties to use different terms, see by analogy the Appellate Body Report, US – Gasoline, pp. 17-18, ([Exhibit CLA-0022](#)) when construing the general exceptions under Article XX of the GATT 1994 which likewise use different terms.

V.3.2. Article 496 TCA – Fisheries management

261. Chapter 2 of Heading Five is entitled “Conservation and Sustainable Exploitation”. It comprises two provisions.

- Article 496 TCA is entitled “Fisheries management” and establishes a legal basis for the Parties to decide on fisheries management “measures”.
- Article 497 TCA makes provision for “Authorisations, compliance and enforcement”. In that sense, it sets out mechanisms intended to operationalise the commitments in Article 496 TCA.

262. Article 496(1) TCA provides:

“Each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2) and having regard to the principles referred to in Article 494(3).”

263. It flows from the ordinary meaning of the terms in Article 496(1) TCA that:

- (a) the Parties each have autonomy to “decide” on measures in their “waters”; and
- (b) the permissible purpose of those measures and means for achieving this purpose are informed by Article 494 TCA and hence Article 496 TCA must be read together with Article 494 TCA.

264. Article 496(2) TCA provides:

“A Party shall base the measures referred to in paragraph 1 on the best available scientific advice.

A Party shall not apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the same measures to its own vessels.”

265. It flows from the ordinary meaning of the terms in Article 496(2) TCA that:

- any “measures” decided on pursuant to Article 496(1) TCA must fulfil a positive requirement. Namely those measures must be “based” on the “*best available scientific advice*” (Article 496(2), first subparagraph TCA); and
- any “measures” decided on pursuant to Article 496(1) TCA must fulfil a negative requirement. Namely, those measures must not be applied to the vessels of the other Party “*unless*” the “*same*” measures are applied to that Party’s own vessels (Article 496(2), second subparagraph TCA). As explained further in section V.3.2.5 below, this should be understood to be an articulation of a national treatment principle which is itself an expression of the requirement that measures must be “non-discriminatory” on grounds of origin.

V.3.2.1. The meaning of a “fisheries management” measure in Article 496 TCA

266. The title of Article 496 TCA affirms that this provision concerns “fisheries management” and hence, the measures it addresses are measures related to “fisheries management”.

267. Since this provision is in a chapter entitled “conservation and sustainable exploitation”, “fisheries management” must be understood as being a tool related to giving effect to those specific objectives and having regard to the principles referred to in Article 494(3) TCA.

268. Whilst “fisheries management” is not a defined term as such, Article 495(1)(b) TCA provides:

“precautionary approach to fisheries management” means an approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve

target species, associated or dependent species and non-target species and their environment;”

269. It follows from this definition that “management measures to conserve target species, associated or dependent species and non-target species and their environment” are all considered to be potential “fisheries management” measures.

270. Equally, Article 498(4)(d) TCA identifies that among the issues Parties may wish to consult upon are “measures for fisheries management, including, where appropriate, fishing effort limits”. It follows from this provision that “fishing effort limits” may also be considered a potential “fisheries management” measure.

271. Article 508 TCA provides that the Specialised Committee on Fisheries may

“consider measures for fisheries management and conservation, including emergency measures and measures to ensure selectivity of fishing”;

272. Therefore, “measures to ensure selectivity of fishing” may also be fisheries management measures.

273. All of these provisions indicate that the Parties have chosen to define a “fisheries management” measure primarily by reference to the purpose that is pursued and have considered a broad range of means to be apt for achieving that purpose. Therefore, the objective that a measure pursues is central to the question of whether a given “fisheries management” measure is consistent with the requirements of Article 496 TCA. For these purposes, measures decided on for the conservation of marine living resources and the management of fisheries resources also fall within the definition of a fisheries management measure as defined in Article 496 TCA. In other words, that provision governs any measure decided upon in pursuit of the objectives in 494 TCA.

274. According to its ordinary meaning, the term “in pursuit of” as used in Article 496(1) TCA is to be understood as meaning “in order to achieve” the said objectives.

275. As to the normative content of the objectives, this must be understood by reference to Articles 494(1) and (2) TCA.

276. As described in section V.3.1 above, those provisions contemplate measures that have two discrete objectives both of which are directed towards the management of shared stocks. Moreover, Articles 494(1) and (2) TCA contain a finite list of enumerated objectives.²⁴⁶

277. This interpretation is also consistent with other relevant rules of international law which, therefore, provide relevant context when interpreting the ordinary meaning of this provision.

278. In particular, the FAO Code of Conduct for Responsible Fisheries²⁴⁷ refers to “fisheries management measures”. While the FAO Code of Conduct is not formally legally binding, it is in part “based on relevant rules of international law”, and hence provides relevant context. Indeed, it is one of the instruments specifically mentioned in Article 404(2)(a) TCA.

279. The FAO Code of Conduct establishes inter alia “principles and criteria for the elaboration and implementation of national policies for responsible conservation of fisheries resources and fisheries management and development” (Article 2(b) of the Code).

²⁴⁶ To recall, these objectives are to “cooperate with a view to ensuring that fishing activities for shared stocks in [the Parties’] waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States as exercised by the Parties” and to exploit “shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield.”

²⁴⁷ FAO, Code of Conduct for Responsible Fisheries, [Exhibit CLA-0033](#).

280. Article 6 of the FAO Code stipulates certain General Principles regarding Fisheries Management and provides that “fisheries management should promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development. Management measures should not only ensure the conservation of target species but also of species belonging to the same ecosystem or associated with or dependent upon the target species”.

281. Article 7.1.1 of the FAO Code of Conduct specifies:

“States and all those engaged in fisheries management should, through an appropriate policy, legal and institutional framework, adopt measures for the long-term conservation and sustainable use of fisheries resources. Conservation and management measures, whether at local, national, subregional or regional levels, should be based on the best scientific evidence available and be designed to ensure the long-term sustainability of fishery resources at levels which promote the objective of their optimum utilization and maintain their availability for present and future generations”.

The long-term conservation and sustainable use of the fisheries resources as the key objective of fisheries management measures is further restated in Article 7.2.1 of the FAO Code of Conduct.

282. Therefore, this affirms that it is primarily the objective of a measure that delimits what is and what is not a fisheries management measure.

V.3.2.2. The right of each Party to “decide on any measures applicable to its waters” under Article 496(1) TCA

283. According to the Oxford English Dictionary, the term “decide” means:

“To arrive at an opinion or conclusion about (a matter under consideration); to make a decision regarding (question, issue, etc., on which there is doubt or dispute), esp. after considering several alternatives.”²⁴⁸

284. This term, as used in Article 496(1) TCA reflects therefore, that “each Party” may, having considered relevant factors, reach a conclusion on the measures it will apply to its waters.

285. The reference to “each Party” is an expression of regulatory autonomy. As indicated above, this provision reflects a change in the legal situation following the withdrawal of the UK from the EU since under Union law, Article 3(1)(d) TFEU²⁴⁹ provides that “the EU shall have exclusive competence” in the area of “the conservation of marine biological resources under the Common Fisheries Policy”. It must therefore be accorded relevance and meaning.

286. For these purposes, “waters” is a defined term in Article 495(1)(g) TCA:

““waters” (of a Party) means:

(i) in respect of the Union, by way of derogation from Article 774(1), the EEZs of the Member States and their territorial seas;

(ii) in respect of the United Kingdom, its EEZ and its territorial sea, excluding for the purposes of Articles 500 and 501 and Annex 38 the territorial sea adjacent to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man.”

287. The right accorded to each Party to “decide” on “any measures” in its “waters” is, however, made subject to certain constraints. These are specified in the remainder of the clause as well as in Article 496(2) TCA.

²⁴⁸ Oxford English Dictionary, s.v. “decide (v.1),” September 2024, <https://doi.org/10.1093/OED/2027886117>

²⁴⁹ Treaty on the Functioning of the European Union, [Exhibit CLA-0065](#).

288. In the first place, such measures must be in “*pursuit*” of the specific objectives defined in Articles 494(1) and (2) TCA. As discussed above, this indicates that only measures that have as their purpose one or both of the objectives in Article 494 TCA will be a “fisheries management” measure consistent with the requirements of Article 496 TCA.

289. In the second place, when deciding on measures, “regard” must be had to the principles in Article 494(3) TCA. This obligation informs the considerations that must be taken into account by the decision-maker.

290. The expression “and having regard” in this provision is also significant. The placement of the comma as well as the use of the conjunction “*and*” denotes that when deciding on measures applicable to a Party’s waters adopted in pursuit of the objectives in Articles 494(1) and (2), the Party shall additionally, “have regard” or “heed” the principles in Article 494(3) TCA.²⁵⁰

291. Consequently, the decision on the measures contemplated by Article 496(1) TCA precludes the Party taking that decision from considering exclusively the objectives defined in Articles 494(1) and (2) TCA.

292. The use of the expression “having regard to” in Article 496(1) TCA mirrors the language used in Article 494(3) TCA, which requires Parties to “*have regard to*” the principles enumerated in points (a) to (i) of that provision. This underscores their relevance in the context of deciding on fisheries management measures pursuant to Chapter 2 (Conservation and Sustainable Exploitation).

293. The relevant context for interpreting Article 496 TCA indicates that there are additional constraints on the exercise of the autonomous “decision-making” power set down in Article 496 TCA.

²⁵⁰ On the interpretation of the term “have regard” see further Section V.3.1.2 above.

294. In particular, as reflected in the preamble to the TCA and in Article 493 TCA, the sovereign rights of coastal States exercised by the Parties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including the United Nations Convention on the Law of the Sea. Therefore, the Parties' respective autonomy to "*decide*" is also constrained by the obligation to adhere to international law, in particular to the international agreements to which they have both consented to be bound.²⁵¹

V.3.2.3. UNCLOS as relevant context for interpreting Article 496 TCA

295. UNCLOS seeks to establish a legal order for the seas and oceans which will, among other things, facilitate international communication, and will promote the equitable and efficient utilisation of the resources of the seas and oceans, the conservation of their living resources, and the study, protection and preservation of the marine environment.²⁵² The general character of UNCLOS is directed towards a delicate balancing of rights and competing interests, as an interrelated, integral package where rights and obligations go hand-in-hand.

296. On fisheries, the legal framework provided in Part V of UNCLOS on the EEZ provides for the balancing between the sovereign rights of coastal States and the rights of other States to access any surplus. While there is a clear obligation of conduct of coastal States to ensure, through conservation and management measures, the maintenance of marine living resources in their EEZ, in complying with that obligation coastal States are required to take into account the "best scientific advice available" to them (Article 61(2) UNCLOS).

²⁵¹ See Preamble to the TCA, recital (20).

²⁵² 4th preambular clause of UNCLOS, [Exhibit CLA-0023](#).

297. In taking measures, coastal states shall also take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction becomes seriously threatened (Article 61(4) UNCLOS).
298. Article 61 UNCLOS moreover provides for obligations to cooperate and to contribute and exchange scientific information and other relevant data.
299. Coastal States are under the obligation to determine their capacity to harvest the living resources of the EEZ (Article 62(2) UNCLOS) which builds on their obligation to determine the allowable catch of the living resources in the EEZ (Article 61(1) UNCLOS). Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, for instance through agreements, give other States access to the surplus of the allowable catch (Article 62(2) UNCLOS).
300. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and the laws and regulations of the coastal State. These laws and regulations shall be consistent with the Convention and may, for instance, relate to determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or over a period of time (Article 62(4)(d) UNCLOS).
301. Pursuant to Article 62(4) UNCLOS, coastal States shall give due notice of conservation and management laws and regulations.

V.3.2.4. The obligation to “base” measures on the “best available scientific advice” in Article 496(2) TCA

302. Pursuant to Article 496(2) TCA, a Party shall “base” the measures referred to in paragraph 1 on the “best available scientific advice”.
303. Article 496(2) TCA reiterates the Parties’ obligation to have regard to the principle of basing fisheries conservation and management decisions on

the “best available scientific advice”, principally that provided by ICES as provided for in Article 494(3)(c) TCA.

304. The use of the term “shall” establishes an obligation to “*base*” measures on that scientific advice.

305. The central importance of the principle of “best available scientific advice” in taking fisheries management and conservation measures is made operational by the terms “base (...) on” (Article 496(2) TCA) and “basing (...) on” (Article 494(3)(c) TCA).

306. Starting from the ordinary meaning of the term, according to the Oxford English Dictionary, “to base” means “to place on (also upon) a foundation, fundamental principle, or underlying basis”²⁵³.

307. This suggests that, pursuant to Article 496(2) TCA and Article 494(3)(c) TCA, conservation and management decisions are to be placed on a foundation of the best available scientific advice which is to serve as the underlying basis of these decisions.

308. Article 496(2) TCA should therefore be understood to impose that conservation and fisheries management decisions taken pursuant to such advice are “placed on a foundation” of the “best available scientific advice”.

309. This interpretation is confirmed by the object and purpose of ensuring the environmental sustainability of fishing activities (Article 494(1) TCA) and maintaining and progressively restoring populations of harvested species above biomass levels that can produce the maximum sustainable yield (Article 494(2) TCA). The realisation of both objectives is critically dependent on the best available scientific advice, given environmental

²⁵³ Oxford English Dictionary, s.v. “base (v.3),” July 2023, <https://doi.org/10.1093/OED/6384815056>.

sustainability and the state of harvested species populations are intrinsically science-based.²⁵⁴

310. The obligation “to base” conservation and management decisions on the best available scientific advice constitutes an obligation of result, given that it requires a specific outcome.²⁵⁵ The specific outcome owed in the given context is that conservation and management decisions are based on the best available scientific advice.

311. The use of the terms “base (...) on” and “basing (...) on” is in line with similar terms used in the context of international instruments establishing regional fisheries management organisations (‘RFMOs’).²⁵⁶

312. By contrast, Article 61(2) UNCLOS requires the “taking into account” of the best scientific evidence which should be understood as a different standard. According to the Oxford English Dictionary, the meaning of “to take into account” is “to take into consideration, esp. as a contributory factor; to notice.”²⁵⁷ Article 61(2) UNCLOS thus establishes an obligation of conduct.²⁵⁸

313. Since the requirement to base conservation and management decisions on the best available scientific advice in Article 496(2) TCA constitutes an

²⁵⁴ See further section VII below.

²⁵⁵ Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009, p. 3, para. 27, [Exhibit CLA-0024](#); ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 110, [Exhibit CLA-0025](#).

²⁵⁶ For example: “based on” [NEAFC, NAFO, SEAFO, SPRFMO, GFCM, NPFC, WCPFC, IATTC] or “on the basis of” [SIOFA, CCAMLR, ICCAT, IOTC]).

²⁵⁷ Oxford English Dictionary, s.v. “to take account of” in account (n.), sense P.2.g.i,” September 2024, <https://doi.org/10.1093/OED/1255070184>.

²⁵⁸ The term “taking into account” is also used in the international instrument establishing NASCO.

obligation of result, in order to meet the requirements of Article 496(2) TCA, read together with Article 494(3)(c) TCA, the Parties must establish a rational or objective relationship between the best available scientific advice on one hand and any conservation and management measures adopted pursuant to it on the other.

314. By way of summary:

- Article 496(2) TCA emphasises the central importance of “best available scientific advice” as a foundation or basis for fisheries management and conservation decisions; and
- the obligation to “base” fisheries management and conservation decisions on the “best available scientific advice” must be interpreted to mean that the Parties must establish a rational or objective relationship between the “best available scientific advice” and the conservation and management measures adopted pursuant to it in the sense that such measures are placed on a foundation of the best available scientific advice.

315. The meaning to be ascribed to the term “best available scientific advice” is discussed under Claim 1.²⁵⁹

V.3.2.5. The non-discrimination requirement in Article 496(2) TCA

316. The second sentence of Article 496(2) TCA sets down a further constraint on the measures that may be decided on by the Parties. It affirmatively states that Parties “*shall not*” apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the “*same measures*” to its own vessels. This is an absolute limitation in the sense that it cannot be derogated from.

²⁵⁹ See section VII.1.1.

317. The reference to vessels of “a Party” and “of the other Party” reflects that this provision is intended to address discrimination on grounds of origin. In other words, this should be understood as a non-discrimination obligation in the form of a national treatment provision.

318. For these purposes, a “vessel” is a defined term in Article 495(1)(h) TCA which provides:

“vessel” (of a Party) means:

(i) in the case of the United Kingdom, a fishing vessel flying the flag of the United Kingdom, registered in the United Kingdom, the Bailiwick of Guernsey, the Bailiwick of Jersey or the Isle of Man, and licensed by a United Kingdom fisheries administration;

(ii) in the case of the Union, a fishing vessel flying the flag of a Member State and registered in the Union.”

319. This clause is also an expression of the principle in Article 494(3)(f) that measures applied must be “non-discriminatory”. It makes clear that the requirement that measures cannot discriminate on grounds of origin cannot be derogated from.

320. The obligation to ensure that any measures decided on pursuant to Article 496(1) TCA must be understood as an obligation to ensure that such measures do not discriminate either *de jure* or *de facto* on grounds of origin.²⁶⁰

²⁶⁰ See section VIII.2.2 below.

321. As discussed below in the context of Claim 2, this interpretation is consistent with the approach in other parts of the TCA and hence with the object and purpose of the TCA.²⁶¹

322. This interpretation also reflects the approach that has been applied when interpreting the principle of non-discrimination under international economic law, the rules of which also provide relevant context for the interpretation of this term. Indeed, recital 6 to the preamble of the TCA confirms that this Agreement is intended to build on the obligations of the Parties under the WTO Agreements, an objective that is made binding in Article 515 TCA.

323. In this framework, the EU recalls that when interpreting obligations under the GATT 1994 and other covered WTO agreements, including the TBT Agreement the Appellate Body has consistently construed the core disciplines to cover both *de jure* and *de facto* discrimination.²⁶² The TBT Agreement and the GATT 1994 are among the ‘WTO Agreements’ which the Parties have agreed to be relevant to the interpretation of all obligations in Part Two of the TCA of which the Fisheries Heading forms part.²⁶³

324. Similarly, UNCLOS precludes discrimination on the grounds of the origin of a vessel in “form and fact” in a number of its provisions.²⁶⁴ The rules set down in UNCLOS are also relevant context for the interpretation of Article 496(2) TCA and hence confirm that this provision should be understood to preclude *de jure* and *de facto* discrimination.

²⁶¹ See for instance Article 300(2) TCA which refers to “treatment under terms and conditions no less favourable than that accorded to any other like entity in like situations.”

²⁶² For instance, Appellate Body Report, Korea – Various Measures on Beef, paras 136-137, [Exhibit CLA-0026](#).

²⁶³ See Article 513 TCA.

²⁶⁴ See further section VIII.2.3.2 below.

325. The legal standard for determining *de facto* discrimination for these purposes is considered in section VIII.2 below, to which the EU refers.

V.3.2.6. The “precautionary approach”

326. Article 493(3)(a) refers to the “precautionary approach”. It provides that among the principles to which the Parties shall have regard is:

“applying the precautionary approach to fisheries management”.

327. It follows that Parties are to apply the precautionary approach when deciding on fisheries management measures under Article 496 TCA.

328. The “precautionary approach” referred to in Article 493(3)(a) TCA is defined in Article 495 TCA as meaning:

“an approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment”.

329. As a result of the wording of Article 495 TCA which refers to “the absence of adequate scientific information”, the application of the precautionary approach is contingent there being such an absence.

330. Given that the Parties are under an obligation to base fisheries management measures on the “best available scientific advice” (Article 496(2) TCA read together with Article 494(3)(c) TCA), the application of the precautionary approach must be interpreted in the context of that other obligation. When applying the precautionary approach Parties must, therefore, take into account the “best available scientific advice”.

331. Other rules of international law also provide relevant context for interpreting this term.

332. In terms of the international law of the sea, UNCLOS does not refer explicitly to the precautionary approach. Nevertheless, in Case No. 17 the

Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (‘ITLOS’) found that the precautionary approach constitutes a due diligence obligation that “*applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks*”.²⁶⁵

333. The role of the precautionary approach is to recognise that while scientific advice might be uncertain at present, action may still have to be taken as matter of “prudence and caution”.²⁶⁶ This is also recognised in Article 6(2) of the UN Fish Stocks Agreement (‘UNFSA’) according to which the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

334. At the same time, the rules of international law underline the importance of scientific evidence in the application of the precautionary approach and affirm the interpretation that this approach cannot be relied upon to displace the role of the “best available scientific advice”.

335. The intrinsic connection between the best available scientific advice and the precautionary approach was recognised by the UK in its written statement to ITLOS in Case No. 31, where the UK stated that “the best

²⁶⁵ ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion, 1 February 2011, ITLOS Reports 2011, paragraph 131, [Exhibit CLA-0025](#). See also ITLOS, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion, 21 May 2024, paragraph 213. [Exhibit CLA-0021](#).

²⁶⁶ In the Southern Bluefin Tuna case, ITLOS held that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna”. Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Report 1999, para. 77. [Exhibit CLA-0027](#).

available science is linked to the precautionary principle as it is the state of scientific knowledge that will inform, for example, whether particular prudence and caution are demanded with respect to a proposed course of action.”²⁶⁷

336. This position accords with Article 6.5 of the FAO Code of Conduct²⁶⁸, which states: “States and subregional and regional fisheries management organizations should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available.”

337. Moreover, Article 6(3)(a) UNFSA provides that, “in implementing the precautionary approach States shall improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty.”

338. Moreover, as the precautionary approach implies taking measures in situations where the best available scientific advice is unreliable, uncertain or insufficient, international law recognises an obligation to review measures regularly in the light of new information. Such obligations are reflected in Articles 6(5),²⁶⁹ 6(6)²⁷⁰ and 6(7)²⁷¹ UNFSA, as well as in the context of Articles 7.5.4 and 7.5.5 of the FAO Code of Conduct.

²⁶⁷ ITLOS, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (UK written statement), paragraph 89 point b, [Exhibit C-0073](#).

²⁶⁸ FAO, Code of Conduct for Responsible Fisheries, [Exhibit CLA-0033](#).

²⁶⁹ Article 6.5 UNFSA: “Where the status of target stocks or non-target or associated or dependent species is of concern, States shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.” United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the

V.3.2.7. Conclusion

339. In sum, Article 496 TCA provides a legal basis for each of the Parties to decide on measures applicable in its waters.

340. However, such measures must pursue one or both of the objectives in Article 494 TCA.

341. Moreover, the Parties must ensure that any such measure is:

(a) based on the best available scientific advice (Article 496(2) TCA); and

(b) not discriminatory on grounds of origin (Article 496(2) TCA).

342. These are obligations of result.

343. In addition, each Party has additional obligations when deciding on measures. It must have regard to the principles referred to in Article 494(3) TCA (Article 496(1) TCA).

Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), [Exhibit CLA-0028](#).

²⁷⁰ Article 6.6 UNFSA: “For new or exploratory fisheries, States shall adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.” [Exhibit CLA-0028](#).

²⁷¹ Article 6.7 UNFSA: “If a natural phenomenon has a significant adverse impact on the status of straddling fish stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and shall be based on the best scientific evidence available.” [Exhibit CLA-0028](#).

344. Therefore, whereas the Parties shall apply a “precautionary approach”:

(a) a measure that is not in pursuit of one of the objectives in Article 494 TCA and/or which is not based on the best available scientific advice and/or which is discriminatory on grounds of origin cannot be considered a “fisheries management” measure that is consistent with the requirements of Article 496 TCA; and

(b) Where the Party deciding on a measure fails to have regard to the principles referred to in Article 494(3) TCA, that Party will have breached its obligations when deciding on that measure under Articles 496(1) and (2) TCA.

V.3.3. Access to waters to fish

345. One of the functions of Heading Five is to establish a framework for the granting of access by the Parties to their respective “waters” to fish.²⁷² This framework is set down in Chapter 3 entitled “Arrangements on Access to Waters and Resources”.

346. At the outset, the EU recalls that each Party has the sovereign right to grant access to its waters to fish and that, under the TCA it has committed to do so in accordance with the general principles of international law and in accordance with obligations to which it has consented to be bound under international law. This is recalled in Article 493 TCA.

347. Whilst the grant of access to waters to fish must be understood as a sovereign “right” which each Party may exercise, under the TCA, the Parties made commitments which govern how they would exercise that sovereign right vis-à-vis one another. In that sense, they accepted to limit their autonomy to exercise the right to grant access to their respective waters to fish by reference to the commitments in Heading Five, Chapter 3

²⁷² As explained above, “waters” is a defined term under Article 495 TCA.

and, during a specific period of time, by reference to the commitments in Annex 38 TCA.

348. The core obligation on “Access to Waters” to fish is set down in Article 500(1) TCA which stipulates:

“Provided that TACs have been agreed, each Party shall grant vessels of the other Party access to fish in its waters in the relevant ICES sub-areas that year. Access shall be granted at a level and on conditions determined in those annual consultations.”

349. This provision therefore establishes a relationship between the agreed TACs and the right of access to waters to fish.

350. The rules governing the setting of TACs are themselves contained in Article 498 TCA, entitled “Fishing Opportunities”. A TAC is a defined term under Article 495(1)(d) TCA and means:

“the total allowable catch, which is the maximum quantity of a stock (or stocks) of a particular description that may be caught over a given period;”

351. As explained in section III.3 above, specific principles apply to the setting of TACs for shared stocks and these are reflected in Annex 35 TCA.

352. Importantly, Article 500(8) TCA provides:

“This Article shall apply subject to Annex 38”.

353. It must, therefore, be read together with Annex 38 TCA.

354. Annex 38 TCA is entitled “Protocol on Access to Waters”. Article 1 of Annex 38 TCA establishes an adjustment period from 1 January 2021 until 30 June 2026. It provides:

“An adjustment period is hereby established. The adjustment period shall last from 1 January 2021 until 30 June 2026”.

355. This dispute has arisen in the adjustment period.

356. For that reason, the obligations on access to waters to fish currently applicable are those set down in Annex 38 TCA.

357. The interpretation of Annex 38 TCA is, nevertheless, informed by the relevant context reflected in not only Article 500 TCA but also other provisions in Heading Five.

V.3.3.1. The rationale for the adjustment period

358. The rationale for the adjustment period established in Article 1 of Annex 38 TCA is explained in the preamble to that Annex. In particular, the third preambular paragraph notes the “social and economic benefits of a further period of stability, during which fishers would be permitted until 30 June 2026 to continue to access the waters of the other Party to fish as before the entry into force of the TCA.”

359. This reflects that, prior to the TCA and whilst the UK was a Member State of the EU, EU vessels had broad access rights to UK waters to fish. In other words, the purpose of the adjustment period is conferring “social and economic benefits” associated with stability to be achieved by preserving a greater degree of access to each Party’s waters than that contemplated by Article 500 TCA which comes into application after 30 June 2026.

360. This change in the legal situation and the need for an “adjustment” prior to it occurring is also reflected in the first preambular paragraph to Annex 38 which affirms the “sovereign rights and obligations of independent coastal States exercised by the Parties”. This should be understood as a renvoi to Article 493 TCA and an expression of regulatory autonomy.

361. Annex 38 TCA is temporary in its application. This flows from the setting of a specific time frame in which the “adjustment period” is applicable.

362. This is also clear from other provisions within Annex 38 which establish procedural requirements related to the termination of the “adjustment period”.

363. Thus, Article 2(2) of Annex 38 TCA provides:

“The Parties shall notify the other Party of any change in the level and conditions of access to waters that will apply from 1 July 2026.

364. In addition, Article 2(3) of Annex 38 TCA provides:

“Article 501 of this Agreement shall apply mutatis mutandis in relation to any change under paragraph 2 of this Article in respect of the period from 1 July 2026 to 31 December 2026.”

365. It flows from the ordinary meaning of the terms of Articles 2(2) and 2(3) of Annex 38 TCA that the legal framework regarding access to waters to fish will change after 30 June 2026 and from that date the “level and conditions of access to waters” may differ. Indeed, it is precisely for that reason that a period for “adjustment” is required.

V.3.3.2. The right of full access to waters to fish in Article 2(1) of Annex 38 TCA

366. Article 2 of Annex 38 TCA sets down an express derogation from the provisions on access to waters in Articles 500(1), (3), (4), (5), (6) and (7) TCA during the adjustment period. In that period, the obligations concerning access to waters are therefore, those set down in Annex 38 TCA.

367. Article 2(1) of Annex 38 TCA provides:

“By way of derogation from Article 500(1), (3), (4), (5), (6) and (7) of this Agreement, during the adjustment period each Party shall grant to vessels of the other Party full access to its waters to fish:

(a) stocks listed in Annex 35 and in tables A, B and F of Annex 36 at a level that is reasonably commensurate with the Parties’ respective shares of the fishing opportunities;

(b) non quota stocks at a level that equates to the average tonnage fished by that Party in the waters of the other Party during the period 2012-2016;

(c) for qualifying vessels to the zone in the waters of the Parties between six and twelve nautical miles from the baselines in ICES divisions 4c and 7d-g to the extent that each Party's qualifying vessels had access to that zone on 31 December 2020.

For the purposes of point (c), "qualifying vessel" means a vessel of a Party, which fished in the zone mentioned in the previous sentence in at least four years between 2012 and 2016, or its direct replacement.”

368. First, the chapeau to Article 2(1) of Annex 38 TCA, on its ordinary meaning affirms that the obligation to grant “full access to its waters to fish” is linked to a purpose – namely “to fish”. Therefore, this provision is not intended to simply preserve a right for vessels to access or enter the waters of the other Party. A right of access to waters in the sense of entering waters would apply in any event pursuant to Article 58(1) UNCLOS. Rather, Article 2(1) of Annex 38 TCA is explicitly intended to preserve or guarantee the right to access those waters in order to carry out an economic activity, i.e. to “fish”. This same term appears in Articles 497, 500 and 502 TCA.

369. Second, since Article 2(1) of Annex 38 TCA establishes a derogation, this right applies in lieu of the agreement reflected in Article 500 TCA.²⁷³

370. Third, to ascertain the scope of the rights under Annex 38, it is helpful to compare the terms of Article 2(1)(a) to (c) of Annex 38 TCA with the terms of Articles 500(1), (3), (4), (5), (6) and (7) TCA. Indeed, if the rights

²⁷³ See the definition of “derogation” in the Oxford English Dictionary: “the partial abrogation or repeal of a law, contract, treaty, legal right, etc”. Oxford English Dictionary, s.v. “derogation (n.),” June 2024, <https://doi.org/10.1093/OED/2165675956>.

were identical in scope, there would be no need for a “derogation” to allow for an “adjustment” and hence the terms “derogate” and “adjustment” must be accorded some relevance and meaning.

371. In the first place, Annex 38 TCA, like Article 500(1) TCA, acknowledges the relevance of the Parties’ agreement on TACs. This flows from the ordinary meaning to be accorded to the terms of Article 2(1)(a) of Annex 38 TCA.

372. In particular, in so far as point (a) refers to “*fishing opportunities*”, this should be understood as a reference the provision setting down the Parties’ commitments on “fishing opportunities” in Heading Five, namely Article 498 TCA.

373. Article 498(1) TCA provides:

“By 31 January of each year, the Parties shall cooperate to set the schedule for consultations with the aim of agreeing TACs for the stocks listed in Annex 35 for the following year or years. That schedule shall take into account other annual consultations among coastal States that affect either or both of the Parties.”

374. In the second place, the expression “full access” in Article 2(1) TCA is broader than the terms of Article 500(1) TCA which establishes an obligation to allow “access to fish in its waters in the relevant ICES sub-areas that year”. The second sentence of that provision then specifies that:

“Access shall be granted at a level and on conditions determined in those annual consultations.”

375. The use of the adjective “full” just before the word “access” in Annex 38 reflects the nature of the “access” rights that are being preserved in the “adjustment period”.

376. The second preambular paragraph to Annex 38 TCA emphasises that the right of each Party to grant vessels of the other Party access to its waters to

fish is “ordinarily to be exercised in annual consultations following the determination of TACs for a given year in annual consultations”. This provides relevant context confirming that Article 2(1)(a) of Annex 38 TCA should be interpreted as meaning that when a “fishing opportunity” i.e. a “TAC” is agreed for a jointly managed shared fish stock in EU and UK waters, the Parties must “usually” or “ordinarily” grant each other “full access” to their “waters” in order “to fish” that stock at a level that is “reasonably commensurate” with the “guaranteed share” of the agreed TAC.

377. This interpretation is reinforced by the rationale for the adjustment which is described above and hence the stability that is derived from the certainty of the level of access (i.e. full access to fish) that must be conferred.

378. As has been explained, for shared stocks, of which sandeel, Annex 35 TCA specifies the shares that have been agreed by the Parties on conclusion of the TCA. Therefore, for those stocks, “full access to waters to fish” must be understood to mean “full access to waters to fish” that stock at a level that is “reasonably commensurate” with the “guaranteed share” of the agreed TAC as set down in Annex 35 TCA. The precise volume depends on the TAC set in annual consultations.

V.3.3.3. The relationship between fisheries management and access to waters to fish

379. The EU does not consider that the obligation to ensure “full access to waters to fish” is absolute.

380. Heading Five contains provisions that are designed to give effect to the Parties’ shared commitment to promoting “the peaceful use of the waters adjacent to their coasts and the optimum and equitable utilisation of the

marine living resources in those waters including the continued sustainable management of shared stocks.”²⁷⁴

381. In particular, Article 496 TCA, as described above, establishes a legal basis for the Parties to adopt measures for the purpose of achieving the objectives in Articles 494(1) and (2) TCA, which aim to ensure the environmental sustainability of fishing activities and the sustainable exploitation of shared stocks.

382. In addition, Article 497(2) TCA provides that:

Each Party shall take all necessary measures to ensure compliance by its vessels with the rules applicable to those vessels in the other Party's waters, including authorisation or licence conditions.

383. It follows that the Parties contemplated that rules might be applied to vessels including through the mechanism of authorisation or licence conditions.

384. Whereas the EU considers that the right of “full access to waters to fish” may be derogated from, any impairment to that right must be justified.

385. However, since any derogation from or impairment of the right of “full access to waters to fish” goes against the ordinary meaning of Article 2(1)(a) of Annex 38 TCA, it is reasonable to presume that a Party denying such full access must demonstrate that such a derogation is justified and, in line with the requirement to implement the TCA in good faith, must refrain from any measures which could jeopardise the attainment of the objectives of those provisions in the Agreement.²⁷⁵

²⁷⁴ See recital 18 of the Preamble to the TCA.

²⁷⁵ See Article 3(2) TCA.

386. The justification for any impairment of the right of access to waters must take in to account the progressive entry into application of Heading V of the TCA and hence that, during the adjustment period, the obligation is to grant “full access to waters to fish” in contrast to the terms of Article 500 TCA.

387. The EU acknowledges that a “fisheries management” measure that has been decided on consistent with the requirements of Article 496 TCA may, in certain circumstances, justify a derogation from or impairment to the “right of full access to waters to fish”.

388. As described in section V.3.2, Article 496 TCA sets the conditions agreed upon by the Parties on the exercise of regulatory autonomy to decide on such measures. Therefore, in order that such a measure could justify a derogation from or restriction on the right of “full access to waters to fish” as foreseen in Article 2(1)(a) of Annex 38 TCA, the “measure” in question must be consistent with the requirements of Articles 496(1) and (2) TCA, read in the light of Article 494(3) TCA.

389. Indeed, this is the provision which, read together with Article 494 TCA, reflects the Parties’ commitments on how very important considerations of marine conservation and fisheries management should be balanced against other commitments in Heading Five.

390. It follows that:

- The only circumstances in which a Party may derogate from its obligation to grant “full access to waters to fish” in reliance on the legitimate objectives of marine conservation, fisheries management as defined and expanded upon in Article 494 TCA is where it adopts measures that are consistent with the requirements under Article 496 TCA; and
- A measure decided on for marine conservation or fisheries management that is inconsistent with the requirements set down in Article 496 TCA

cannot justify an impairment of the right of the other Party to “full access to waters to fish” granted pursuant to Annex 38 TCA.

391. Finally, in the context of the application of Annex 38 TCA, any impairment to or restriction on the right of “full access to waters to fish” should be extraordinary given the rationale for the adjustment period. Hence a particularly high degree of scrutiny over the reliance on such measures is warranted and particular regard should be had to the impairment of the rationale of Annex 38 which was precisely to maintain stability and thereby confer economic and social benefits.

V.3.4. Burden of proof

392. In accordance with general principles, a party shall have the burden of proving facts relied upon to support its claim or defence.²⁷⁶

393. The EU observes that the Parties have agreed that this proposition should apply to the resolution of claims in the present dispute. This agreement is reflected in paragraph 8.1 of Procedural Order No 1.

VI. Overview of the EU’s claims

394. The EU contends that, in adopting and implementing the sandeel fishing prohibition, the UK has acted inconsistently with its obligations under the TCA. It advances three claims.

395. First, the EU will demonstrate that since the sandeel fishing prohibition is not based on the best available scientific advice, it is inconsistent with the UK’s obligations under Articles 496(1) and 496(2) TCA, read together with Article 494(3)(c) TCA [**Claim 1**].

²⁷⁶ See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 61, para. 162, [Exhibit CLA-0029](#).

396. Second, the EU will demonstrate that the sandeel fishing prohibition is not a “proportionate and non-discriminatory” fisheries management measure. Therefore, in deciding on this measure, the UK is acting a manner inconsistent with its obligations under Articles 496(1) and 496(2) TCA, read together with Article 494(3)(f) TCA [**Claim 2**].

397. Third, the UK is in breach of its obligations under Article 2(1)(a) of Annex 38 TCA [**Claim 3**].

VII. Claim 1: The sandeel fishing prohibition is inconsistent with the United Kingdom’s obligations under Articles 496(1) and 496(2) TCA, read together with Article 494(3)(c) TCA

398. As described in section V.3.1.2 above, Article 494(3) TCA identifies principles to which the Parties must adhere in the framework of their cooperation on fisheries under Heading Five TCA.

399. Article 494(3)(c) TCA establishes that Parties shall have regard to the principle of basing conservation and management decisions for fisheries on the “best available scientific advice, principally that provided by the International Council for the Exploration of the Sea (ICES)”.

400. This obligation is mirrored in Article 496(1) TCA which provides that “each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3)”.

401. This obligation is further mirrored in Article 496(2) TCA which provides that “a Party shall base the measures referred to in paragraph 1 on the best available scientific advice.”

402. It follows from these provisions that any measures, including those which impact or depart from the obligations set down in Article 498 TCA read together with Annex 38 TCA, must be consistent with the principle that they must be based on the best available scientific advice.

403. The EU addresses first the relevant legal standard and second, demonstrates that the sandeel fishing prohibition is inconsistent with that standard.

VII.1. Legal standard

VII.1.1. The term “best available scientific advice” in 496(2) and Article 494(3)(c) TCA

404. The EU has addressed the meaning of the term “base” on in section V.3.2.4 above. In this section it addresses the meaning of the term “best available scientific advice.

405. Since the term “best available scientific evidence” has not been defined in the TCA for the purposes of applying Article 494(3)(c), as well as Article 496(2) TCA, must be interpreted in line with the approach set down in Article 4 TCA.²⁷⁷

VII.1.2. Ordinary meaning of the term “best available scientific advice”

406. In line with the common terminology used both in international and domestic law, the term “advice” in the TCA is determined in three cumulative manners, by reference to its specific characteristics (“scientific”, “best”, “available”).

407. The Oxford English Dictionary defines the term scientific as meaning:

²⁷⁷ The EU recalls that in accordance with Article 4(2) TCA, there is no obligation to interpret those provisions in line with the domestic law of the Parties. It observes however, that the term “best available scientific advice” is used in Union fisheries legislation. See for instance, recital 8 of Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008. [Exhibit CLA-0030](#).

“Of a process, method, practice, etc.: based on or regulated by science, as opposed to traditional practices or natural skill; valid according to the principles of science. Hence (of a person or other agent): guided by a knowledge of science; acting in accordance with the principles or methods of science.”²⁷⁸

408. The word “best” is a superlative. According to the Oxford English Dictionary, it means “of the highest excellence; surpassing all others in quality.”²⁷⁹

409. The ordinary meaning of the term “available” is “able to be used” or “at one’s disposal”²⁸⁰. In the context of scientific advice this may be understood to mean “accessible” published or peer reviewed and hence, open to corroboration.

VII.1.3. Object and purpose of the term “best available scientific advice”

410. As described in section V.3.2.4, Article 496 TCA establishes an obligation to “base” measures on the “best available scientific advice”. Therefore, this term services to define the quality that the evidential base for a given measure must have. This must be understood, therefore, as denoting a standard and setting a further constraint on the exercise of regulatory autonomy when deciding on measures.

²⁷⁸ Oxford English Dictionary, s.v. “scientific (adj.), sense 3.a,” September 2024, <https://doi.org/10.1093/OED/1095767662>.

²⁷⁹ Oxford English Dictionary, s.v. “best (adj.), sense 1.a,” September 2024, <https://doi.org/10.1093/OED/6837507003>.

²⁸⁰ See Oxford English Dictionary, “Able to be used, obtained, or selected; at one's disposal”: Oxford English Dictionary, s.v. “available (adj.), sense 4,” September 2024, <https://doi.org/10.1093/OED/4771155958>.

VII.1.4. The objectives of the TCA and the structure and content of Heading Five

411. To determine the meaning of the term “best available scientific advice”, it is also necessary to consider the relevant context which includes the objectives and purpose of the TCA and Heading V specifically.
412. The EU recalls in this respect that Heading V addresses “Fisheries”. Therefore, it is relevant to consider how the term “best available scientific advice” has been understood in the specific framework of fisheries management and marine conservation.
413. In this respect, the EU highlights that in the context of fisheries “*organised methods*” of science typically rely on large amounts of data and the ability to create and apply models so as to arrive at objectively verifiable and valid conclusions.
414. Therefore, the term “scientific advice” should be understood in the light of this usual practice. In the specific context of scientific advice for fisheries management, the term “best” implies that scientific advice must be based on robust methods.
415. Article 494(3)(c) TCA further qualifies the term “best available scientific advice” by requiring that such advice is “principally that provided by the International Council for the Exploration of the Sea (ICES)”. Article 494(3)(c) TCA therefore attributes a principal importance to scientific advice emanating from that specific body. The purpose of this provision is to accord scientific advice produced by ICES a specific status in the sense that it should form a “preeminent” or “main” base for conservation and management decisions. This presupposes that ICES has issued relevant advice. Hence, the term “principally” does not preclude reliance on other advice. Given the stringent standard in Article 494(3) TCA, such other advice should be based on compelling and authoritative scientific evidence such that it can be considered to have an equivalent authoritative status. Notably, this implies that this advice should be based on evidence that has

the “necessary scientific and methodological rigor to be considered reputable science”²⁸¹.

416. This interpretation is supported by other provisions in Heading V. For example, Article 508 TCA identifies that the Specialised Committee on Fisheries may:

“consider approaches to the collection of data for science and fisheries management purposes, the sharing of such data (including information relevant to monitoring, controlling and enforcing compliance), and the consultation of scientific bodies regarding the best available scientific advice;”²⁸²

417. Article 494(3)(c) TCA immediately follows the objectives set out in Articles 494(1) and (2) TCA. This reflects that there is a relationship between the objectives and the principles that should inform the means by which those objectives are pursued.

418. The link between the objectives and principles is confirmed by Article 496(1) TCA which refers to Article 494 TCA.

419. As a consequence, having regard to the principle of “best available scientific advice” is a requirement imposed on a Party deciding on a measure for the purpose of the objectives defined in Articles 494(1) and (2) TCA.

²⁸¹ See by analogy Panel Reports, Australia – Tobacco Plain Packaging, para. 7.627, [Exhibit CLA-0031](#); Appellate Body Report, US – Continued Suspension, para. 591, [Exhibit CLA-0032](#).

²⁸² See Article 508(1)(e) TCA.

VII.1.5. Relevant rules of international law

420. As specified in Article 4 TCA, the Tribunal may also have regard to any relevant rules of international law applicable in the relations between the Parties.²⁸³

421. For the reasons explained in section V.1 above, both the rules applicable to relations to the Parties under the international law of the sea and in international economic law may provide relevant context for interpreting the provisions in Heading Five.

VII.1.5.1. The international law of the sea

422. While the UNCLOS does not refer to the best available scientific “advice”, it uses the related notion of best available scientific “evidence” on three occasions.

423. First, Article 61(2) UNCLOS concerning the conservation of the living resources in the exclusive economic zone provides that the “coastal State, taking into account the best scientific evidence available to it”, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.

424. Second, Article 119(1)(a) UNCLOS requires States in determining the allowable catch and establishing other conservation measures for the living resources in the high seas, to take measures “which are designed, on the best scientific evidence available to the States concerned”, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.

425. Finally, pursuant to Article 234 UNCLOS, laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-

²⁸³ See Article 31 VCLT.

covered areas within the limits of the exclusive economic zone shall, among other things, have due regard to the protection and preservation of the marine environment based on the “best available scientific evidence”.

426. Other provisions in UNCLOS establish obligations related to scientific research. For instance, Article 200 UNCLOS provides that:

“States shall cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment”.

427. This provision reflects more generally the role of scientific research in managing the marine environment.

428. The International Tribunal for the Law of the Sea (‘ITLOS’) has held when advising on the interpretation of Articles 61 and 119(1) UNCLOS that conservation and management measures must be informed by the best available science and States are required to take into account relevant environmental and economic factors, including the impact of climate change and ocean acidification.²⁸⁴

429. ITLOS further considered in the context of necessary measures to prevent, reduce and control marine pollution from anthropogenic greenhouse gas emissions that such measures “should be determined objectively, taking into account, inter alia, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature

²⁸⁴ ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, para. 418, [Exhibit CLA-0021](#).

goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal”.²⁸⁵

430. In the same vein, ITLOS has confirmed that in formulating and elaborating rules consistent with UNCLOS and based on available scientific knowledge States are required to cooperate to promote studies, undertake scientific research, and encourage the exchange of information and data.²⁸⁶

431. This importance of science is confirmed by the FAO Code of Conduct for Responsible Fisheries.²⁸⁷ This sets out international principles and standards of conduct to ensure effective conservation, management and development. In various sections, the FAO Code of Conduct for Responsible Fisheries emphasises the requirement for conservation and management decisions for fisheries to be based on the best scientific evidence available.

432. By way of example, Article 6.4 of the FAO Code of Conduct for Responsible Fisheries provides:

“6.4 Conservation and management decisions for fisheries should be based on the best scientific evidence available, also taking into account traditional knowledge of the resources and their habitat, as well as relevant environmental, economic and social factors. States should assign priority to undertake research and data collection in order to improve scientific and technical knowledge of fisheries including their interaction with the ecosystem. In recognizing the transboundary nature of many aquatic ecosystems, States should encourage bilateral and multilateral cooperation in research, as appropriate.”

²⁸⁵ Ibid, at para. 441(3)(b).

²⁸⁶ Ibid, at para. 321.

²⁸⁷ FAO, Code of Conduct for Responsible Fisheries, [Exhibit CLA-0033](#).

433. Article 7.3.1 provides:

“[t]he best scientific evidence available should be used to determine, inter alia, the area of distribution of the resource and the area through which it migrates during its life cycle”.

434. Similarly, Articles 12.1 and 12.3 state:

12.1 States should recognize that responsible fisheries requires the availability of a sound scientific basis to assist fisheries managers and other interested parties in making decisions. Therefore, States should ensure that appropriate research is conducted into all aspects of fisheries including biology, ecology, technology, environmental science, economics, social science, aquaculture and nutritional science. States should ensure the availability of research facilities and provide appropriate training, staffing and institution building to conduct the research, taking into account the special needs of developing countries.

(...)

12.3 States should ensure that data generated by research are analyzed, that the results of such analyses are published, respecting confidentiality where appropriate, and distributed in a timely and readily understood fashion, in order that the best scientific evidence is made available as a contribution to fisheries conservation, management and development. In the absence of adequate scientific information, appropriate research should be initiated as soon as possible.”

435. Similarly to UNCLOS, Articles 5(b), 6(7), 10(f) and 16(1) UNFSA, which is an agreement implementing UNCLOS, refer to “the best scientific evidence available”.

436. Neither UNCLOS nor UNFSA define “best available scientific evidence” and nor do they identify any specific scientific body, for instance ICES.

437. There are frequent references to the “best available” scientific evidence/advice in international instruments establishing RFMOs which have the power to adopt binding fisheries conservation and management measures in relation to certain fish stocks, usually termed “recommendations”.²⁸⁸
438. These international agreements establishing RFMOs therefore incorporate, and partly specify, the requirement set out in UNCLOS to base management and conservation decisions on the “best available scientific evidence/advice.”
439. Two of these agreements include a specific reference to ICES.
440. The NEAFC Convention requires the NEAFC Commission to seek advice from ICES (Article 14 of the NEAFC Convention). However, the NEAFC Convention is silent as to the specific relevance of ICES advice in the NEAFC Commission determining the best scientific evidence available.
441. The NASCO Convention, by contrast, provides for an explicit link between “the best available information” and the advice of ICES. Specifically, Article 7 of the NASCO Convention refers to the best available information as “including advice from the International Council for the Exploration of the Sea and other appropriate scientific organizations” as information that the NASCO Commission “shall take into account”.

²⁸⁸ See, for instance, Article 4(2) of the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries. [Exhibit CLA-0034](#). The Commission shall in particular ensure that recommendations “are based on the best scientific evidence available”. See also Convention for the Conservation of Salmon in the North Atlantic Ocean establishing the North Atlantic Salmon Conservation Organization (NASCO) [Exhibit CLA-0035](#); the Convention on Cooperation in the Northwest Atlantic Fisheries establishing the Northwest Atlantic Fisheries Organization (NAFO) [Exhibit CLA-0036](#); Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean establishing the South East Atlantic Fisheries Organisation (SEAFO) [Exhibit CLA-0037](#).

442. As to the standard of review, in the Southern Bluefin Tuna Cases²⁸⁹ ITLOS considered, when granting interim measures, that it need not “conclusively assess the scientific evidence” relied upon by the Parties in order to rule on the request for interim relief. Nevertheless, ITLOS examined that evidence to determine whether it supported the claim that stock had been “severely depleted and is presently in a poor state.”²⁹⁰ The EU considers that this confirms that a Tribunal confronted with scientific evidence must determine whether that evidence has the attributes necessary to support the factual propositions asserted by a Party.

VII.1.5.2. International economic law

443. As described in section V.1 above, rules of international economic law as defined and applied under the WTO Agreements are among the relevant rules of international law applicable to relations between the Parties to the TCA. Moreover, in view of the role accorded to WTO law under the TCA, those rules are also relevant context for the interpretation of Part Two, Heading Five in general and Article 496 and Article 494 TCA in particular.²⁹¹

444. Heading Five regulates the granting of specific rights which confer an economic benefit on operators. In particular, and as explained above, the rights of access to waters to fish and the fishing opportunities agreed pursuant to Article 498 TCA and operationalised through the provisions on

²⁸⁹ ITLOS, Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, recital 80. [Exhibit CLA-0027](#).

²⁹⁰ See in particular, the Joint Declaration of Vice-President Olfrum and Judges Caminos, Marotta Rangel, Yankov Anderson and Eiriksson. [Exhibit CLA-0038](#).

²⁹¹ See Article 493 TCA, Article 513 TCA, Article 515 TCA and Article 516 TCA as well as recital 6 to the Preamble of the TCA.

access to waters, confer rights on operators to perform an economic activity.

445. Where fisheries management and marine conservation measures prevent that economic activity from being performed, this impairs the enjoyment of the economic and social benefits granted under the TCA. Therefore, when considering the circumstances in which a fisheries management and marine conservation measure – which undoubtedly pursues a legitimate regulatory aim - may justify the impairment of such benefits, the rules of international economic law provide relevant context for the interpretation of the requirement that such measures are based on the best available scientific advice.

446. Whilst neither the GATT 1994 nor other covered agreements employ the term “best available scientific advice”, the EU considers that a number of principles have been established when interpreting and applying those agreements which provide relevant context for the interpretation of that term as it appears in Article 496(2) TCA.

447. This is because, in the framework of those rules, questions also arise as to when and in what circumstances scientific information provides “justification” for a measure which is otherwise restrictive of international trade. This is arguably most clearly expressed in Article 2.2 of the SPS Agreement which requires WTO Members to base their SPS measures on scientific principles and prohibit their maintenance without “sufficient” scientific evidence.

448. It has consistently been recalled that the disciplines of the WTO are not intended to prevent Members from exercising their regulatory autonomy when pursuing policy choices.²⁹² As an expression of this principle,

²⁹² See further below the discussion of regulatory autonomy which is accorded a specific role in recital 6 of the preamble to the TBT Agreement. [Exhibit CLA-0039](#).

Members are free to determine the level at which they consider it appropriate to pursue a specific objective and to set the level of protection that they consider appropriate. This principle has been recognised when applying the GATT 1994 and the TBT Agreement.²⁹³

449. Under the SPS Agreement this has concretised in the recognition that members may determine the “appropriate level of sanitary or phytosanitary protection” or “ALOP” that they wish to apply in their territory. Where there is scientific justification for that ALOP, they may “introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations.”²⁹⁴

450. For these purposes there is a “scientific justification” if, “on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection”²⁹⁵. Article 5 SPS establishes requirements relating to the risk assessment that must be conducted before applying a measure based on an ALOP.

451. As the role of a precautionary principle, Article 5.7 SPS provides:

“In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant

²⁹³ See Appellate Body Reports, EC – Seal Products, paras. 5.200-5.201, [Exhibit CLA-0040](#).

²⁹⁴ See Article 3.3 of the SPS Agreement, [Exhibit CLA-0041](#).

²⁹⁵ See Footnote 2 of the SPS Agreement concerning the term “scientific justification” as used in Article 3.3 SPS, [Exhibit CLA-0041](#).

international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

452. Where a Member asserts that a specific policy is underpinned by scientific evidence or information, in accordance with the general principles concerning the allocation of the burden of proof under international economic law, it should demonstrate that this is the case by reference to the scientific evidence on which it relies.

453. The types of scientific information and evidence on which a WTO member may rely to support a measure has consistently been interpreted broadly.

454. In particular, it has been held that scientific evidence or information need not reflect a “majority view”. This is clear from, inter alia, the findings of the Appellate Body in EC – Asbestos. In those proceedings, Canada argued that the relevant test when assessing scientific evidence is that of the balance of probabilities. This was rejected by the Appellate Body who recalled the existing jurisprudence that “*responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.*”²⁹⁶

455. When reviewing policy choices, it has been recognised that it is not the role of a WTO Panel to determine what that level of protection should be. Nor may a panel present its own scientific judgement. Instead, Article 11 of the Dispute Settlement Understanding requires a Panel to consider

²⁹⁶ Appellate Body, EC - Asbestos, para. 178 citing EC-Hormone, [Exhibit CLA-0042](#).

whether all of the evidence before it, considered as a whole, provides a reasonable basis in support of the proposition advanced by either party.²⁹⁷

456. On the other hand, a Panel may have regard to whether a specific item of evidence has the “‘necessary scientific and methodological rigor to be considered reputable science’ according to the standards of the relevant scientific community, as well as the extent to which its use in support of the measures at issue is ‘objective and coherent’”²⁹⁸ In EC-Hormones, the word ‘scientific’ was defined by the Appellate Body as “having or appearing to have an exact, objective, factual, systematic or methodological basis and relating to, or exhibiting the methods or principles of science”.²⁹⁹ In the specific context of the SPS Agreement, the Appellate Body has also found that “a panel should review whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the scientific evidence relied upon”.³⁰⁰

457. When addressing the “sufficiency” of an evidential foundation, the Appellate Body has considered the need to have a rational or objective relationship between the measure and the relevant scientific evidence, and have emphasises the case specific nature of this assessment³⁰¹.

458. The EU considers that given the approach reflected in the rules of international economic law, in choosing the term “best available scientific advice”, in Article 496 TCA, the Parties to the TCA should be understood to have elected to apply a legal standard that reflects the core propositions

²⁹⁷ Panel Report, Australia – Tobacco Plain Packaging, para. 7.627, [Exhibit CLA-0031](#).

²⁹⁸ Panel Reports, Australia – Tobacco Plain Packaging, para. 7.627, [Exhibit CLA-0031](#); Appellate Body Report, US – Continued Suspension, para. 591, [Exhibit CLA-0032](#).

²⁹⁹ Appellate Body Report, EC – Hormones, fn 172 (referring to the ordinary meaning of the word ‘scientific’), [Exhibit CLA-0043](#).

³⁰⁰ Appellate Body Report, US – Continued Suspension, para. 591, [Exhibit CLA-0032](#).

³⁰¹ Appellate Body Report, Japan – Apples, para 163 to 164, [Exhibit CLA-0044](#).

that scientific information and advice must be based on rigorous methods and, where data is an integral part of the design of a measure, a party must rely “on the most recent available data to ensure a balanced and coherent application of the measure”.³⁰²

459. Finally, consonant with the role of a WTO Panel, a Tribunal called upon to consider the evidential foundation for a measure may review whether the conclusions drawn “find sufficient support in the scientific ...[advice] relied upon”. The existence or absence of a rational connection between the degree of risk and the measure applied are relevant when considering the sufficiency of the scientific justification.

VII.1.6. Conclusion on the meaning of the term “best available scientific advice”

460. On the basis of the different references to the notion of “best available scientific advice” or the synonymous notion of “best available scientific evidence” as described above, the EU considers that the ordinary meaning of the term “best available scientific advice” as used in Article 494(3)(c) TCA and Article 496(2) TCA should be understood to require the following.

461. First, to the extent that data is an essential component justifying the design or scope of a measure as is the case with fisheries management measures, the advice must be supported by the most recent available scientific data and must be derived from rigorous scientific methods.

462. In keeping with the legal standard that has been applied in the relevant context of the law of the sea and fisheries management, Article 496(2) and 494(3)(c) TCA should be understood to establish a stringent standard. It requires the Parties to base conservation and management decisions on the

³⁰² See Panel Report, EU-Certain measures concerning Palm Oil, paragraph 7.566, [Exhibit CLA-0045](#).

“best” advice, to the exclusion of advice that is incomplete or which is not based on the most recent available scientific data.

463. Second, the qualifier “available” must be read in the light of the Parties’ obligation to cooperate to obtain scientific research or acquire relevant scientific data before taking conservation and management decisions that are required to be based on resulting scientific advice.³⁰³

464. Third, the scientific advice must be publicly available.³⁰⁴

465. Fourth, scientific bodies should be understood as best placed to provide such advice as affirmed by the reference to ICES in Article 496(3)(c) TCA.

466. As to the standard of review, this Tribunal is not required to “conclusively assess” the scientific evidence.³⁰⁵ However, it should consider whether that evidence has the methodological rigour required in order to be considered the “best available scientific advice”³⁰⁶.

VII.2. Application of the legal standard

467. The sandeel fishing prohibition is inconsistent with the UK’s obligation to base fisheries management measures applicable to its waters on the “best

³⁰³ See, for instance, Article 12.3 of the FAO Code of Conduct for Responsible Fisheries, [Exhibit CLA-0033](#).

³⁰⁴ See, for instance, Article 12.3 of the FAO Code of Conduct for Responsible Fisheries, [Exhibit CLA-0033](#).

³⁰⁵ See recital 80 of the Order of 27 August 1999 in the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, [Exhibit CLA-0027](#).

³⁰⁶ Panel Reports, Australia – Tobacco Plain Packaging, para. 7.627, [Exhibit CLA-0031](#); Appellate Body Report, US – Continued Suspension, para. 591, [Exhibit CLA-0032](#).

available scientific advice” in accordance with Articles 496(1) and 496(2) TCA, read together with Article 493(3)(c) TCA.

468. The EU advances two arguments in support of this claim.

469. First, the “scientific advice” that the UK has identified as the base for the sandeel fishing prohibition is not the “best available scientific advice” within the meaning of Article 496(2) TCA or Article 493(3)(c) TCA (which must be accorded the same meaning). This is because certain elements of that advice lack the scientific and methodological rigour required.

470. Second, even to the extent that the UK can demonstrate that the “scientific advice” it has identified as the base for the sandeel fishing prohibition could be qualified as the “best available scientific advice” within the meaning of Articles 496(2) and 494(3)(c) TCA, in deciding on the sandeel fishing prohibition, the UK did not base the measure on that “best available scientific advice”.

471. The EU will first identify the “scientific advice” that the UK has identified as the base for the sandeel fishing prohibition (section VII.2.1). The EU will then explain why that “scientific advice” is not the “best available scientific advice” (section VII.2.2). Finally, the EU will explain why the sandeel fishing prohibition is not “based on” the “best available scientific advice” (section VII.2.3 above).

VII.2.1. The “scientific advice” that the UK has identified as the base for the sandeel fishing prohibition

472. The “scientific advice” that the UK has identified as the base for the sandeel fishing prohibition can be inferred from three letters that the UK sent the European Commission on 30 January 2024, 2 February 2024 and 8 February 2024.

473. In a letter sent on 30 January 2024 by the Secretary of State Environment, Food & Rural Affairs to the European Commissioner for the Environment,

Oceans and Fisheries, the UK identified the evidence base for the sandeel fishing prohibition in so far as it concerns English waters of the North Sea as follows:

“[t]he ICES [Technical Service] on 28 November supports the measures we are introducing and made clear that annual ICES advice for sandeel management does not account fully for predator needs. It also advocated for local regulation to ensure sandeel management delivers for ecosystem needs”; and

“[o]ur evidence base for this decision was published alongside the consultation, and we are also confident that this – alongside the ICES response to our joint request – supports a more precautionary approach to sandeel management”.³⁰⁷

474. In a letter sent on 2 February 2024 by the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands to the Directorate-General for Maritime Affairs and Fisheries of the European Commission, the UK identified the evidence base for the sandeel fishing prohibition in so far as it concerns all Scottish waters as follows:

“[i]n your letter you made reference to the commitment by the EU and UK (paragraph 6 of the Written Record of fisheries consultation regarding sandeel in 2023) to seek further information from ICES on ecosystem considerations in the provision of single-stock advice for forage fish species. This advice was published on 28 November 2023 and we made sure that it formed part of the scientific evidence base that was used to inform the Scottish Government’s decision-making on this issue”.³⁰⁸

³⁰⁷ [Exhibit C-0058](#) as referred to in paragraph 143 above.

³⁰⁸ [Exhibit C-0059](#) as referred to in paragraph 147 above.

475. In a letter of 8 February 2024, the UK identified the evidence base for the sandeel fishing prohibition in so far it concerns UK waters of the North Sea as follows:

“Evidence

We note that the response received from ICES on 28 November 2023 to our joint technical request supports the use of national regulation and suggests that the annual single species advice for sandeel from ICES should only be part of an overall management regime to ensure that local food availability is preserved. It advocates for local regulation to ensure that sandeel stock management delivers for broader ecosystem needs. This supports a strategy for a more precautionary approach to sandeel management including the introduction of spatial closures.

The public consultation on potential management measures in English waters ran from March-May 2023 and we welcomed the responses received from EU stakeholders. The results showed that over 95% of respondents support some form of prohibition on fishing for sandeel, with a majority favouring the closure of all English waters. UK Ministers have therefore decided to introduce a spatial closure of English waters in the North Sea for all vessels in order to offer improved protection to sandeel and the dependent ecosystem. Our decision takes the consultation responses into consideration alongside the scientific evidence, and is further to the prohibition which has already been in place for UK vessels for the past 3 years.

Evidence from the UK Government’s expert advisory bodies, including CEFAS and Natural England, was published alongside the details of the English consultation and can be accessed from this website.

The consultation in relation to sandeel management in Scottish Waters ran from July to October 2023 and resulted in 97% of respondents supporting the option of a full closure of Scottish Waters for sandeel fishing. Further details about the consultation are available [here](#).

The consultation is supported by complementary documents such as “Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment” produced by Marine Directorate in Scottish Government, as well as impact assessments. These documents have been published alongside the consultation document and can be viewed online.

The Scottish Statutory Instrument, associated documents and final assessment can be found here.”³⁰⁹

476. It can therefore be inferred from the UK’s three letters, in particular from the letter of 8 February 2024, that the “scientific advice” identified by the UK as the base for the sandeel fishing prohibition is: (i) the ICES Technical Service; (ii) the Natural England/Cefas/JNCC advice; and (iii) the Scottish scientific literature review.

VII.2.2. The “scientific advice” identified by the UK as the base for the sandeel fishing prohibition is not the “best available scientific advice”

477. The EU has addressed the meaning to be accorded to the term “best available scientific advice” above.³¹⁰

478. The EU considers that, for these purposes, “advice” may consist of different, individual items of scientific evidence which, collectively are relied upon as the basis for a measure. Hence, what has to be assessed is whether that evidence, assessed holistically, can be qualified as the “best available scientific advice”.

479. That “scientific advice” must provide a basis for the full extent of the measure in question. In the case of the sandeel fishing prohibition, only

³⁰⁹ [Exhibit C-0060](#) as referred to in see paragraph 147 above.

³¹⁰ See section **Error! Reference source not found.** above.

one of the pieces of scientific evidence - the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC and the simulations generated based on that updated model – is sufficient to justify the full spatial scope of the sandeel fishing prohibition covering all UK waters of the North Sea.

480. The EU argues that the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC and the simulations based on that model do not have the “necessary scientific and methodological rigor to be considered reputable science”³¹¹. Since this updated model and the simulations generated based on that model are an integral part of the scientific base for the full spatial scope of the sandeel fishing prohibition, the insufficiencies in that model and the simulations generated based on that model and the availability of other means to have applied a more scientifically rigorous model, mean that the body of evidence on which the UK relies to support the full spatial scope of the sandeel fishing prohibition cannot be considered the “best available scientific advice”.³¹²

481. As the Natural England/Cefas/JNCC³¹³ advice explained:

- a) Natural English/Cefas/JNCC sought “to simulate the impacts of sandeel depletion (the reduction of sandeel biomass due to fishing mortality) on important commercial stocks and trophic guilds”³¹⁴ using “an Ecopath with Ecosim (EwE) model of the North Sea”³¹⁵:

³¹¹ Panel Reports, Australia – Tobacco Plain Packaging, para. 7.627, [Exhibit CLA-0031](#); Appellate Body Report, US – Continued Suspension, para. 591, [Exhibit CLA-0032](#).

³¹² The EU does not argue that the ICES Technical Service and the Scottish scientific literature review have deficiencies in terms of methodological and scientific rigour.

³¹³ Natural English/Cefas/JNCC, [Exhibit C-0045](#)

³¹⁴ Ibid, page 21.

³¹⁵ Ibid, page 21.

- b) the model “was initially built by Mackinson and Daskalov (2007) and subsequently updated and presented to the International Council for the Exploration of the Seas (ICES) Working Group on Multispecies Assessment Methods (WGSAM) to be used as an ICES advice product (ICES, 2013)”³¹⁶;
- c) Natural England/Cefas/JNCC updated the publicly available 2013 model “for the purpose of this work, bringing simulations to 2020 by updating the underlying time series data (Driver time series: fishing effort and mortality and Calibration time series: catch and biomass)”³¹⁷; and
- d) based on its updated “North Sea Ecopath with Ecosim model”, Natural England/Cefas/JNCC simulated “the biomass response to prohibition of industrial sandeel fisheries in the North Sea” and “to prohibition of industrial fisheries in the UK waters of the North Sea”³¹⁷.

482. The simulations generated by the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC were that:

- a) “[p]rohibiting sandeel fishing in UK waters may reduce sandeel exploitation to somewhere between 5% and 13%, which is estimated to lead to increase in seabird biomass between 4% and 8%”³¹⁸ over a period of “around 10 years”³¹⁹;

³¹⁶ Ibid, page 21.

³¹⁷ Ibid, page 27.

³¹⁸ Ibid, page 25.

³¹⁹ Ibid, page i.

- b) prohibiting sandeel fishing in UK waters of the North Sea is simulated to lead an increase in seal biomass of between 2% and 5% over the same period of around 10 years³²⁰; and
- c) “[p]rohibiting sandeel fishing in UK waters had limited impacts on the biomasses of toothed whales and baleen whales as their consumption in the model was compensated by increased consumption of other prey (such as whiting and mackerel)”³²¹.

483. However, the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC and the simulations generated based on that updated model rely on several assumptions and caveats that, individually and collectively, deprive the updated model and the simulations generated based on that model of the “necessary scientific and methodological rigor to be considered reputable science”.

484. First, the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC assumed that a prohibition on sandeel fishing in UK waters of the North Sea would reduce by 58% the amount of catches of sandeel in North Sea³²². However, that 58% is based on a 2003-2020 reference period whereas, since 2011, the sandeel fishery in the North Sea is managed according to an escapement strategy that ensures catches are reduced in years where the sandeel stock size is estimated to be lower. The 58% assumed reduction is therefore likely to overestimate the amount of catches that the prohibition on sandeel fishing in UK waters of the North Sea will reduce.

³²⁰ Ibid, page 29.

³²¹ Ibid, page 29.

³²² Ibid, page 23.

485. Second, the Natural England/Cefas/JNCC advice assumed “a fixed fishing pressure up until 2100”³²³. However, since 2011, the sandeel fishery in the Greater North Sea is managed according to an escapement strategy that ensures that fishing pressure is reduced in years where the sandeel stock size is estimated to be lower³²⁴.

486. Third, based on its updated “North Sea Ecopath with Ecosim model”, Natural England/Cefas/JNCC simulated “the biomass response to prohibition of industrial fisheries in the UK waters of the North Sea” of all seabird predators taken together as a group³²⁵. This may therefore underestimate or over-estimate the simulated “biomass response” of individual seabirds because: (i) sandeels comprise a substantial proportion of the diet of only certain seabirds³²⁶; (ii) the feeding range of seabirds varies greatly between species³²⁷; and (iii) there a limited spatial overlap between the feeding range of chick-rearing seabirds and the sandeel fishery³²⁸.

487. Fourth, the Natural England/Cefas/JNCC advice³²⁹ itself highlighted four caveats to its updated “North Sea Ecopath with Ecosim model” that, in the advice’s own words, “may lead to the over- or underestimation”³³⁰ of the simulated “biomass response”. The second and third of those caveats are particularly relevant for this dispute.

³²³ Natural English/Cefas/JNCC, page 30, [Exhibit C-0045](#).

³²⁴ See paragraph 71 above.

³²⁵ Natural English/Cefas/JNCC, page 25, [Exhibit C-0045](#).

³²⁶ See paragraph 75 above.

³²⁷ See paragraph 77 above.

³²⁸ See paragraph 79 above.

³²⁹ Natural English/Cefas/JNCC, page 25, [Exhibit C-0045](#).

³³⁰ Ibid, page 47.

488. “Caveat 2” highlighted that the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC is not a size-structured model and thus “may overestimate the impacts of forage fish depletion by not accounting for cases where (...) predators take small forage fish that are unaffected by fishing” (page 33). However, it was necessary for the updated “North Sea Ecopath with Ecosim model” to account for the fact that “predators take small forage fish that are unaffected by fishing” because chick-rearing seabirds for which sandeel comprises a substantial proportion of their diet take sandeels that are unaffected by the fishery in the North Sea. This is because: (i) kittiwakes “generally switch from feeding on older sandeel at the start of breeding (April/May) to juvenile sandeel (for both self-feeding and their young) as the season progresses”³³¹; and (ii) the sandeel fishery in the North Sea does not target juvenile sandeel³³².

489. “Caveat 3” explained that “[t]he models used in this study do not account for the spatial distribution of sandeels”³³³ and “[n]ot accounting for this spatial component could mean we overestimate or underestimate some specific ecosystem impacts of fishing if, for example, even at low abundance forage fish occupy core areas local to important mammal or bird breeding sites. We may also underestimate localised benefits, which we might expect to be greater than the average benefit across the entire area due to the localised impacts of sandeel biomass on predator condition and reproduction”³³⁴. However, it was necessary for the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC to account for the spatial distribution of sandeels because: (i) chick-rearing seabirds require sufficient sandeel of the right age to be available within

³³¹ Scottish scientific literature review, page 38, [Exhibit C-0050](#).

³³² See paragraph 68 above.

³³³ Natural England/Cefas/JNCC, [Exhibit C-0045](#), page 33.

³³⁴ *Ibid*,

their feeding range³³⁵; and (ii) there a limited spatial overlap between the feeding range of chick-rearing seabirds and the sandeel fishery³³⁶.

490. In sum: (i) Natural England/Cefas/JNCC did not disclose how they updated the publicly available 2013 “Ecopath with Ecosim (EwE) model of the North Sea” model and what underlying data they used to parameterise the updated model; and (ii) as applied, the updated model *inter alia* failed to consider separately different seabirds, failed to size-structure and failed to take into account the spatial distribution of sandeels.

491. While the EU does not challenge the scientific and methodological rigour of: (i) the ICES Technical Service; (ii) the remainder of the Natural England/Cefas/JNCC advice; and (iii) the Scottish scientific literature review, the only “scientific advice” identified by the UK as the base for the sandeel fishing prohibition and supporting the full spatial scope of the sandeel fishing prohibition covering all UK waters of the North Sea is the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC and the simulations generated based on that model. Consequently, that evidential basis assessed holistically for the sandeel fishing prohibition is insufficient and by necessary implication, does not constitute the “best available scientific advice” within the meaning of Articles 496(2) and 494(3)(c) TCA.

VII.2.3. The sandeel fishing prohibition is not “based (...) on” the best available scientific advice

492. Given the EU contends that the “scientific advice” that the UK has identified as the base for the sandeel fishing prohibition is not the “best available scientific advice”, consequential to that position, the EU further contends that the UK has not based its measure on the “best available

³³⁵ See paragraphs 76-77 above.

³³⁶ See paragraph 79 above.

scientific advice” since the UK plainly relies on the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC and the simulations generated based on that model.

493. In addition, the EU submits that, even should the Tribunal consider the “scientific advice” invoked by the UK to constitute the “best available scientific advice” within the meaning of Articles 496(2) and 494(3)(c) TCA (*quod non*), the sandeel fishing prohibition would not be based on the “best available scientific advice” because there would be no rational or objective relationship between the “scientific advice” invoked by the UK as the base for the sandeel fishing prohibition and the full spatial scope of that prohibition, which covers all UK waters of the North Sea.

494. First, the sandeel fishery in the North Sea is currently exploited in a manner that ensures the healthy level of the sandeel stock both in the North Sea as a whole and at the level of each of the seven sandeel management areas, and thus its abundance and availability. Thus, as the ICES Technical Service³³⁷ noted:

- “ICES quotas for sandeel, Norway pout, sprat, and herring in the North Sea are based on best available scientific assessments. If followed, this advice should ensure healthy levels of these stocks. For sandeel there is a state-of-the-art spatial management system, herring have a known stock structure (though the advice only partially accounts for this”³³⁸, and
- for sandeel in particular, the spatial structure of the management advice is likely sufficient to ensure that local depletions can be reversed by recruitment from elsewhere in the management region”³³⁹.

³³⁷ [Exhibit C-0022](#).

³³⁸ Ibid, page 2.

³³⁹ Ibid, page 2.

495. This is consistent with the fact that, since 2011, the sandeel fishery in the Greater North Sea has been managed according to an escapement strategy ensuring there is a less than 5% risk of the fishery negatively affecting the recruitment of new sandeel the following year.³⁴⁰

496. Second, fluctuations in the North Sea sandeel stock are principally due to natural sandeel mortality not associated directly or indirectly with the North Sea sandeel fishery. Thus, as the Scottish scientific literature review³⁴¹ noted:

a) “[c]auses of variation in sandeel abundance are numerous and are driven by fishing mortality and (principally) natural mortality, the latter being influenced by factors such as environmental change (temperature effects, regime shifts) and top-down processes (trophic regulation by marine predators). Evidence shows that causes of variation in natural mortality played a more prominent role than fishing mortality in shaping sandeel abundance in Scottish waters and as these causes of variation are rarely accounted for, an effect of fishing pressure on sandeel abundance is seldom observed”³⁴²; and

b) “complex environmental interactions, including dynamics in predatory fish populations, competition for food sources, cannibalism and climate change may also affect the abundance of sandeel in the North Sea, making prediction of sandeel stock development following a fishery closure difficult”³⁴³.

³⁴⁰ [Exhibit C-0044](#) and the explanation in paragraph 76 above.

³⁴¹ Scottish scientific literature review, [Exhibit C-0050](#).

³⁴² *Ibid*, pages 24-25.

³⁴³ *Ibid*, page 35.

497. This is also consistent with the fact that the removal of sandeel from the North Sea by predatory fish alone, greatly exceeds that of fisheries, seabirds, and marine mammals combined³⁴⁴.

498. Third, there may be instances where the sandeel fishery has an impact on localised sandeel abundance within a management area. As the ICES Technical Service noted³⁴⁵, “advice which maintains a high overall biomass could still result in local depletion depending on other management measures”. Similarly, the Scottish scientific literature review³⁴⁶ noted that “[t]he combination of limited adult movements between sandbanks and the patchiness of available suitable habitat indicates that local conditions affecting adult mortality (fishing pressure, food availability and predator abundance) can lead to significant variation in sandeel age and length composition over a relatively fine spatial scale”.

499. Fourth, there is a correlation between the insufficient localised abundance of sandeel and the breeding success of chick-rearing seabirds for which sandeel comprises a substantial proportion of their diet. Thus, as the ICES Technical Service noted, seabirds “are the most sensitive predators to changes in sandeel abundance”³⁴⁷ and there “a number of seabird species where there is evidence that breeding success is correlated with (local) sandeel abundance” (ibid). Such a correlation is why sandeel fishing has been prohibited since 2000 in an area within English waters of ICES area 4b and Scottish waters of ICES areas 4a and 4b³⁴⁸.

³⁴⁴ [Exhibit C-0019](#) and paragraph 82 above.

³⁴⁵ [Exhibit C-0022](#), page 5.

³⁴⁶ [Exhibit C-0050](#), page 5.

³⁴⁷ [Exhibit C-0022](#), page 1.

³⁴⁸ See paragraph 84 above.

500. The EU does not, therefore, contest that there is a rational and objective relationship between the “scientific advice” invoked by the UK as the base for the sandeel fishing prohibition and a prohibition on sandeel fishing in UK waters of the North Sea coinciding spatially with the feeding range of the chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet.

501. Fifth, and by contrast, there is no rational or objective relationship between the “scientific advice” invoked by the UK as the base of the sandeel prohibition and a spatial prohibition on sandeel fishing in UK waters of the North Sea that goes beyond the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet could have on the breeding success of seabirds. The “scientific advice” invoked by the UK as the base of the sandeel prohibition does not indicate that a spatially broader prohibition may have additional positive environmental effects compared to the effects for chick-rearing seabirds that would already have a prohibition on sandeel fishing in UK waters of the North Sea coinciding with the feeding range of seabirds for which sandeels comprise a substantial proportion of their diet. This is for the following reasons.

502. In the first place, the “scientific advice” invoked by the UK as the base of the sandeel prohibition does not indicate that a spatially broader prohibition on sandeel fishing in UK waters of the North Sea going beyond the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet would increase the abundance and resilience of sandeel.³⁴⁹ This is because fluctuations in the North Sea

³⁴⁹ The EU understands that the UK uses these two notions interchangeably. See, for example, Table 3 of the England consultation document: “Fluctuations in sandeel stocks are largely driven by extraneous factors (e.g., hydroclimatic factors). Even if fishery exploitation rates are low, the risk of stock collapse exists. However, the risk of collapse increases with increasing exploitation pressure. Reducing exploitation by prohibiting fishing in English waters may increase sandeel resilience.”

sandeel stock are principally due to natural mortality not associated directly or indirectly with the North Sea sandeel fishery³⁵⁰.

503. In the second place, the “scientific advice” invoked by the UK as the base of the sandeel prohibition does not indicate that a spatially broader prohibition on sandeel fishing in UK waters of the North Sea going beyond the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet would benefit further the breeding success of those seabirds. As the Scottish scientific literature review noted³⁵¹ when describing the prohibition since 2000 of sandeel fishing in an area within English waters of ICES area 4b and Scottish waters of ICES areas 4a and 4b:

- “a typical foraging range [of kittiwakes] would not regularly include foraging outside of the existing closed area”³⁵²; and
- “unless sandeel metapopulation dynamics mean a wider sandeel closure would significantly change sandeel availability within the existing closed area, improved sandeel availability may generally be of limited benefit to kittiwake breeding success”.³⁵³

504. This is consistent with the fact that there is a limited spatial overlap between the sandeel fishery and the feeding range of chick-rearing seabirds for which sandeel comprises a substantial proportion of their diet³⁵⁴.

505. As for the Natural England/Cefas/JNCC advice³⁵⁵, while it simulated that “[p]rohibiting sandeel fishing in UK waters may (...) lead to increase in

³⁵⁰ See paragraphs 496-497 above.

³⁵¹ Scottish scientific literature review, [Exhibit C-0050](#).

³⁵² *Ibid* page 51.

³⁵³ *Ibid*, page 53.

³⁵⁴ See paragraph 79 above.

seabird biomass between 4% and 8%”³⁵⁶ over a period of “around 10 years”³⁵⁷:

- the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC assumed that the prohibition on sandeel fishing in UK waters of the North Sea would reduce by 58% the amount of catches of sandeel in North Sea. However, that 58% is based on a 2003-2020 reference period whereas, since 2011, the sandeel fishery in the North Sea is managed according to an escapement strategy³⁵⁸ that ensures catches are reduced in years where the sandeel stock size is estimated to be lower. The 58% assumed reduction is therefore likely to overestimate the amount of catches that the prohibition on sandeel fishing in UK waters of the North Sea will reduce;
- The “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC assumed “a fixed fishing pressure up until 2100”³⁵⁹. However, since 2011, the sandeel fishery in the Greater North Sea is managed according to an escapement strategy that ensures that fishing pressure is reduced in years where the sandeel stock size is estimated to be lower³⁶⁰; and
- Natural England/Cefas/JNCC did not simulate the biomass response to a more spatially limited prohibition of sandeel fishing in UK waters of the North Sea that would coincide with the feeding range

³⁵⁵ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#).

³⁵⁶ Ibid, page 25.

³⁵⁷ Ibid, page i.

³⁵⁸ See paragraph 78 above.

³⁵⁹ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#), page 30.

³⁶⁰ See paragraph 78 above.

of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet. It is therefore not possible to evaluate how the simulated biomass increase to such a more spatially limited prohibition would compare with the simulated biomass increase of “[p]rohibiting sandeel fishing in UK waters” of the North Sea.

506. In the third place, the “scientific advice” invoked by the UK as the base for the sandeel prohibition does not indicate that a spatially broader prohibition on sandeel fishing in UK waters of the North Sea going beyond the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet would have any of the other environmental effects claimed by the UK.

507. Regarding the benefits for marine mammals, the Scottish scientific literature review³⁶¹ noted that “it seems a reasonable assumption that any increase in sandeel abundance that might result from a reduction in fisheries pressure might be beneficial to several populations of marine mammals given their dependence on sandeel as a prey source” (page 74). However, this statement is based on a series of unsupported assumptions that are too speculative to support the alleged link between the sandeel fishing prohibition and the benefits for marine mammals: (i) the sandeel fishing prohibition “might result” in a reduction in fishing pressure; (ii) such a reduction in fishing pressure “might result” in an increase in sandeel abundance; and (iii) such an increase in sandeel abundance “might be beneficial to several populations of marine mammals” for which sandeel is an important part of their diet.

508. Regarding the benefits for fish, the Scottish scientific literature review³⁶² noted that “[p]redatory fish are often generalist feeders, where the diet typically consists of no more than 20% of any species, as predators switch

³⁶¹ Scottish scientific literature review, [Exhibit C-0050](#).

³⁶² Ibid, page 35.

between prey species based on availability” and “[t]he importance of sandeel as a food source is more variable for predatory fish than for seabirds and mammals”. However, as the Natural England/Cefas/JNCC advice noted, “[t]he diet ‘flexibility’ and ability of predatory commercial fish to substitute diet shortfalls with other prey species suggests that they are less crucially dependent on local sandeel abundance than, for example, seabird colonies off Scotland”³⁶³. The Natural England/Cefas/JNCC advice is also consistent with ICES’s explanation that “[l]ocal depletion of sandeel aggregations at a distance less than 100 km from seabird colonies may affect some species of birds, especially black-legged kittiwake (*Rissa tridactyla*) and sandwich tern (*Sterna sandvicensis*), whereas the more mobile marine mammals and fish may be less vulnerable to local sandeel depletion”.³⁶⁴

509. Regarding the increased occurrence of marine mammals within UK waters of the North Sea, the Natural England/Cefas/JNCC advice noted³⁶⁵ that the effect is contingent on “if management actions led to an increase of sandeels in the English waters”³⁶⁶, in which case “we might expect to observe an increased occurrence of marine mammals in English waters”³⁶⁷. However, in the present case, fluctuations in the abundance of sandeel are principally due to natural sandeel mortality not associated directly or indirectly with the North Sea sandeel fishery³⁶⁸.

³⁶³ Natural England/Cefas/JNCC advice, page 13, [Exhibit C-0045](#).

³⁶⁴ Report of the ICES Working Group on the Assessment of Demersal Stocks in the North Sea and Skagerrak (WGNSSK), ICES CM 2011/ACOM:13, Section 4.1.1, [Exhibit C-0074](#).

³⁶⁵ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#).

³⁶⁶ *Ibid*, page 17

³⁶⁷ *Ibid*,

³⁶⁸ [Exhibit C-0019](#) and paragraph 82 above.

510. Regarding the improved condition of the other commercial fish, the Natural England/Cefas/JNCC advice noted that “increased sandeel availability and consumption has been shown to positively correlate with the body condition of some commercial fish”³⁶⁹. However, this does not indicate that a broader geographic prohibition on sandeel fishing in UK waters of the North Sea would lead to the improved condition of other commercial fish because: (i) fluctuations in the abundance of sandeel are principally due to natural sandeel mortality not associated directly or indirectly with the North Sea sandeel fishery³⁷⁰ and (ii) as the Natural England/Cefas/JNCC advice noted, “[t]he diet ‘flexibility’ and ability of predatory commercial fish to substitute diet shortfalls with other prey species suggests that they are less crucially dependent on local sandeel abundance than, for example, seabird colonies off Scotland”³⁷¹.

511. Finally, regarding progress towards achieving good environmental status, the Natural England/Cefas/JNCC advice noted that this effect is predicated on “substantiated links (...) between the abundance of sandeels and the survival and breeding success of birds, mammals, and commercial fish”³⁷². However, as explained above, the “scientific advice” invoked by the UK as the base of the sandeel prohibition does not indicate that a broader geographic prohibition on sandeel fishing in UK waters of the North Sea would benefit “the survival and breeding success of birds, mammals, and commercial fish” beyond the effects that a prohibition on sandeel fishing in UK waters of the North Sea coinciding spatially with the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet would already have for seabirds.

³⁶⁹ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#), page 20.

³⁷⁰ [Exhibit C-0019](#) and paragraph 82 above.

³⁷¹ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#), page 13

³⁷² *Ibid*, page 20.

VII.3. Conclusion on Claim 1

512. For the reasons set out above, the EU seeks a ruling that the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(c) TCA.

VIII. Claim 2: the sandeel fishing prohibition is inconsistent with the United Kingdom's obligations under Articles 496(1) and 496(2) TCA, read together with Article 494(3)(f) TCA

513. The EU submits that in adopting and applying the sandeel fishing prohibition the UK has acted inconsistently with its obligation to ensure that a measure decided on for the conservation of marine living resources and the management of fisheries resources pursuant to Article 496 TCA has regard to the principle that measures applied for that purpose must be "proportionate and non-discriminatory" within the meaning of Article 494(3)(f) TCA. In so far as the sandeel fishing prohibition impairs the rights conferred under Annex 38 TCA, it is also inconsistent with that provision.

514. The EU addresses first the relevant legal standard and second, demonstrates that the sandeel fishing prohibition is inconsistent with that standard.

VIII.1. Legal standard

515. As described in section V.3.2 above, Article 496 TCA entitled "fisheries management" establishes a legal basis for the Parties to decide on:

"any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3)."

516. The expression "and having regard (...)" denotes that, when deciding on measures applicable to a Party's waters adopted in pursuit of the objectives

in Articles 494(1) and (2) TCA, the Party shall additionally, “have regard” or “heed” the principles in Article 494(3) TCA.³⁷³

517. Consequently, rather than considering exclusively the objectives of those measures, the Party taking a decision on the measures to be applied under Article 496(1) TCA must also have regard to the principle articulated in Article 494(3)(f) TCA.

518. Article 494(3)(f) TCA provides that, among the principles to which the Parties “shall have regard” is “applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties”.

519. It follows that Article 496 TCA, read together with Article 494(3)(f) TCA, means that one of the principles to which a Party shall have regard when deciding on a fisheries management measure is that any “fisheries management” “measure” applied on the basis of Article 496(1) TCA must be “proportionate and non-discriminatory”.

520. In Article 494(3)(f) TCA, the term “proportionate” and the term “non-discriminatory” are used as adjectives. As such, each of these terms denotes a quality that a “measure” applied for the purposes of “conservation of marine living resources and the management of fisheries resources” pursuant to Article 496 TCA must have.

521. The juxtaposition of the term “proportionate” and the term “non-discriminatory” in the same provision reflects that there are two qualities which, whilst discrete in their scope and meaning, must be satisfied cumulatively in the context of applying measures for fisheries management. In other words, it is not sufficient to have regard to only one quality to the exclusion of the other.

³⁷³ On the interpretation of the term “have regard” see section V.3.1.2 above.

522. The EU highlights that the expression “proportionate and non-discriminatory” appears in four other provisions under the TCA:

- a. in Article 75(5) TCA concerning import procedures in relation to sanitary and phytosanitary measures which must be “applied in a proportionate and non-discriminatory manner”;
- b. in Article 104(1)(c) TCA concerning customs and other trade related procedures which must be “based on legislation that is proportionate and non-discriminatory”;
- c. in Article 104(1)(d) TCA concerning customs and other trade related procedures which must contain rules that ensure that “any penalty imposed for breaches of customs regulations or procedural requirements is proportionate and non-discriminatory”; and
- d. in Article 304(3) TCA concerning wholesale electricity and gas markets which provides that “[e]ach Party shall ensure that any capacity mechanism in electricity markets is clearly defined, transparent, proportionate and non-discriminatory.”

523. A plain reading of these other provisions supports the interpretation that “proportionate” is a distinct quality to “non-discriminatory”. The use of this expression elsewhere in the TCA further confirms that the interpretation to be accorded to that expression in Article 494(3)(f) TCA is potentially of broader significance across the TCA.³⁷⁴

524. There is no suggestion in the language of Article 494(3) TCA that what is “proportionate” or what is “non-discriminatory” is self-judging.³⁷⁵ In other

³⁷⁴ The EU acknowledges that each provision should be interpreted in its proper context.

³⁷⁵ The EU addresses the relevance of the reference to “regulatory autonomy” in section VIII.1.5 below.

words, what a “proportionate (...) measure” means and what a “non-discriminatory (...) measure” means must be determined objectively.

525. Given that these two principles are distinct, the EU considers their meaning separately and sequentially.

VIII.1.1. A “proportionate (...) measure” in Article 494(3)(f) TCA

526. The EU observes that the term “proportionate” appears more than sixty times across the TCA as a whole. However, despite its recurrent use, the term “proportionate” has not been defined in the TCA. In particular, the term is not included in Article 495 TCA which sets out definitions relevant to the implementation of Heading Five.

527. The term “proportionate” in Article 494(3)(f) TCA falls, therefore, to be interpreted in line with the approach defined in Article 4(1) and 4(2) TCA and described in section V.1 above.³⁷⁶

528. This implies that when interpreting the term “proportionate... measure”, it is necessary to consider the ordinary meaning of that term in its context, including the objectives and purpose of the TCA. When considering the relevant context, the Tribunal may also have regard, in particular, to any relevant rules of international law applicable in the relations between the Parties.³⁷⁷ This is without prejudice to the possibility for the Tribunal to have recourse to supplementary interpretative guidance in accordance with Article 32 VCLT.

529. For the reasons explained in section VIII.1.9 below, as regards the specific term “proportionate”, the EU considers that the meaning ascribed to

³⁷⁶ In particular, and described in section V.1 above, in accordance with Article 4(1) TCA, the provisions of the TCA shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the VCLT.

³⁷⁷ See Article 31 VCLT.

“proportionality” in the domestic law of both Parties should inform the interpretation of the term in the TCA.

VIII.1.2. The ordinary meaning of the term “proportionate (...) measure”

530. When interpreting Article 494(3)(f) TCA read together with Article 496 TCA, the starting point is the ordinary meaning of the language in those provisions.

531. Article 494(3)(f) TCA refers to a “measure for the conservation of marine living resources and the management of fisheries resources.” Therefore, Article 494(3)(f) TCA relates to “measures” that are “applied” for a specific purpose. That purpose is defined as the “conservation of marine living resources and the management of fisheries resources”.

532. According to the Oxford English Dictionary, “proportionate” means:

“Proportioned, adjusted in proportion; that is in (due) proportion, proportional (to); appropriate in respect of quantity, extent, degree, etc.”³⁷⁸

533. According to a synonym note in the Collins English Dictionary:

— “proportionate, proportional both imply a being in due proportion, the former usually being preferred with reference to two things that have a reciprocal relationship to each other [the output was proportionate to the energy expended], and the latter, with reference to a number of similar or related things [proportional representation];

commensurable applies to things measurable by the same standard or to things properly proportioned; commensurate, in addition, implies equality in measure or size of things that are alike or

³⁷⁸ Oxford English Dictionary, entry 1398.

somehow related to each other [a reward commensurate with their heroism].”³⁷⁹

534. Therefore, a “proportionate ...measure” is a measure that has been adjusted and which is “appropriate” in the sense that it is commensurate with the aim it pursues.

535. It follows that, on its ordinary meaning, the reference to a “proportionate...measure” in Article 494(3)(f) TCA should be understood as a measure which is in due proportion to the objective of the “conservation of marine living resources and the management of fisheries resources” in the sense that is appropriate in its quantity, extent and degree and commensurate to that objective.

536. In the following sections the EU addresses additional context which provides evidence as to the “ordinary meaning” of this term.

VIII.1.3. Object and purpose of the term “proportionate measure”

537. The objectives and purpose of the term “proportionate (...) measure” have been outlined in section V.3 above.

538. In short, by requiring that measures applied for fisheries management and conservation on the basis of Article 496 TCA are “proportionate and non-discriminatory”, the Parties intended to limit their respective regulatory autonomy when deciding on such measures by reference to these requirements.

539. For that reason, “proportionate” must be interpreting as imposing a standard with which such measures must comply and hence against which they must be assessed.

³⁷⁹ Collins English Dictionary, [PROPORTIONATE definition and meaning | Collins English Dictionary](#)

VIII.1.4. The objectives of the TCA and the structure and content of Heading Five

540. The interpretation of what constitutes a “proportionate ...measure” within the meaning of Article 494(3)(f) TCA must also take into account the overall objectives of the TCA and the broader context of the commitments on fisheries in Heading Five since these provide relevant context within the meaning of Article 31(1) VCLT and according to Article 4 TCA are thus to be considered.
541. Given the wider context and objectives of the TCA, a “proportionate ...measure” must be understood to mean a measure that has been applied following a balancing of the objectives and commitments set down in Heading Five.
542. The EU refers to sections V.1 and V.2 above and recalls the following points.
543. In the first place, the TCA is intended to provide for preferential rights in a number of sectors, of which fisheries.
544. Annex 38 TCA, read together with Article 498 TCA, confer rights which are intended to confer economic and social benefits. Notably, the fishing opportunities agreed pursuant to Article 498 TCA establish economic rights which are assigned by the Parties to vessels and economic operators.
545. As to access to waters to fish, Article 501 TCA makes provision for compensatory measures in the event that there is a reduction or withdrawal of access to waters to be set at a level “commensurate to the economic and societal impact of the change in the level and conditions of access to waters”. This affirms that access to waters to fish is also understood to give rise to economic and social benefits. Indeed, the economic and social benefits derived from access to waters to fish are inherently linked to the fishing opportunities conferred.

546. In the second place, both Parties subscribe to the importance of ensuring a high level of protection in the field of marine conservation and share the objectives described in Articles 494(1) and (2) TCA.
547. Fisheries management measures as provided for under Article 496 TCA are a tool intended to allow the Parties to give effect to that legitimate policy objective in the framework of their agreement on fisheries.
548. In the third place, the exercise of rights under the TCA, including the right to apply fisheries management measures for the purpose of marine conservation is underpinned by the recognition of the importance of cooperation between the Parties. Hence, the TCA includes mechanisms allowing for consultation and dialogue between the Parties, including in the framework of fisheries. Article 494(1) TCA expressly provides for cooperation with a view to “ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefit.”
549. Given that the Heading Five makes provision both for marine conservation and economic rights, the requirement that a fisheries management measure is a “proportionate (...) measure” in Article 494(3)(f) TCA is intended to reflect that there should be a balancing of the benefits and impacts of any fisheries management measure when it is decided on and when it is applied.
550. This is because a fisheries management measure may impact economic rights and benefits derived from fishing opportunities allocated under Article 498 TCA. Those impacts include the “economic and social” impacts associated with any indirect impairment of the benefits associated with the right to access waters to fish and the fishing opportunities that have been agreed. Indeed, the TCA acknowledges the relationship between a fisheries management measure and fishing opportunities since Article 498(4)(d) TCA identifies such measures as one of the items that Parties may discuss in their annual consultations.

551. The function of Article 494(3)(f) TCA is thus to inform and set a limit on the manner in which the right to decide on and apply fisheries management measures for the purpose of “conservation of marine living resources and the management of fisheries resources” is exercised.

552. In doing so, it reflects the dual objectives identified in Article 494(1) TCA of “ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefit”. Indeed, ensuring “environmentally sustainable” stocks and achieving “economic and social benefit” are separate and concurrent objectives.

VIII.1.5. “Regulatory autonomy” in Article 494(3)(f) TCA

553. Article 494(3)(f) TCA also refers to the preservation of the “regulatory autonomy” of the Parties.

554. As discussed in section V.2 above, whereas “regulatory autonomy” is not a defined term under the TCA, it should be understood to be an expression of the recognition in the TCA that the Parties should have “autonomy” to “regulate within their territories in order to achieve legitimate public policy objectives.”³⁸⁰

555. Indeed, Article 1 of the TCA, which defines the overall purpose of the agreement stipulates that:

“This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty.”

³⁸⁰ See recital 7 of the Preamble to the TCA.

556. Several other provisions refer to the “autonomy” of the Parties’ respective decision-making and legal orders.³⁸¹

557. The EU considers that the reference to “regulatory autonomy” in Article 494(3)(f) TCA should therefore, be interpreted as reflecting that the Parties may set legitimate policy objectives and define a level of protection within their territories in line with those objectives.

558. This term also reflects the nature of the relationship between the Parties as defined in the TCA and as distinguished from the governance of fisheries prior to the withdrawal of the UK from the EU.

559. As to the relationship between “regulatory autonomy” and the qualities that measures must have, the terms of Article 494(3)(f) TCA reflect that “while” policy space for the Parties to determine the level of protection is to be preserved, this does not detract from the principle that measures that are applied must be “proportionate”. Indeed, the use of the present tense “while preserving” shows precisely that the Parties agreed that regulatory autonomy does not have primacy over the requirement to ensure that measures are “proportionate” but must be accommodated alongside that requirement and considered concurrently.

560. Therefore, the preservation of “regulatory autonomy” under Article 494(3)(f) TCA is not unconstrained. Rather fisheries management measures must be calibrated. In other words, the preservation of the “regulatory autonomy” of the Parties to apply measures in the light of the level of protection which each Party deems appropriate for legitimate conservation objectives in the framework of fisheries management does not allow the Parties to apply measures that are otherwise disproportionate or discriminatory.

³⁸¹ See for instance, Articles 98 and 351 TCA.

VIII.1.6. The relationship with Article 494(3)(a) TCA

561. As described above, Article 494(3) TCA enumerates nine principles to which the Parties shall have regard in the framework of their fisheries cooperation. One of those principles is to apply the “precautionary approach” to fisheries management.

562. The EU submits that this principle serves to guide the Parties as to when they may decide on a fisheries management measure.

563. This is not inconsistent with the requirement that such measures, when adopted and applied must be “proportionate”. The precautionary approach addresses the threshold for intervention and may be relevant to determining the level of protection, but does not displace the obligation to ensure that any measure applied on the basis of that approach is consistent with the other principles to which the Parties must also have regard.

VIII.1.7. The relationship with Article 494(3)(e) TCA

564. Article 494(3)(e) TCA refers to “taking due account of and minimising harmful impacts of fishing on the marine ecosystem and of the need to preserve marine biological diversity”. Whereas “taking due account” is not a defined term under the TCA and only appears in Article 494(3)(e) TCA and one other provision of the TCA³⁸², it should be understood to be an expression of the recognition in the TCA of “the importance of conserving and sustainably managing marine biological resources and ecosystems” (Article 404(1) TCA).

³⁸² Article 317(4) TCA: “The Specialised Committee on Energy shall review the draft technical procedures, and may recommend that the Parties implement such procedures in their respective domestic arrangements, taking due account of the opinions of the Agency for the Cooperation of Energy Regulators and the regulatory authority in the United Kingdom designated in accordance with Article 310. The Specialised Committee on Energy shall monitor the effective operation of such technical procedures and may recommend that they be updated.”

565. Article 404(4) TCA clarifies that Article 404 TCA (and thus the recognition in Article 404(1) TCA of the importance of conserving and sustainably managing marine biological resources and ecosystems) “is without prejudice to the provisions of Heading Five”.

566. Therefore, the TCA is structured to reflect that this legitimate objective must be reconciled with all other relevant principles, of which the need to have regard to ensuring that fisheries management measures taken in pursuit of that aim are “proportionate and non-discriminatory” as provided for in Article 494(3)(f) TCA.

VIII.1.8. Relevant rules of international law

567. Since Article 4 TCA refers to the customary rules of treaty interpretation as codified in the VCLT, relevant rules of international law applicable to the relations between the Parties to the TCA may also provide relevant context for the interpretation of the provisions of the TCA, including the term “proportionate (...) measure”.

568. In this section, the EU addresses rules of international law which it considers to be of particular relevance.

VIII.1.8.1. UNCLOS³⁸³

569. The EU recalls that Heading Five refers expressly to the obligations of the parties under UNCLOS and international rules under UNCLOS are relevant context when interpreting the term “proportionate (...) measure” in the TCA.

570. The term “proportionate” is not used explicitly in UNCLOS and has not, therefore, been defined in that Convention.

³⁸³ [Exhibit CLA-0023](#)

571. Nevertheless, a principle of “proportionality” has been applied in disputes involving the international law of the sea, including in disputes in which UNCLOS has been interpreted and applied.

572. One example of the application of “proportionality” predating UNCLOS is the North Sea Continental Shelf cases.³⁸⁴ In those disputes, the International Court of Justice (ICJ) was called upon to examine a methodology for delimiting the continental shelf that departs from the application of a principle of “equidistance”.

573. The ICJ relied on “proportionality” as a principle relevant to that examination and, in that sense, linked “proportionality” to the principle of “equity”. This has been reaffirmed in subsequent judgments in which the ICJ has identified the role of proportionality – or rather “disproportionality” as a final test against which the equity of a substantive method for delimiting the continental shelf (other than equidistance) can be assessed.³⁸⁵

574. UNCLOS also contains provisions that imply the need to ‘weigh and balance’ competing rights and interests.

575. For instance, according to Article 56(2) UNCLOS, a coastal State in exercising its rights and duties in its exclusive economic zone shall “have due regard to the rights and duties of other States.”

576. The expression “due regard” in this provision has been interpreted as imposing a standard that is informed by the circumstances and by the

³⁸⁴ North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3. [Exhibit CLA-0046](#).

³⁸⁵ See *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 61 at paragraph 110 in which the ICJ held “The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment.” See also paragraphs 210 to 216. [Exhibit CLA-0047](#).

nature of those rights and which is, for all intents and purposes, equivalent to the obligation of good faith.³⁸⁶ The extent of the regard required depends upon the nature of the rights held, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the other State, and the availability of alternative approaches. The obligation to have “due regard” to “the rights and duties of other States” has been considered to entail “at least”, both consultation and a balancing exercise with the State’s own rights and interests.³⁸⁷

577. Article 58(3) UNCLOS similarly provides that “[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone (...) States shall have due regard to the rights and duties of the coastal State.”

578. These provisions reflect that the parties to UNCLOS may have to measure the impacts of their activities on other parties and ‘weigh’ those impacts in the sense of taking the interests of other States into account.

579. In the second place, the interaction between Article 192 and Article 193 UNCLOS reflects that States have to balance their obligation to protect and preserve the marine environment against the sovereign right to exploit their natural resources. As explained by ITLOS:

“while article 193 of the Convention recognizes the sovereign right of States to exploit their natural resources pursuant to their environmental policies, it further provides that States must exercise such right “in accordance with their duty to protect and preserve the marine environment.” This article thus places a constraint upon States’ exercise of

³⁸⁶ See Article 2(3) of UNCLOS, [Exhibit CLA-0023](#).

³⁸⁷ Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Final Transcript) PCA Case No 2011-03, Award of 18 March 2015, paragraphs 518, 519, 520 and 534, [Exhibit CLA-0048](#).

their sovereign right. This shows the importance the Convention attaches to the protection and preservation of the marine environment.”³⁸⁸

580. This “weighing and balancing” exercise must take into account the duty incumbent on parties to cooperate and must reflect the importance of the legitimate interest of marine protection. As reflected in the Advisory Opinion, marine protection may act as a constraint on the exercise of a sovereign right. Nevertheless, under the terms of UNCLOS, it does not eliminate that sovereign right which is also recognised in the Convention. Therefore, when determining the limits of the permissible constraint in the circumstances of a given case, an analytical approach equivalent to a proportionality analysis may be applied.

581. In that context, ITLOS has recalled the importance of carrying out environmental impact assessments, which in turn reflects that measures taken by States should be evidence-based.³⁸⁹ This affirms the role of assessments of risks and impacts whenever the “weighing” and “balancing” exercise falls to be carried out.

582. Article 194(4) UNCLOS provides another example of a provision which requires a State to balance its interests against those of another State when taking measures. It provides:

“In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.”

³⁸⁸ ITLOS, Case No.31, Advisory opinion - Request for an Advisory Opinion Submitted By The Commission Of Small Island States On Climate Change And International Law, para 187. See also paragraph 380. [Exhibit CLA-0021](#).

³⁸⁹ See ITLOS Advisory Opinion on Climate Change, paras 356 to 358, [Exhibit CLA-0021](#).

583. This has been interpreted to mean, similar to the interpretation of the obligation of good faith set down in Article 2(3) UNCLOS and the obligations under Article 56(2) UNCLOS, that a State must base any such interference on an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue. Whereas environmental considerations could potentially justify the infringement of other rights, including fishing rights in the territorial sea, such justification requires significant engagement to explain the need for the measure and to explore less restrictive alternatives.³⁹⁰

584. Similarly, in previous disputes, arbitral tribunals have considered and acknowledged that international conventions, including UNCLOS, also recognise the importance of economic rights, including in EEZs and hence, a balance may have to be struck between the impacts of a given activity and the intentions of the Parties when granting those economic rights.³⁹¹

VIII.1.8.2. International economic law

585. As described in section V.1, rules of international economic law as defined and applied under the WTO Agreements are among the relevant rules of international law applicable to relations between the Parties. Therefore, those rules are also relevant context for the interpretation of Heading Five in general and Article 496 and Article 494 TCA in particular.

³⁹⁰ See by analogy Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Final Transcript) PCA Case No 2011-03, Award of 18 March 2015, paragraph 541 in which the Tribunal considered an interference with the fishing rights of Mauritius in the territorial sea and considered that whereas Article 194 UNCLOS may provide a justification on grounds on environmental protection for an interference, on the facts there had not been sufficient engagement, [Exhibit CLA-0048](#).

³⁹¹ See by analogy the discussion of Article 121(3) UNCLOS and the objectives and role of the EEZ in The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), PCA Case No. 2013-19. [Exhibit CLA-0049](#).

586. Heading Five regulates the granting of specific rights which confer an economic benefit on operators.

587. In particular, and as explained above, the rights of access to waters to fish and the fishing opportunities agreed pursuant to Article 498 TCA confer rights on operators to perform an economic activity.

588. Where fisheries management and marine conservation measures prevent that economic activity from being performed, this impairs the enjoyment of the economic and social benefits granted under the TCA.

589. Therefore, when considering the circumstances in which a fisheries management and marine conservation measure may justify the impairment of such benefits, the rules of international economic law provide relevant context for the interpretation of the term “proportionate (...) measure”.

590. In the field of international economic law and in particular under the WTO Agreements, there is no “proportionality” test as such.

591. Under the GATT 1994³⁹² as well as under the specific agreements including the Agreement on Sanitary and Phytosanitary measures³⁹³ (‘SPS Agreement’) and the Agreement on Technical Barriers to Trade³⁹⁴ (‘TBT Agreement’), there are, however, mechanisms allowing for the core disciplines governing international trade to be reconciled with the pursuit of legitimate regulatory aims by WTO members.³⁹⁵ Those legitimate regulatory aims include environmental objectives. Indeed, the Appellate Body has held that:

³⁹² [Exhibit CLA-0050](#).

³⁹³ [Exhibit CLA-0041](#).

³⁹⁴ [Exhibit CLA-0039](#).

³⁹⁵ Under the Agreement on Sanitary and Phytosanitary measures Agreement, it is Article XX of the GATT 1994 which applies.

“WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.”³⁹⁶

592. The precise legal standard differs according to the specific WTO Agreement that applies to the measure in question. However, it has been consistently recognised that where international trade is restricted by reference to a legitimate regulatory aim (of which environmental protection and conservation of resources are examples), the assessment of the consistency of that restriction requires a ‘weighing and balancing’ of the rights and obligations at stake.

593. For example, Article XX of the GATT 1994 establishes general exceptions.³⁹⁷ Where applicable these allow a WTO member to justify a measure that would otherwise be inconsistent with obligations under the GATT 1994. When considering the application of Article XX of the GATT 1994, the Appellate Body has held:

“[A] balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.”³⁹⁸

594. Equally, the TBT Agreement recognises that Members have autonomy to define technical regulations in pursuit of legitimate objectives, but applies certain disciplines to the exercise of that regulatory autonomy. In

³⁹⁶ Appellate Body Report, US – Gasoline, pp. 30. [Exhibit CLA-0022](#).

³⁹⁷ Since they are general exceptions, they have been considered conceptually as a “defence”: Panel Report, EC – Asbestos, paras. 8.177-8.178. [Exhibit CLA-0051](#).

³⁹⁸ See Appellate Body Report, US – Shrimp, para 156. [Exhibit CLA-0052](#).

particular, paragraph 6 of the preamble to the Agreement on Technical Barriers to Trade provides:

“No country should be prevented from taking measures necessary (...) for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate.”

595. Under Article 2.2 of the TBT Agreement, Members nevertheless have obligations to ensure that technical regulations are “not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” To meet this purpose, Members have the obligation to ensure that technical regulations are not “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”.

596. Article 2.2 TBT, therefore, also sets down a framework for ‘weighing and balancing’ measures adopted in the exercise of a Member’s regulatory autonomy in furtherance of a legitimate policy objective. As has been recognised by the Appellate Body in WTO disputes, the object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalisation and, on the other hand, Members’ right to regulate.³⁹⁹ By preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective.⁴⁰⁰

597. Indeed, when considering the application of Article 2.2 TBT, the Appellate Body has held:

³⁹⁹ Appellate Body Report, United States – Measures Affecting The Production And Sale Of Clove Cigarettes, paragraph 174. [Exhibit CLA-0053](#).

⁴⁰⁰ Report of the Appellate Body, US – Tuna II (Mexico), paragraph 316. [Exhibit CLA-0054](#).

“Ultimately, the task of a panel under Article 2.2 is to determine whether the technical regulation at issue restricts international trade beyond what is necessary for that technical regulation to achieve the degree of contribution that it makes to the achievement of a legitimate objective.”⁴⁰¹

598. As to the factors that must be taken into account in that ‘weighing and balancing’ exercise, it has consistently been held, both in application of Article XX of the GATT 1994 and when applying Article 2.2. of the TBT Agreement, that a measure that otherwise impairs economic rights must be shown to:

- be apt to contribute to the stated aim⁴⁰²; and
- have a relationship of ends and means with the interest to be protected.⁴⁰³

599. The requirement that a measure is ‘apt’ to contribute to its objective has been interpreted broadly and generally requires a panel to be satisfied that a measure is not “incapable” of contributing to its stated aim.⁴⁰⁴

600. If a measure *prima facie* is apt to and pursues a legitimate aim, this does not terminate the analysis.

601. The next stage of the analysis requires consideration of a number of distinct factors relating both to the measure sought to be justified and,

⁴⁰¹ Appellate Body Report, US -COOL (Article 21.5), para 5.197 citing Appellate Body Reports, US – COOL, para. 461 [Exhibit CLA-0055](#); and Appellate Body Report, US – Tuna II (Mexico), paragraph 319, [Exhibit CLA-0054](#).

⁴⁰² Appellate Body Reports, Colombia – Textiles, paras. 5.67. [Exhibit CLA-0057](#).

⁴⁰³ Appellate Body Report, Brazil – Retreaded Tyres, para. 145. [Exhibit CLA-0058](#).

⁴⁰⁴ Appellate Body Reports, Colombia – Textiles, paras. 5.68-5.70, [Exhibit CLA-0057](#); Appellate Body Report, India – Solar Cells, para. 5.58, [Exhibit CLA-0059](#); Panel Report, EU and Certain Member States – Palm Oil (Malaysia), paras 7.343-7.351, [Exhibit CLA-0045](#).

usually, to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective. Relevant factors include the degree of contribution that a measure may make to the objective it pursues and the degree of trade restrictiveness of the measure itself.⁴⁰⁵

602. The standard or benchmark against which a measure must be assessed depends on the nature of the legitimate objective pursued.

603. Article XX(b) of the GATT 1994 establishes a general exception for measures that pursue ‘environmental objectives’. To fall within the scope of this exception, measures must be “necessary to protect human, animal or plant life or health”. The standard is, therefore, one of “necessity” and not one of “proportionality”.

604. Article 2.2 of the TBT Agreement likewise applies a standard of “necessity” since it uses the term “unnecessary obstacles”. The Appellate Body has recognised that “the reference in Article 2.2 to “unnecessary obstacles” implies that “some” trade-restrictiveness is allowed and, further, that what is actually prohibited are those restrictions on international trade that “exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.”⁴⁰⁶ Therefore, by its terms, Article 2.2 requires an assessment of the necessity of the trade-restrictiveness of the measure at issue, and the requirement of “necessity” serves to delimit the permissible scope of a restriction on trade rather than to preclude it altogether.⁴⁰⁷

⁴⁰⁵ There may be circumstances in which there is no reasonably available alternative See Appellate Body EC – Asbestos, paras. 174-175. [Exhibit CLA-0042](#).

⁴⁰⁶ Appellate Body Report, US – Tuna II (Mexico), para. 319. [Exhibit CLA-0054](#).

⁴⁰⁷ See Appellate Body – US COOL, para 275. [Exhibit CLA-0055](#).

605. Within the particular normative framework of the TBT Agreement, regulatory autonomy is therefore made subject to constraints which inter alia require Members to calibrate measures taken in exercise of their regulatory autonomy to ensure that they are not more “trade restrictive” than “necessary”. This requirement of calibration applies irrespective of the fact that the objective pursued is accepted to be legitimate.

606. Although “necessity” is not equivalent to “proportionality”, certain aspects of the ‘weighing and balancing’ exercise carried out in application of these provisions are informative.

607. First, a holistic assessment is required that goes beyond simply considering the contribution to the legitimate objective. As the Appellate Body has held:

“whether a measure is 'necessary' cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis”.⁴⁰⁸

608. When applying Article 2.2 of the TBT Agreement the Appellate Body has similarly held that:

“the assessment of 'necessity' involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create”.⁴⁰⁹

609. Second, the notion that the parties to GATT 1994 should adopt the “least restrictive measure” that is reasonably available to contribute to an equivalent degree to the objective pursued is a core element of the

⁴⁰⁸ Appellate Body Reports, EC – Seal Products, paras. 5.213-5.215 [Exhibit CLA-0040](#).

⁴⁰⁹ See Appellate Body Report, US – Tuna II (Mexico), para. 318-320. [Exhibit CLA-0054](#).

balancing exercise, since the existence of such alternatives undermines the proposition that the measure is “necessary”.

610. Third, as to evidential considerations, the Appellate Body has noted that a party seeking to demonstrate that its measures are 'necessary' should seek to establish such necessity through 'evidence or data, pertaining to the past or the present', establishing that the measures at issue contribute to the achievement of the objectives pursued.⁴¹⁰

611. The EU observes that “necessity” under Article XX(b) of the GATT 1994 or under Article 2.2 of the TBT Agreement cannot be fully assimilated to a “proportionality” standard as set down in the TCA. It is for this reason that the EU relies on the rules under international economic law as an interpretative guide affirming that there needs to be a balancing exercise rather than suggesting that precisely the same legal standard must be applied *mutatis mutandis* to the TCA.

612. Indeed, had the Parties intended to impose a standard of “necessity” as the benchmark against which measures adopted for marine conservation and fisheries management should be assessed, this term could have been used expressly.

613. Therefore, the choice of the term “proportionate (...) measure” as opposed to the term “necessary measure” should be understood as a deliberate choice by the Parties which differentiates the legal standard from that applicable under WTO law when applying either Article XX(b) of the GATT 1994 or Article 2.2 of the TBT Agreement.

614. The difference between what is “necessary” and what is “proportionate”, does not, however, denote a lower degree of scrutiny. Proportionality is a broader concept than necessity. Assessing whether a measure is “proportionate” will therefore include an assessment of its “necessity” but

⁴¹⁰ See Appellate Body, Brazil – Retreaded Tyres, para 151. [Exhibit CLA-0058](#).

requires a further analytical step. In particular, a measure might be “necessary” to fulfil a legitimate aim, but still be disproportionate once a cost benefit analysis is properly taken into account.

VIII.1.9. Domestic law

615. As explained in section V.1 above, Article 4(2) TCA provides that there is no “obligation” to interpret a provision of the TCA in line with the domestic law of the Parties.

616. However, in certain circumstances, such as where the Parties have ascribed a similar meaning to a term under their domestic law, this may be a further source of interpretative guidance which the Tribunal may take into account.

617. As is apparent from the preceding sections, the term “proportionate (...) measure” is neither defined in the TCA itself, nor is it defined in UNCLOS and nor is it a term that is derived from international economic law which rather applies a standard of “necessity”.

618. However, insofar as the term “proportionate (...) measure” may be understood to refer to a principle of “proportionality”, this is a term which has been accorded a meaning in the domestic law of both Parties to the TCA. Moreover, there is a high degree of correlation between the principle of “proportionality” as understood in EU law and the manner in which the UK Courts have interpreted and applied a principle of “proportionality”.

619. Given this, the EU considers that this is an example of a term where the manner in which the Parties have applied the term in their respective domestic law has a bearing on the “ordinary meaning” to be accorded to that term as used in Article 494(3)(f) TCA.

620. The EU therefore, briefly addresses how proportionality has been applied in the EU and by the apex court in the UK.

VIII.1.9.1. “Proportionality” under UK law

621. “Proportionality” is a principle that has been ascribed a role in the context of judicial review of administrative decision-making by the courts of the UK.⁴¹¹

622. In the period in which the UK was a Member State of the EU, proportionality was most often considered by the courts of the UK when applying EU law as well as when giving effect to the obligations arising under the European Convention of Human Rights.⁴¹²

623. Nevertheless, the UK Supreme Court, the apex court in the UK, has expressed the view that proportionality has been integrated into the common law or in any event, is not materially different in the substantive analysis that it implies. In that sense, proportionality has been recognised by the UK’s apex court as introducing a structural framework and methodology for the review of public decision-making. Thus, the UK Supreme Court has held:

“The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such

⁴¹¹ It is also a standard that has been integrated into certain domestic statutes, for instance the Equality Act 2010. [Exhibit CLA-0060](#).

The UK Supreme Court has acknowledged that the principle of “proportionality” under EU law is “neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights”. See *R (on the application of Lumsdon and others) (Appellants) v Legal Services Board (Respondent)*. [2015] UKSC 41, para 26. [Exhibit CLA-0061](#).

factors should not be relevant in judicial review even outside the scope of Convention and EU law.”⁴¹³

624. In another judgment, the UK Supreme Court held:

“Proportionality is a test for assessing the lawfulness of a decision-maker’s choice between some legal norm and a competing public interest. Baldly stated, the principle is that where the act of a public authority derogates from some legal standard in pursuit of a recognised but inconsistent public interest, the question arises whether the derogation is worth it.”⁴¹⁴

625. The UK Supreme Court has identified different components of a “proportionality” assessment including that:

- the intensity of review will depend on the nature of the right that has been impaired;⁴¹⁵
- there should be a rational connection between the objective pursued and the measure applied;
- there should be an inquiry into whether less intrusive alternatives exist; and
- a measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification.⁴¹⁶

⁴¹³ Kennedy (Appellant) v The Commission (Respondent) [2014] UKSC 20, paragraph 57. [Exhibit CLA-0062](#).

⁴¹⁴ R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6, paragraph 47 ([Exhibit CLA-0063](#)). See also Bank Mellat, paragraph 74 per Lord Sumption. [Exhibit CLA-0064](#).

⁴¹⁵ Kennedy (Appellant) v The Charity Commission (Respondent) [2014] UKSC 20, paragraph 57 et seq. [Exhibit CLA-0062](#).

VIII.1.9.2. “Proportionality” in EU law

626. “Proportionality” is recognised as a general principle of EU law. Article 5(4) of the Treaty on European Union⁴¹⁷ provides:

“Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

627. The contours of the principle of proportionality have been developed through the case law of the Court of Justice of the EU. In the specific context in which there is an impairment of an economic right under EU law, the principle of “proportionality” has been held to require that:

- (a) the measure pursues a legitimate aim;
- (b) the measure is an appropriate measure;
- (c) the measure is among those that is the least restrictive available of the economic right; and
- (d) when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the objectives pursued.⁴¹⁸

628. In short, under EU law, “proportionality” implies that even where the objective is recognised as legitimate and the measure is appropriate to meet that aim, there is still an exercise of balancing rights and legitimate aims. This balancing exercise requires consideration of the impacts and benefits associated with the measure at issue. Therefore, proportionality under EU

⁴¹⁶ See *Bank Mellat v Her Majesty’s Treasury*, [2013] UKSC 38 & [2013] UKSC 39, paragraph 25. [Exhibit CLA-0064](#).

⁴¹⁷ Treaty on the European Union, [Exhibit CLA-0065](#).

⁴¹⁸ Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*, EU:C:1990:391 ([Exhibit CLA-0066](#)).

law not only requires an assessment of the relationship between the means and the ends of an action (a legitimate aim), but also between the means and their interference with the interest ‘deserving of protection’.

629. That this is the role of the principle of proportionality under EU law has been well understood by the UK courts. In 2019, the UK Supreme Court applying one of its own earlier judgments recalled the following:

“Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.

For reasons which appear below, it should be emphasised that Lord Reed and Lord Toulson in this passage have made it clear that the third question, regarding proportionality *stricto sensu*, does indeed constitute an aspect of the EU law principle of proportionality. It is identified as such by the Court of Justice whenever it is necessary for it to do so.”⁴¹⁹

⁴¹⁹ Secretary of State for Work and Pensions (Appellant) v Gubeladze (Respondent) 2019] UKSC 31, paragraph 58 to 59 citing *R (on the application of Lumsdon and others) (Appellants) v Legal Services Board (Respondent)*. [2015] UKSC 41, [Exhibit CLA-0067](#).

630. When applying the principle of “proportionality” in the context of derogations from Treaty rights established under EU law, the Court of Justice of the EU has recognised that national decision-makers enjoy a margin of appreciation. In particular, the criterion to be applied is “not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate”.⁴²⁰

631. In areas where EU law is not fully harmonised, Member States have discretion to set a level of protection in accordance with national policy objectives. Having exercised their discretion to set the level of protection, however, the Member States must act proportionately within the confines of their choice. A national measure will be considered to consist of a disproportionate interference with one of the freedoms guaranteed under the EU Treaties if the desired level of protection could be attained equally well by measures which were less restrictive of a fundamental freedom.⁴²¹

632. Where a decision-maker impairs an economic right on grounds of an economic or social justification, under EU law there is an expectation that this should be supported by evidence.⁴²² The same applies to justifications premised on environmental or health grounds which are recognised as legitimate policy aims.⁴²³

⁴²⁰ See Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2001:420, para 83, [Exhibit CLA-0068](#); and Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Exp Fedesa*, EU:C:1990:391, [Exhibit CLA-0066](#).

⁴²¹ Case C-170/04 *Rosengren v Riksåklagaren*, EU:C:2007:313, para 43. [Exhibit CLA-0069](#).

⁴²² Case C-319/06 *Commission of the European Communities v Grand Duchy Luxembourg*, EU:C:2008:350, paras 51 to 53. [Exhibit CLA-0070](#).

⁴²³ Case C-242/17 *L.E.G.O.*, EU:C:2018:804, paragraphs 63 to 72 ([Exhibit CLA-0071](#)). See also Case C-297/05 *Commission v Netherlands*, EU:C:2007:531 in which an environmental justification was rejected on the grounds that it was disproportionate ([Exhibit CLA-0072](#)).

633. Where justifications for the impairment of rights are premised in whole or in part on the precautionary principle, the evidential basis may be reduced, but this does not imply that evidence has no role whatsoever. Under EU law, even if it may prove impossible to carry out a full scientific risk assessment because of the inadequate nature of the available scientific data, the precautionary principle implies that this should not preclude preventive measures from being taken in accordance with the precautionary principle. However, the Court of Justice of the EU has recognised that it is “important in such a situation, that scientific experts carry out a scientific risk assessment notwithstanding the existing scientific uncertainty, so that the competent public authority has available to it sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts.” Such a scientific risk assessment must “be based on the most reliable scientific data available and the most recent results of international research.”⁴²⁴

634. The precautionary principle is not therefore a *carte blanche* for discretionary decision-making. Sufficient indications must be available to corroborate the existence of a genuine scientific risk, and decision-makers must still deploy the best available evidence in decision making. Where a measure is not supported by sufficient scientific evidence, this is a factor which may weigh in favour of a conclusion that it is disproportionate.

VIII.1.10. Conclusion on the meaning of the term “proportionate (...) measure”

635. On the basis of the different factors described above, the EU summarises its position as to the proper interpretation of the term “proportionate (...) measure” as used in Article 494(3)(f) TCA.

⁴²⁴ See, for instance, C-616/17 *Blaise and Others*, EU:C:2019:800, paragraph 46, [Exhibit CLA-0073](#).

636. First, to be proportionate it must be demonstrated that there is a relationship of ends and means between the legitimate objective of marine conservation or fisheries management and the measure in question. In that sense the measure must have been adopted “for conservation of marine living resources and the management of fisheries resources”.

637. Second, the measure must be apt or appropriate to secure that objective in the sense that it must be capable of contributing to that objective. In the light of the rules of international economic law, the EU suggests that ‘apt’ should be interpreted broadly and implies that the measure is ‘not incapable’ of contributing to that objective. This also reflects the logic of the TCA which focuses on the purpose of a fisheries management measure rather than exhaustively identifying the form of such measures.

638. Third, when applying a measure for marine conservation or fisheries management, even where such a measure pursues that legitimate interest and is appropriate or apt to do so, this is not the end of the analysis.

639. To demonstrate that a measure is proportionate it must be shown that there has been a ‘weighing and balancing’ of the contribution of the measure to its legitimate objective, the economic and social impacts of the measure and the impairment by the measure of other rights provided for in the TCA. In the context of Heading Five, this includes the right of “full access to waters to fish” set down in Annex 38 TCA.

640. In carrying out that weighing and balancing exercise:

- a. regard should be had to the degree of contribution that the measure makes to the objective pursued;
- b. regard should be had to the economic and social impacts of a measure;
- c. regard should be had to the impairment of other rights, notably those provided for in the same Heading of the same Agreement;
and

- d. a measure may not go beyond what is “necessary” to meet the objective that is pursued. When assessing this, one factor which may be relevant to determining whether a measure goes beyond what is necessary or is otherwise “disproportionate” is the reasonable availability of other measures which would contribute to the objective and which, to the extent that they have economic and social impacts or impair other rights, would do so in a manner that is commensurate with that contribution. A measure may be “necessary” and nonetheless disproportionate when the balancing exercise has been undertaken if it transpires that the ‘costs’ or ‘impacts’ outweigh the benefits or ‘contribution’.

641. The EU underscores that it is this final stage of the analysis which differentiates the term “proportionate” from the term “necessary” as used in international economic law and which hence reflects the intention of the Parties when selecting that term and including it in Article 494(3)(f) TCA to apply a different legal standard. Indeed, the framework of proportionality, which is used in the domestic law of both Parties, provides important and relevant context for understanding the terms of the TCA.

VIII.2. The meaning of the term “non-discriminatory measure” in Article 494(3)(f) TCA

642. Article 494(3)(f) TCA provides that when applying fisheries management measures regard shall be had to ensuring such measures are “non-discriminatory”.

643. The term “non-discriminatory” has not been defined in Article 295 TCA which sets out the definitions that apply to Heading Five TCA. However, the expression “non-discriminatory” appears more than 115 times in the Agreement as a whole. For the purposes of applying certain Parts, a

specific definition of the term “non-discrimination” has been included in the TCA.⁴²⁵

644. Indeed, unlike the principle of proportionality, the principle of non-discrimination underpins many trade agreements since it correlates to core principles of international economic law and notably the core disciplines of the WTO Agreements. Hence, the fact that there are multiple references to “non-discrimination” and “discrimination” across the Trade part of the TCA is relevant to the interpretation of this term in the Fisheries Heading.

645. In sum, whereas in the absence of a definition, the term “non-discriminatory measure” as used in Article 494(3)(f) TCA must also be construed in accordance with Article 4 TCA, the EU considers that broader context, including rules of international economic law is particularly relevant.⁴²⁶

VIII.2.1. The ordinary meaning of the term “non-discriminatory measure”

646. According to the Oxford English Dictionary, the term “non-discriminatory” means:

⁴²⁵ See for instance, Article 300(2) TCA which provides that for the purpose of applying the provisions on energy “references to “non-discriminatory” and “non-discrimination” mean most-favoured-nation treatment as defined in Articles 130 and 138 and national treatment as defined in Articles 129 and 137, as well as treatment under terms and conditions no less favourable than that accorded to any other like entity in like situations.”

⁴²⁶ The EU recalls that recital 6 of the Preamble refers to the Parties “BUILDING upon their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation”.

“That does not make distinctions; esp. that does not make prejudicial distinctions on the grounds of a person's race, colour, sex, etc.”⁴²⁷

647. In general terms, discrimination may entail distinctions based on other factors, including origin.

VIII.2.2. Object and purpose of the term “non-discriminatory” measure

648. The objectives and purpose of the term “non-discriminatory (...) measure” in Article 494(3)(f) TCA should be understood in the same manner as the adjective “proportionate” in this same provision.

649. In other words, it describes one of the qualities that a “measure” applied “for the conservation of marine living resources and the management of fisheries resources” must have. As is the case for the term “proportionate (...) measure”, its function is therefore, to limit or constrain the types of measure that may be applied in accordance with Article 496 TCA.⁴²⁸

VIII.2.3. The term “non-discriminatory... measure” in its context

650. The EU recalls that according to recital 18 of the Preamble to the TCA, one of the objectives of the Agreement is:

“to promote the peaceful use of the waters adjacent to their coasts and the optimum and equitable utilisation of the marine living resources in those waters including the continued sustainable management of shared stocks.”

651. The expression “equitable” is defined in the Oxford English Dictionary as

⁴²⁷ Oxford English Dictionary, s.v. “non-discriminatory (adj.),” July 2023, <https://doi.org/10.1093/OED/5209270960>.

⁴²⁸ See the analysis in section VIII.1.5 above which applies.

“That is in accordance with equity; fair, just, reasonable”.⁴²⁹

652. According to the Collins Thesaurus, one synonym for discriminatory is “inequitable”.

653. On this basis, one of the objectives of the commitments in Heading Five should be understood as being to ensure that the utilisation of the marine living resources in the Parties’ waters is equitable or fair. The requirement that fisheries management measures are non-discriminatory is one manifestation of that objective. This is particularly relevant to the management of shared stocks.

654. In that context, Article 496(2) TCA provides in relevant part :

“A Party shall not apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the same measures to its own vessels.”

655. This suggests that the type of discrimination with which Article 494(3)(f) TCA is concerned is discrimination that is based on origin. Indeed, as explained in section V.3.2.5, Article 496(2) TCA is an expression of the principle in Article 494(3)(f) TCA that measures applied must be “non-discriminatory”. It makes clear that the requirement that measures cannot discriminate on grounds of origin cannot be derogated from.

656. It is trite law that “discrimination” may be *de jure* or *de facto*.

657. The EU submits that the requirement set down in Article 496(2) TCA to ensure the even-handed or “fair” application of fisheries management measures to all fishing vessels irrespective of their origin, should be understood to require the Parties to have regard to ensuring that such

⁴²⁹ Oxford English Dictionary, s.v. “equitable (adj.),” July 2023, <https://doi.org/10.1093/OED/6873909885>.

fisheries management measures are neither *de jure* nor *de facto* discriminatory.

658. Indeed, this interpretation is consistent with the approach in other parts of the TCA.⁴³⁰

VIII.2.3.1. International Economic Law

659. The rules of international economic law also affirm that the reference to a “non-discriminatory measure” should be interpreted broadly and so as to encompass *de facto* and *de jure* discrimination.

660. In *Canada – Wheat Exports and Grain Imports*, the Appellate Body stated:

“When viewed in the abstract, the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner. The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term “non-discriminatory” and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of discrimination can accommodate both drawing distinctions *per se*, and drawing distinctions on an improper basis. Only a full and proper interpretation of a provision containing a prohibition on discrimination will reveal which type of differential treatment is prohibited”.⁴³¹

⁴³⁰ See for instance Article 300(2) TCA which refers to “treatment under terms and conditions no less favourable than that accorded to any other like entity in like situations.”

⁴³¹ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87, [Exhibit CLA-0074](#). This finding was cited by the Panel in its report in *European Union - Measures Affecting Tariff Concessions on Certain Poultry Meat Product*, paragraph 7.194, [Exhibit CLA-0075](#). See also Appellate Body Report, *EC – Tariff Preferences*, paras. 142–173 cited by the Appellate Body in *Canada – Wheat Exports and Grain Imports*, para. 87 and Appellate Body Report, *Korea – Various Measures on Beef*, paras 136 to 137 as regards the GATT 1994, [Exhibit CLA-0026](#).

661. Equally, previous WTO Panels have considered that whilst the ordinary meaning of the term "discriminatory" is "somewhat elastic and may be interpreted narrowly or broadly, depending on the context", the sine qua non is that the different treatment must be accorded to "similarly-situated" entities.⁴³²

662. Article 494(3)(f) TCA indicates that "regulatory autonomy" should be preserved and, as the EU has explained in section VIII.1.5 above, this implies a consideration of "regulatory autonomy" concurrently with the requirement to apply a "non-discriminatory (...) measure".

663. On this basis, the EU considers that when interpreting the meaning of the term "non-discriminatory (...) measure" and when analysing what should be understood to constitute *de facto* discrimination, the rules under the TBT Agreement provide relevant context.

664. Indeed, the EU considers that Article 2.1 of the TBT Agreement offers a more relevant analogy to the structure of the fisheries provisions in the TCA than the GATT 1994.

665. In the first place, as described above, the TBT Agreement expressly requires a balancing between trade liberalisation and regulatory autonomy. This is analogous to the balancing required by Article 494(3)(f) TCA.

666. In the second place, unlike certain provisions under the GATT, it has been held by the Appellate Body that regulatory purpose is relevant to the assessment of whether there is "less favourable treatment" or not and

⁴³² See Panel Report, *European Union - Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, paragraph 7.197-199 citing Appellate Body Report, *EC – Tariff Preferences* para. 153. [Exhibit CLA-0075](#).

hence whether a measure is inconsistent with the non-discrimination obligation.⁴³³

667. Article 2.1 of the TBT Agreement establishes a requirement that members should not discriminate on grounds of origin. It provides:

“Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

668. In *US – Clove Cigarettes*, the Appellate Body considered the interpretation of Article 2.1 of the TBT Agreement and made the following findings:

“the object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.

Accordingly, the context and object and purpose of the TBT Agreement weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both de jure and de facto discrimination on against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.”⁴³⁴

⁴³³ Under the GATT 1994, for certain provisions regulatory purpose is not relevant at all and hence is only considered under the General Exceptions.

⁴³⁴ Appellate Body Report, *US – Clove Cigarettes*, paras. 174 – 175, [Exhibit CLA-0053](#).

669. As to the normative content of *de facto* discrimination, the Appellate Body has also considered that it is not dispositive to identify a detrimental impact on imported products. Instead:

“a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.”⁴³⁵

670. Hence, a two staged analysis is required.

671. First, it is necessary to consider a modification to conditions of competition to the detriment of imported products vis-à-vis like products of domestic origin and/or like products originating in any other country.

672. Second, it is necessary to consider whether such detrimental impact “stems exclusively from a legitimate regulatory distinction” and to the extent that it does, this is not inconsistent with Article 2.1 TBT.

673. This in turn requires an assessment of the design, architecture, revealing structure, operation, and application of the technical regulation at issue.⁴³⁶

⁴³⁵ Appellate Body Report, US – Clove Cigarettes, paras. 182, [Exhibit CLA-0053](#).

⁴³⁶ Appellate Body Reports, US – Tuna II (Mexico), para. 215, [Exhibit CLA-0054](#); US – COOL, para. 271, [Exhibit CLA-0055](#); and US – Tuna II (Mexico) (Article 21.5 – Mexico), para. 7.26, [Exhibit CLA-0076](#). See also Panel Reports, US – Tuna II (Mexico) (Article 21.5 – Mexico), para. 7.73; and US – COOL (Article 21.5 – Canada and Mexico), paras. 7.60-7.62, [Exhibit CLA-0077](#).

VIII.2.3.2. UNCLOS

674. UNCLOS includes multiple references to “discrimination” and “non-discrimination”.

675. First, Article 25 UNCLOS which concerns the rights of protection of the coastal States provides in relevant part:

“(3) The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.”

676. A similar expression precluding discrimination “in form or in fact” is included in Article 52 UNCLOS.

677. Equally, Article 227 UNCLOS provides that:

“In exercising their rights and performing their duties under this Part, States shall not discriminate in form or in fact against vessels of any other State.”

678. The EU considers, on this basis, that the terms of UNCLOS, like the rules of international economic law, support an interpretation of a “non-discriminatory measure” which requires that measure to neither discriminate *de jure* (in form) or *de facto* (in fact).

VIII.2.4. Conclusion on the meaning of the term “non-discriminatory measure”

679. On the basis of the different factors described above, the EU summarises its position as to the proper interpretation of the term “non-discriminatory (...) measure” as used in Article 494(3)(f) TCA.

680. First, to be non-discriminatory it must be demonstrated that there is no *de jure* origin discrimination in the sense that measures, on their face do not distinguish between vessels based on which Party those vessels belong to.

681. Second, it must also be demonstrated that a measure does not give rise to *de facto* discrimination. For these purposes, given the reference in Article 494(3)(f) TCA to “regulatory autonomy”, this is a factor that should be considered in the context of assessing whether there is discrimination at all. To the extent that any detrimental impact that is identified stems exclusively from a legitimate regulatory distinction, this will not give rise to discrimination. These accords meaning to the term “regulatory autonomy” in Article 494(3)(f) TCA.

682. Conversely, where there is no legitimate regulatory distinction or where the design, architecture and revealing structure of a measure indicates that any detrimental impacts do not stem exclusively from such a distinction, such a measure would not satisfy the requirement that it is “non-discriminatory”.

683. Finally, there is a relationship between a non-discriminatory measure and a proportionate measure in the sense that a measure that is discriminatory in the manner described above could not be considered proportionate since, by design it is premised on an impairment of one Party’s rights in a manner that is insufficiently connected to the legitimate regulatory objective pursued.

VIII.3. Application of the legal standard

VIII.3.1. The sandeel fishing prohibition is not a “proportionate measure”

684. On the application of the legal standard set out in section VIII.1 above, the EU submits that the sandeel fishing prohibition is not a “proportionate (...) measure”. Therefore, in deciding on the sandeel fishing prohibition, the UK acted in a manner that is inconsistent with its obligation to have regard

to the principle that the measure must be “proportionate” and hence the sandeel fishing prohibition is inconsistent with Article 496(1) TCA, read together with Article 494(3)(f) TCA.

685. Central to the EU’s claim that the sandeel fishing prohibition is not a “proportionate (...) measure” is its position that, on a proper assessment of a cost-benefit analysis as required to determine whether a measure is “proportionate”, the economic and social impacts and the degree of impairment to rights granted under the TCA are not commensurate with the degree of contribution that the sandeel fishing prohibition can make to the legitimate objectives it pursues.

686. As elaborated upon below, the EU does not deny that marine conservation and the sustainable exploitation of fisheries are legitimate objectives and nor does it challenge the legitimacy of the objectives pursued by the sandeel fishing prohibition as such. It also does not call into question the UK’s attachment to ensuring the sustainable management of its waters, nor its autonomy as a sovereign coastal state.

687. Indeed, the EU recalls that one of the objectives of the TCA in general and of Heading V in particular is to reflect the regulatory autonomy of the Parties, including to adopt fisheries management measures. This is given expression in Article 496(1) TCA and further reiterated in the principles set down in Article 494(3)(f) TCA.

688. However, Article 496(1) TCA, read together with 494(3)(f) TCA, reflects the intention of the Parties to apply certain constraints on the exercise of their respective regulatory autonomy.⁴³⁷ One of the reasons for doing so is precisely that the TCA contains provisions intended to ensure the granting

⁴³⁷ See section Therefore, this affirms that it is primarily the objective of a measure that delimits what is and what is not a fisheries management measure.

The right of each Party to “decide on any measures applicable to its waters” under Article 496(1) TCA²⁸² above.

of “fishing opportunities” as well as provisions intended to ensure the Parties’ shared commitment to sustainability can be given expression.

689. The UK has not respected those constraints in deciding on and applying the sandeel fishing prohibition.

VIII.3.2. The sandeel fishing prohibition is “for the purpose” of a legitimate policy objective and is apt for that purpose

690. The objectives of marine conservation and the sustainable exploitation of fisheries resources are undoubtedly legitimate objectives which have been ascribed importance in the TCA and under international law, including UNCLOS.⁴³⁸

691. Indeed, the EU recalls that, like the UK, it attaches significant importance to the objectives of marine conservation and the sustainable exploitation of fisheries resources which are also tenets of the Union’s fisheries policy.⁴³⁹

692. Therefore, the EU does not call into question that, to the extent that the sandeel fishing prohibition is ‘for the purpose’ of the broad objectives of marine conservation and the sustainable exploitation of fisheries resources, it is in pursuit of a legitimate objective. Moreover, the importance of that

⁴³⁸ See section V.3 above.

⁴³⁹ See for instance, recital 3 of Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008 ([Exhibit CLA-0030](#)): “Regulation (EU) No 1380/2013 of the European Parliament and of the Council establishes the rules of the Common Fisheries Policy (CFP) in line with the international obligations of the Union. The CFP is to contribute to the protection of the marine environment, to the sustainable management of all commercially exploited species, and in particular to the achievement of good environmental status by 2020, as set out in Article 1(1) of Directive 2008/56/EC of the European Parliament and of the Council”.

objective may be taken into account when considering whether a measure is “proportionate”.

693. The precise objectives of the sandeel fishing prohibition must be identified at a more granular level and the EU refers to Section IV.4 above in which it describes the objectives by reference to the English and Scottish consultation documents and other material published the UK. For ease of reference and to summarise:

— The DEFRA consultation document⁴⁴⁰ explained that the objectives of the sandeel fishing prohibition in so far as it concerns English waters are:

“[t]o increase the biomass of sandeel stocks and therefore increase the food availability for higher trophic level predators such as seabirds within the wider ecosystem”⁴⁴¹.

— The Scottish consultation document⁴⁴² explained that the objectives of the sandeel fishing prohibition in so far as it concerns Scottish waters are:

“a) To seek effective protection of sandeel, as a contribution to the wider marine ecosystem. b) To provide the opportunity for wider ecosystem benefits to a range of species, including commercial fish species, seabirds and marine mammals, that will also improve resilience to changes in the marine environment. c) To complement, as far as possible, existing sandeel management measures”⁴⁴³.

694. The EU accepts these stated objectives to be the objectives of the sandeel fishing prohibition. On that basis, the EU considers that there is a relationship of ends and means between the legal instruments which

⁴⁴⁰ [Exhibit C-0044](#).

⁴⁴¹ [Exhibit C-0044](#), paragraph 10.

⁴⁴² [Exhibit C-0049](#).

⁴⁴³ [Exhibit C-0049](#), page 3.

comprise the sandeel fishing prohibition and the objectives of marine conservation and the sustainable exploitation of fisheries resources set down in Article 494 TCA.

695. As regards the stated objective of the Scottish instrument “to complement (...) existing sandeel management measures”, the EU observes that a free-standing objective of “complementing” another existing measure cannot be presumed to be a measure adopted for the purposes of the objectives defined in Articles 494(1) and (2) TCA.

696. The EU considers that it is only to the extent that a complementary measure separately and individually contributes to the objectives of marine conservation and the sustainable exploitation of fisheries resources that it is “for the purpose” of one of the objectives in Article 494 TCA.

697. However, the EU understands the stated objective of “complementing” the existing partial closure for sandeel fishing to be subordinate or ancillary to the primary objectives described in points a) and b) of the Scottish consultation document.

698. It follows from the above that the EU accepts that, in principle, the sandeel fishing prohibition is a measure that has been decided on in the exercise of the UK’s regulatory autonomy “for the purpose” of meeting objectives that fall within the scope of the objectives set down in Article 494 TCA.

699. The EU also accepts that the sandeel fishing prohibition is “apt” to contribute to the legitimate regulatory objectives it pursues. Indeed, and as described above, the EU considers that a broad range of measures may be “apt” in the sense that they are not “incapable” of contributing to a legitimate objective and that the terms of the TCA reflect the intention of the Parties to confer regulatory autonomy to determine the form of fisheries management measures.

700. For completeness, the EU indicates that it also accepts that: (i) there may be instances where the North Sea sandeel fishery could have an impact on

localised sandeel abundance; (ii) such a localised impact may occur in areas within the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet; and (iii) those seabirds require sufficient localised availability of sandeel during their breeding season. The EU takes heed of the evidence provided by ICES confirming that “[s]eabirds are the most sensitive predators to changes in sandeel abundance”.⁴⁴⁴ Therefore, the EU accepts that the sandeel fishing prohibition, insofar as it may lead to a localised increase in sandeel, is apt to contribute to the objective of the conservation of certain seabirds sensitive to local changes in sandeel abundance.⁴⁴⁵

VIII.3.3. The degree of contribution of the sandeel fishing prohibition to the legitimate objectives

701. As explained above, central to the EU’s claim that the sandeel fishing prohibition is not a “proportionate (...) measure” is its position that the degree of contribution that the sandeel fishing prohibition can make to the legitimate regulatory objectives it pursues is not commensurate with its economic and social impacts, nor with the impairment of the right of EU vessels to have “full access” to UK waters of the North Sea “to fish”. These factors ought to have been properly assessed and weighed in the balance since the UK was obliged to have regard to those factors.

702. The EU contends therefore, that the Tribunal must consider the degree of contribution to those objectives, the economic and social impacts, and the impairment to other rights provided for in the TCA, notably those set down in Annex 38 TCA.

⁴⁴⁴ ICES Technical Service, page 8, [Exhibit C-0022](#).

⁴⁴⁵ As explained above, the EU does not concede that the sandeel fishing prohibition will have the full spectrum of environmental effects alleged by the UK.

703. The degree of contribution of a measure must be assessed by reference to the scientific and evidential basis (qualitative and quantitative) relied upon by the Party applying that measure.

704. First, for the reasons set out in its first claim, the EU submits that the evidence base relied upon by the UK does not meet the requirements of Article 496(2) TCA, read together with Article 494(3)(c) TCA.

705. Without repeating its submissions, to which it refers, the EU contends that, to the extent that the measure that has been decided on is not based on the “best available scientific advice”, this is a factor that is also relevant to the assessment of whether the measure is “proportionate”.

706. Indeed, where scientific knowledge is less certain, it must have due regard to other impacts that its measure may have. In this sense, even if the Tribunal were satisfied that the UK has applied a precautionary approach in deciding on the sandeel fishing prohibition, this does not mean that the UK could disregard its obligation to balance its choice of measure and the degree of restriction of that measure against other factors.

707. Second, the EU reiterates that, whereas it accepts that the sandeel fishing prohibition will contribute to its stated objectives⁴⁴⁶, there is insufficient evidence to support the UK’s position that the sandeel fishing prohibition will achieve all the environmental effects identified by the UK and as described in Table 3 of the DEFRA consultation document⁴⁴⁷ and Table 9 of the Scottish environmental assessment⁴⁴⁸:

— increased abundance and resilience of sandeel;

⁴⁴⁶ See section IV.4 above.

⁴⁴⁷ [Exhibit C-0044](#).

⁴⁴⁸ [Exhibit C-0052](#).

- increased availability of sandeel for predators, and thus the breeding success of certain seabirds, marine mammals and fish for which sandeel comprises a substantial proportion of their diet;
- increased occurrence of certain marine mammals within UK waters of the North Sea;
- increased breeding success and condition of certain other commercial fish; and
- progress towards achieving good environmental status.

708. In the first place, regarding the link between the sandeel fishing prohibition and the abundance and resilience of sandeel, fluctuations in the North Sea sandeel stock are principally due to natural sandeel mortality not associated directly or indirectly with the North Sea sandeel fishery⁴⁴⁹.

709. In the second place, regarding the link between the sandeel fishing prohibition and the breeding success of chick-rearing seabirds, there is no link between the “scientific advice” invoked by the UK as the base of the sandeel prohibition and a spatial prohibition on sandeel fishing in UK waters of the North Sea that goes beyond the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet could have on the breeding success of seabirds⁴⁵⁰.

710. In the third place, regarding the link between the sandeel fishing prohibition and the breeding success of marine mammals, any such effects are not based on evidence but on a series of unsupported assumptions and logical leaps: (i) the sandeel fishing prohibition “might result” in a reduction in fishing pressure; (ii) such a reduction in fishing pressure “might result” in an increase in sandeel abundance; and (iii) such an

⁴⁴⁹ See paragraphs 496-497 above.

⁴⁵⁰ See paragraphs 501-505 above.

increase in sandeel abundance “might be beneficial to several populations of marine mammals” for which sandeel is an important part of their diet⁴⁵¹.

711. In the fourth place, regarding the link between the sandeel fishing prohibition and the breeding success of fish, the increased occurrence of marine mammals within UK waters of the North Sea, the improved condition of other commercial fish and the progress towards achieving good environmental status, the EU refers to the explanations in paragraphs 508-511 above.

712. Further and in any event, even were the Tribunal to accept that the sandeel fishing prohibition would make a significant contribution to the objectives pursued and would achieve the full spectrum of environmental effects that the UK claims, this does not suffice to demonstrate that it is a “proportionate” measure.

713. As reflected in the EU’s description of the legal standard, in all circumstances, to show a measure is “proportionate”, the impacts must be assessed and a relational analysis must be conducted to show, in essence, that the ends justify the means. This is a key distinction between a standard based on whether a measure is “proportionate” as opposed to whether a measure is “necessary” to fulfil its objective.

714. Therefore, the question for the Tribunal is not only whether the measure will make a significant contribution, but crucially whether that level of contribution justifies the other impacts to which that measure gives rise.

⁴⁵¹ See paragraph 507 above.

VIII.3.4. The economic and social impact and the impairment of rights of full access to waters to fish under the TCA

715. Industrial fishing and “fishing opportunities” provide important economic and social benefits for vessels and for operators and hence, form an important part of the commitments in Heading V.⁴⁵²

716. When deciding on the sandeel fishing prohibition, the UK was required to “have regard” to the principle that measures applied for conservation and fisheries management must be proportionate. Hence, the UK was required to assess the relationship between the contribution of its measure to the stated marine conservation objectives and the other economic and social impacts of the measure.

717. The EU contends first that the UK did not give due weight to the economic and social impacts of the sandeel fishing prohibition.

718. It contends second that, had it done so, it would have concluded that the sandeel fishing prohibition is not proportionate.

VIII.3.5. The UK did not adequately consider the economic and social impacts of the sandeel fishing prohibition

719. The sandeel fishing prohibition precludes any sandeel fishing in UK waters of the North Sea. Therefore, vessels can no longer undertake that economic activity in UK waters of the North Sea and lose the economic benefits associated with the rights previously enjoyed to fish in those waters.

720. The UK, in the English and Scottish consultation documents, identifies economic and social impacts of the measure. The UK therefore, acknowledges that those impacts should weigh in the balance of any decision-making exercise.

⁴⁵² See section V.3.3 above.

721. Those consultation documents identify, correctly, that the sandeel fishing prohibition will primarily have economic and social effects on EU vessels and the EU fishmeal and fish oil sectors. This is a direct and foreseeable consequence of the shares of sandeel agreed between the Parties and reflected in Annex 35 to the TCA. Indeed, the EU recalls that the TCA guarantees the EU a share of any agreed sandeel TAC of 97.26% in 2021, 97.14% in 2022, 97.03% in 2023, 96.89% in 2024 and 96.80% as of 2025.

722. The size of that differential is further influenced by the level of the TAC agreed in annual consultations.

723. The EU acknowledges that a precise quantification of the losses that EU vessels and the EU fishmeal and fish oil sectors will incur is difficult. This is because of the variability in catches between sandeel management areas from one year to the next and the fact that EU vessels may be able to adapt by partially increasing catches in EU waters of the North Sea.

724. However, this certainly does not imply that there will be no impact.

725. The UK itself made some effort to quantify or estimate the losses to EU vessels and to the EU fishmeal and fish oil sectors in the English and Scottish consultation documents.

726. Regarding the English waters of the North Sea, the DEFRA consultation document⁴⁵³ noted that:

— the prohibition of sandeel fishing “will impact EU registered vessels, mostly from Denmark. Over 99% of the total UK and EU value of sandeel landed from English waters has historically been landed by EU vessels, worth around £41.2m each year (2015 – 2019 average)”⁴⁵⁴,

⁴⁵³ DEFRA consultation document, [Exhibit C-0044](#).

⁴⁵⁴ Ibid, paragraph 65.

- “The loss of access to fisheries in English waters could affect relations with the EU, including Denmark, as they are likely to lead to employment and business losses overseas”⁴⁵⁵;
- “EU vessels landed 240,000 tonnes of sandeels from English waters on average between 2015 and 2019, worth £41.2 million a year in 2021 prices. Using the worst-case scenario that 100% of these landings are lost, and applying a discount rate of 3.5%, the net present cost over the 10-year appraisal period to non-UK vessels is estimated to be £354 million”⁴⁵⁶; and
- “During the call for evidence from October to November 2021, Defra received figures from international fish processing businesses suggesting there will be indirect costs to their businesses. The figures detailed that 66% (€37 million) of average annual Danish export value of fishmeal and fish oil, made from sandeels, was from sandeels caught in UK waters (2016 – 2020). The Danish fishmeal and fish oil factories also directly employ ~500 workers in coastal communities and derive additional economic activity in the local communities. This employment and economic activity may be heavily reduced if fish processing businesses don’t find alternative input source”⁴⁵⁷.

727. Regarding all Scottish waters, the Scottish partial impact assessment⁴⁵⁸ noted that:

- EU vessels catching sandeel in Scottish waters “will face the largest cost as they are the main catchers of sandeel in Scottish waters”⁴⁵⁹;
- and

⁴⁵⁵ Ibid, paragraph 66.

⁴⁵⁶ Ibid, Annex 1.

⁴⁵⁷ Ibid.

⁴⁵⁸ Scottish partial impact assessment, [Exhibit C-0051](#).

—“From 2015-2019, vessels catching sandeel from Scottish waters caught on average 17,900 tonnes of sandeel each year, worth £3.8 million in 2021 prices. The net present cost of Option 1 is therefore estimated at £32.8 million, assuming the closure starts in 2024, with a 10-year appraisal period discounted at 3.5%”⁴⁶⁰.

728. The Business and Regulatory Impact Assessment accompanying the Scottish Order summarised the economic impacts as follows:⁴⁶¹

—“Direct cost to EU fishing industry of fishing restriction (primarily Danish or other EU vessels), estimated at between £3.1 million and £4.0 million annually.

—Indirect cost to processing sector with lower/no landings of sandeel, estimated at £0 - £0.6 million annually.

—Direct cost to Scottish Government Compliance of an additional regulation to monitor (minimal).”

729. The EU acknowledges that the figures in the DEFRA consultation document⁴⁶² and in the Scottish partial impact assessment⁴⁶³ were based on revenue and not profit and hence, may over-estimate the actual costs.⁴⁶⁴

⁴⁵⁹ Ibid, page 13.

⁴⁶⁰ Ibid.

⁴⁶¹ The Business and Regulatory Impact Assessment accompanying the Scottish Order, section 16, [Exhibit C-0066](#).

⁴⁶² DEFRA consultation document, [Exhibit C-0044](#).

⁴⁶³ Scottish partial impact assessment, [Exhibit C-0051](#).

⁴⁶⁴ See DEFRA consultation document, Annex 1, [Exhibit C-0044](#): “It is important to note these costs are based on values of landed fish, rather than operating profit. The costs to non-UK vessels are therefore considerably overestimated as the costs are based solely on revenue. Furthermore, as per UK vessels, non-UK vessels are likely to offset some of their lost revenue by fishing in other areas”.

Nevertheless, those economic impacts are significant for EU vessels and for the EU fishmeal and fish oil sectors. According to a work commissioned by the Ministry of Food, Agriculture and Fisheries of Denmark and published in July 2024⁴⁶⁵ (“IFRO Commissioned Work”), the potential economic consequences of the sandeel fishing prohibition for Danish vessels and for the Danish sandeel fishmeal and fish oil sectors in each of the years 2011 to 2023 were estimated to have been the following:

- for Danish vessels, “[o]n average, the landings value would have been reduced with 159 million DKK, the earning capability with 123 million DKK and the gross profit with 92 million DKK, corresponding to 21.23 million euros, 16.51 million euros and 12.35 million euros respectively, using an average exchange rate of 7.45 DKK per euro”⁴⁶⁶; and
- for the Danish fishmeal and fish oil sectors, “an annual reduction in gross profit of between 9 million DKK and 169 million DKK (2013 and 2017, respectively 1.2 million euros and 22.7 million euros), corresponding to average of 62 million DKK annually (8.3 million euros)”⁴⁶⁷.

730. Again, and like the figures in the DEFRA consultation document⁴⁶⁸ and in the Scottish partial impact assessment⁴⁶⁹, the estimates in the IFRO

See also Scottish partial impact assessment, page 13, [Exhibit C-0051](#): “the above estimation is based on revenue and not profit, and therefore will be an overestimation of business impact. There is also no assessment of the potential for non-UK vessels to move their fishing to other waters and therefore offset the loss of a Scottish waters closure”.

⁴⁶⁵ Andersen, J. L., & Nielsen, M. (2024). The economics of the Danish sandeel fishery and fishmeal and fish oil factories. Department of Food and Resource Economics, University of Copenhagen. IFRO Commissioned Work No. 2024/16, [Exhibit C-0025](#).

⁴⁶⁶ Ibid, page 9.

⁴⁶⁷ Ibid, page 14.

⁴⁶⁸ DEFRA consultation document, [Exhibit C-0044](#).

⁴⁶⁹ Scottish partial impact assessment, [Exhibit C-0051](#).

Commissioned Work are subject to certain caveats as they are based on several assumptions:

- “The consequences will only be considered under the assumption that none of the sandeel caught in the UK EEZ can instead be caught in other fishing areas, for instance the EU EEZ. Thus, the economic figures might overestimate the consequences, but on the other hand, given the considerable variation in the sandeel catches between the EU EEZ and the UK EEZ, cf. Table 3, situations might arise where in some years a higher proportion of sandeel can only be caught in the UK EEZ”⁴⁷⁰;
- “The annual loss of gross profit for Danish fishmeal and fish oil factories, which on average is 62 million DKK (varying between 9 million DKK and 169 million DKK), is identified assuming that it is not possible for the vessels to catch more sandeel outside the UK EEZ. If the vessels can catch sandeel outside the UK EEZ, the losses are overestimated”⁴⁷¹; and
- “Moreover, in the calculations, it has been assumed that fish for reduction is the only source of raw material for Danish fishmeal and fish oil factories. It is known that minor quantities of cutoffs from factories that produce fish for human consumption are also applied as raw material. If it is possible to increase the quantities of cutoffs, this can offset some of the economic losses, but this will on the other hand require increased landings of fish for human consumption”⁴⁷².

⁴⁷⁰ Andersen, J. L., & Nielsen, M. (2024). The economics of the Danish sandeel fishery and fishmeal and fish oil factories. Department of Food and Resource Economics, University of Copenhagen. IFRO Commissioned Work No. 2024/16, [Exhibit C-0025](#), page 8.

⁴⁷¹ Ibid, page 14.

⁴⁷² Ibid, page 8.

731. Nevertheless, this confirms that the sandeel fishing prohibition has significant economic impacts for the EU vessels and the EU fishmeal and fish oil sectors.

732. As to the wider social impacts, the DEFRA consultation document noted that “[t]he Danish fishmeal and fish oil factories also directly employ ~500 workers in coastal communities and derive additional economic activity in the local communities. This employment and economic activity may be heavily reduced if fish processing businesses don’t find alternative input source”⁴⁷³.

VIII.3.6. The impairment of the right of full access to UK waters of the North Sea to fish

733. The EU recalls that the right to decide on fisheries management measures must be reconciled with the commitments of the Parties to grant “full access to its waters to fish” (Article 2(1)(a) of Annex 38 TCA and section V.3.3 above). Those rights have been impaired by the sandeel fishing prohibition since EU vessels may no longer access UK waters of the North Sea to fish sandeel. In other words, the rights of access that exist in consequence of the sandeel fishing prohibition are the diametric opposite of the right provided for in Article 2(1)(a) of Annex 38 TCA, namely that the UK should grant “full access to its waters to fish” sandeel.

VIII.3.7. The UK’s failure to balance the degree of contribution to its regulatory objectives and the economic and social impact

734. The EU submits that the UK failed to balance correctly the contribution of the sandeel fishing prohibition to its regulatory objectives with the economic and social impacts and the degree of impairment to the rights. The EU emphasises that it is not sufficient simply to identify or pay lip

⁴⁷³ DEFRA consultation document, Annex 1 ([Exhibit C-0044](#)).

service to such impacts – they must be taken into account which implies according them due weight in the assessment.

735. It is clear from the English and Scottish consultation documents and statements issued by the UK on adoption of the instruments that the analysis of the economic and social impacts of the measure did not properly take into account the impact on EU vessels and the EU fishmeal and fish oil sectors.

736. The overall assessment appears to have been conducted essentially by reference to the impact on UK vessels and UK operators and, having concluded that the burden would fall on EU vessels and the EU fishmeal and fish oil sectors, the economic and social impacts were essentially disregarded.

737. For example, the fact that the adverse economic and social impacts of the sandeel fishing prohibition would be borne almost entirely by EU vessels and the EU fishmeal and fish oil sectors is cited in the English and Scottish consultation documents as a basis to conclude that the impact of the sandeel fishing prohibition is “relatively low”⁴⁷⁴ or “minimal”.⁴⁷⁵ Notably the policy note accompanying the Scottish Order states that:

“the impact of this policy on business is minimal, as no quota has been issued to UK vessels for sandeel since 2021, and no sandeel has been landed into Scottish ports since 2020.”⁴⁷⁶

⁴⁷⁴ See DEFRA consultation document, paragraph 73, [Exhibit C-0044](#).

⁴⁷⁵ See Policy Note The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024, SSI 2024/36, [Exhibit C-0065](#).

⁴⁷⁶ See Policy Note The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024, SSI 2024/36, [Exhibit C-0065](#). The Business and Regulatory Impact Assessment accompanying the Scottish Order states in Section 2.1.3 that, in the case of UK vessels, “the stock has historically been targeted primarily by one UK vessel”. [Exhibit C-0066](#).

738. Second, the UK has not reflected in its assessment that, whereas the degree of environmental benefits is uncertain and not fully supported by the “best available scientific advice”, it is certain that the prohibition on vessels fishing sandeel in UK waters of the North Sea will have economic and social impacts. Indeed, it has been recognised in the TCA that fisheries management measures have economic and social impacts and the existence of such impacts are recalled in the English and Scottish consultation documents.

739. Third, the EU recalls that the right to decide on fisheries management measures must be reconciled with the commitments of each of the Parties to grant “full access to its waters to fish” (Article 2(1)(a) of Annex 38 TCA and section V.3.3 above). In particular, during the adjustment period established by Article 1 of Annex 38 TCA, that right should not be lightly impaired, given the rationale of the adjustment period is the “social and economic benefits of a further period of stability, during which fishers would be permitted until 30 June 2026 to continue to access the waters of the other Party as before the entry into force of this Agreement” (second preambular paragraph to Annex 38 TCA).

740. The sandeel fishing prohibition cuts across that right and this impairment has not been justified. Indeed, the UK has not adhered to the principle of cooperation which underpins the TCA as a whole and Heading Five in particular.

741. The EU recalls in this respect that:

- whilst the UK had already applied a fisheries management measure as regards sandeel (the prohibition of sandeel fishing in an area within English waters of ICES area 4b and Scottish waters of ICES areas 4a and 4b), it agreed to shares of any agreed sandeel TAC on 30 December 2020 as reflected in row 57 of Annex 35 TCA which is an integral part of the TCA;

- 10 months after the entry into application of the TCA, in October 2021, the UK commenced consultations on possible additional sandeel management measures;
- since January 2021, the EU and the UK have continued to negotiate and agree in the context of their annual consultations on TACs for sandeel, most recently on 8 March 2024; and
- the UK has never explained on what legal grounds it considered it could restrict the right of full access to its waters to fish to which it agreed in Annex 38 TCA, in particular given its commitment in Article 2(1)(a) of that annex. In this context, the assertion that it is justified by the “best available science advice” is not sufficient.

742. Whilst the UK adopted legislation (the 2020 Fisheries Act) and on doing so chose to emphasise that it is designed so that “EU vessels’ automatic access right to fish in UK waters is removed”, it is bound to apply the terms of the TCA.⁴⁷⁷

VIII.3.8. The UK could have decided on alternative proportionate measures

743. The EU submits that its position that the sandeel fishing prohibition is not a “proportionate (...) measure” is affirmed by the availability of alternative proportionate measures.

744. Whilst one of the objectives of Heading V is to reflect the autonomy of the Parties to adopt fisheries management measures, the Parties agreed to certain constraints on the exercise of that autonomy. Hence, to the extent that another measure would have been reasonably available to the UK and any economic and social impacts and impairment of rights would have been commensurate to the contribution it makes, this demonstrates that the

⁴⁷⁷ See DEFRA Press Release: “Flagship Fisheries Bill becomes law”, [Exhibit C-0071](#).

UK did not act consistently with Article 496(1) TCA, read together with Article 494(3)(f) TCA, when deciding on the sandeel fishing prohibition.

745. The EU considers that there would have been alternative proportionate measures.

746. In particular, the UK could have implemented one or more spatially targeted prohibitions on sandeel fishing in parts of UK waters of the North Sea that would coincide with the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet. Such more spatially targeted prohibitions on sandeel fishing in parts of UK waters of the North Sea would contribute to the stated objectives of the sandeel fishing prohibition and would be reasonably available to the UK.

747. This is confirmed by the fact that: (i) sandeel fishing has been prohibited since 2000 in part of the English waters of the North Sea and in part of Scottish waters⁴⁷⁸; and (ii) as the Natural England/Cefas/JNCC advice noted, “spatially restricted closures to sandeel fishing have been historically introduced, around Shetland and the southeast of Scotland”⁴⁷⁹ and “[t]hese closures have been linked to increases in the local sandeel population sizes”⁴⁸⁰ of seabirds. This is also consistent with the ICES Technical Service⁴⁸¹, which noted that “[t]here are several closed sandeel areas, and this is one possible example of measures to provide ecosystem services that sits alongside the overall quota”⁴⁸².

⁴⁷⁸ See section III.8 above.

⁴⁷⁹ Natural England/Cefas/JNCC advice, [Exhibit C-0045](#), page 11.

⁴⁸⁰ Ibid.

⁴⁸¹ ICES Technical Service, [Exhibit C-0022](#).

⁴⁸² Ibid.

748. The EU observes that the DEFRA consultation document⁴⁸³ indicated that the UK has not assessed whether it could have implemented more spatially targeted prohibitions on sandeel fishing in English waters of the North Sea. Rather, DEFRA assessed only as alternatives: (i) technical measures such as gear configuration or increased mesh size; (ii) prohibiting sandeel fishing in English waters of the North Sea during part of the fishing season; and (iii) a voluntary prohibition of the sandeel fishery in English waters of the North Sea.⁴⁸⁴

749. As for whether the UK could have implemented more spatially targeted prohibitions on sandeel fishing in Scottish waters, the Scottish sandeel consultation did consider an extension to the entirety of ICES area 4 of the existing prohibition of sandeel fishing in part of Scottish waters of ICES areas 4a and 4b. It noted that while such a prohibition could lead to “a reduction in pressure on the sandeel stock”⁴⁸⁵, “this could be offset by displacement into other areas”⁴⁸⁶, such as “regions in the North Sea outside of [sandeel management area 4] where a reduction in sandeel abundance has been linked to harbour seal decline”⁴⁸⁷.

750. However, as the Scottish scientific literature review noted, “without a robust model of fleet dynamics (which does not yet exist for these fisheries) or an extensive consultation with the international fishing industry, it is impossible to determine what the response of the fleet would be to an area fisheries closure in Scottish waters”⁴⁸⁸.

⁴⁸³ DEFRA consultation document, [Exhibit C-0044](#).

⁴⁸⁴ See paragraph 101 above.

⁴⁸⁵ Scottish partial impact assessment, page 11, [Exhibit C-0051](#).

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Scottish environmental assessment, page 93, [Exhibit C-0052](#).

⁴⁸⁸ Scottish scientific literature review, page 36, [Exhibit C-0050](#).

751. As for the reasonable availability to the UK of one or more such spatially targeted prohibitions, the EU emphasises that this would fall within the range of measures contemplated by the UK’s legal framework:

- as regards English waters, the power to adopt statutory guidance setting conditions on the granting of licences is broad enough to allow for a partial prohibition; and
- as regards Scottish waters, Section 5(1)(b) of the Sea Fish (Conservation) Act 1967 expressly empowers the national authority to apply a “restriction” on fishing. This empowerment is in the same provision (Section 5) as the empowerment to adopt a prohibition.

752. This is further confirmed by the fact that:

- a spatially targeted prohibition of sandeel fishing has already been implemented since 2000 in part of English waters of the North Sea and in part of Scottish waters; and
- the Scottish partial impact assessment⁴⁸⁹ considered such an option to be reasonably available but dismissed it on another ground.

753. Moreover, neither the Scottish partial impact assessment nor the other documents that were part of the English and Scottish consultations suggested that the implementation of one or more spatially targeted prohibitions on sandeel fishing in UK waters of the North Sea would have imposed an undue burden on the UK such as prohibitive costs or substantial technical difficulties.

754. The EU underscores that whilst one or more spatially targeted prohibitions on sandeel fishing in UK waters of the North Sea would still entail economic and social impacts and that these would still be borne almost

⁴⁸⁹ Scottish partial impact assessment, [Exhibit C-0051](#).

entirely by EU vessels and the EU fishmeal and fish oil sectors, such impacts would be significantly lower.

755. In particular, one or more spatially targeted prohibitions on sandeel fishing in UK waters of the North Sea would be a significantly less egregious impairment of the UK's obligation to grant EU vessels full access to UK waters to fish as set down in Article 2(1)(a) of Annex 38 TCA.

756. For these reasons, the UK should justify why it failed to even consider a reasonably available and potentially proportionate measure – e.g. one or more spatially targeted prohibitions on sandeel fishing in parts of UK waters of the North Sea that would coincide with the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet.

VIII.3.9. The fishing prohibition is a “discriminatory (...) measure” and is inconsistent with Articles 496(1) and 496(2) TCA, read together with Article 494(3)(f) TCA

757. By way of subsidiary argument, the EU further contends that, in deciding on the sandeel fishing prohibition the UK has acted inconsistently with Articles 496(1) TCA and Article 496(2), read together with Article 494(3)(f) TCA.

758. The EU does not contend that the sandeel fishing prohibition constitutes *de jure* discrimination within the meaning of Article 496(2) TCA. On its face, both the English legal instrument and the Scottish legal instrument apply the prohibition to all vessels.

759. As explained in section VIII.2 above, the EU considers that Article 496(2) TCA must be read as imposing an obligation on the UK to ensure that any measure it adopts is neither *de jure* nor *de facto* discriminatory. This flows not only from the logic of the TCA but is consistent with the interpretation

of clauses precluding discrimination on grounds of origin under international law of the sea and international economic law.⁴⁹⁰

760. Given that Article 496(1) TCA expressly refers to the right of each Party to take measures, and hence reflects the intention of the Parties to recognise their regulatory autonomy, the EU considers that the standard for establishing *de facto* discrimination must accord that reference purpose and meaning.

761. For that reason, the EU does not suggest that the existence of differential impacts of the sandeel fishing prohibition could in itself support a claim that a measure is *de facto* discriminatory. On that basis, the EU considers that if any differential treatment stems exclusively from a legitimate regulatory objective, there is no “discrimination” within the meaning of the Article 496(2) or Article 494(3)(f) TCA.

762. As has been explained above, the sandeel fishing prohibition has a clear and marked differential impact on UK and EU vessels. Moreover, the UK relied on this differential impact as a ground for concluding that the adverse economic and social impacts are “minimal”.

763. Therefore, the central question in the context of a discrimination claim is whether this differential impact is linked exclusively to its pursuit of the legitimate regulatory objective of marine conservation and sustainable fisheries exploitation. In this regard the EU makes the following observations:

- sandeel are not the only fish consumed by seabirds. Other fish include Norway pout, sprat and herring;⁴⁹¹

⁴⁹⁰ See section VIII.2.2 above.

⁴⁹¹ See paragraph 58 above.

- there has been no explanation by the UK as to the policy choice to address the legitimate regulatory objective of marine conservation and fisheries management commencing with a fish stock in respect of which the shares in the TCA have been attributed to such a significant proportion to one Party; and
- the factors relied upon in the framework of its claim that this is not a proportionate measure are equally relevant here. This includes the absence of proper consideration of the economic and social impacts and the significant degree of impairment of the rights of full access to waters to fish in the adjustment period established by Annex 38 TCA.

VIII.3.10. Conclusion

764. For the reasons set out above, the EU seeks a ruling that the sandeel fishing prohibition is inconsistent with the UK’s obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(f) TCA.

IX. CLAIM 3: The UK has acted inconsistently with its obligations under Article 2(1)(a) of Annex 38 TCA

765. The EU claims that, since the UK has adopted a fisheries management measure that is inconsistent with Article 496 TCA, read together with Article 494 TCA, it has committed a consequential breach of Article 2(1)(a) of Annex 38 TCA as the impairment of the rights guaranteed by that provision is not justified or justifiable.

IX.1. Legal Standard

766. In section V.3.3 above, the EU has described the legal framework establishing the obligations of each of the Parties as regards granting “full access to its waters to fish.” For ease of reference, the EU recalls that this right is set down in Article 2(1)(a) of Annex 38 TCA which provides:

“By way of derogation from Article 500(1), (3), (4), (5), (6) and (7) of this Agreement, during the adjustment period each Party shall grant to vessels of the other Party full access to its waters to fish:

(a) stocks listed in Annex 35 and in tables A, B and F of Annex 36 at a level that is reasonably commensurate with the Parties’ respective shares of the fishing opportunities”.

767. Whilst the EU does not contend that this right, as provided for in Article 2(1)(a) TCA, is non-derogable, that provision requires the Parties to “grant” vessels of the other Party “full access to its waters to fish” a shared stock at a level that is “reasonably commensurate” with the Parties’ respective shares of the agreed TAC as set down in Annex 35 TCA. The mandatory nature of that “grant” of “full access to its waters to fish” during the adjustment period implies that any impairment or reduction of this right must be justified.

768. Whilst a measure that is consistent with Article 496 TCA, read together with Article 494 TCA, might provide a justification for a departure from the obligation set down in Article 2(1)(a) of Annex 38 TCA, there is a particular onus to consider the impairment to the objective of the “adjustment period” established by Article 1 of Annex 38 TCA, which is to ensure stability and thereby confer economic and social benefits. Those economic and social benefits should be understood to be those which EU vessels derive from the certainty of preservation of the rights to access waters to fish they enjoyed at the point in time when the TCA entered into application.

IX.2. Application of the legal standard

769. The sandeel fishing prohibition is inconsistent with the UK’s obligation to grant EU vessels “full access to its waters to fish” in accordance with Article 2(1)(a) of Annex 38 TCA. In particular it is inconsistent with its obligation to grant EU vessels “full access to its waters to fish” sandeel

commensurate with the Parties' respective shares of the TACs, shares which are set out in Annex 35 TCA.

770. In this respect, and in the interests of full clarity, the EU challenges the extension, through the implementation of the sandeel fishing prohibition, of the prohibition since 2000 of sandeel fishing in parts of UK waters of the North Sea in which, prior to that prohibition, sandeel fishing was not prohibited. The partial prohibition is described in section III.8 above.

771. In other words, the EU does not challenge the pre-existing partial prohibition of sandeel fishing in parts of UK waters of the North Sea which predate the agreement of the Parties as reflected in the TCA.

772. The EU's claim under Article 2(1)(a) of Annex 38 TCA is consequential on its claims under Article 496 TCA, read together with Article 494 TCA.

773. This is because the basis for EU's claim that the sandeel fishing prohibition is inconsistent with the UK's obligations under Article 2(1)(a) of Annex 38 TCA is that, whilst it is stated to be a "fisheries management" measure and whilst it pursues what the EU fully endorses to be a legitimate objective, it is inconsistent with Article 496 TCA read together with Article 494 TCA for the reasons addressed in sections VII and VIII above.

774. The EU recalls that it also attaches considerable importance to marine conservation and the sustainable exploitation of fisheries resources. It is not, therefore, suggesting that the right of full access to waters to fish systematically take precedence over these legitimate objectives.

775. It does argue, however, that the obligation to grant full access to waters to fish as has been agreed by the Parties in Annex 38 TCA may only be restricted where there is full respect of the requirements in Article 496 TCA, read together with Article 494 TCA.

776. The EU further submits that given the specific rationale for the establishment of an "adjustment period", this Tribunal should apply

particular scrutiny to the UK's exercise of its right to decide on fisheries management measures applicable to sandeel.

777. The EU recalls that the premise of cooperation in the management of shared stocks and the logic of Article 2(1)(a) of Annex 38 TCA is that each Party will grant to vessels of the other Party full access to its waters to fish. Reciprocity of access to waters to waters is therefore, built into the provision and is an integral part of the commitments on access to waters in Annex 38 TCA.

778. Against this backdrop, the EU recalls the following relevant facts:

- Whilst the UK had already applied a fisheries management measure as regards sandeel (the existing partial prohibition), it agreed to shares of any agreed TAC on 30 December 2020 as reflected in Annex 35 TCA which is an integral part of the TCA;
- 10 months after the entry into application of the TCA, in October 2021, the UK launched a public consultation on possible additional sandeel management measures; and
- since January 2021, the EU and the UK have continued to negotiate and agree in the context of their annual consultations on TACs for sandeel, most recently on 8 March 2024.⁴⁹²

779. The sandeel fishing prohibition cuts across not only the logic of granting reciprocal and full access to waters to fish in the adjustment “period”, but it also cuts across the Parties’ negotiated agreement on the shares (Annex 35 TCA) and on the TACs.

780. This, together with the economic and social rationale underpinning the adjustment period, are not only matters that are relevant when considering if the sandeel fishing prohibition is proportionate. They also should be

⁴⁹² [Exhibit C-0004](#).

taken into account when considering if the impairment of the right of full access to UK waters of the North Sea to fish sandeel can be justified. The EU's position is that, given the inconsistency of the sandeel fishing prohibition with Article 496 TCA, read together with Article 494 TCA, it cannot be justified.

IX.3. Conclusion

781. For the reasons set out above, the EU seeks a ruling that, consequent to the inconsistency of the sandeel fishing prohibition with Articles 496(1) and (2) TCA, read together with Articles 494(3)(c) and 494(3)(f) TCA, the UK is in breach of its obligation to grant "full access to fish" sandeel in its waters as set down in Article 2(1)(a) of Annex 38 TCA.

X. Ruling sought

782. For the reasons explained above, the EU respectfully requests the Arbitration Tribunal to issue a ruling in accordance with Article 745 of the TCA, finding that:

- the sandeel fishing prohibition is inconsistent with the UK’s obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(c) TCA;
- the sandeel fishing prohibition is inconsistent with the UK’s obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(f) TCA; and
- the UK is in breach of its obligation to grant full access to its waters to fish in accordance with Article 2(1)(a) of Annex 38 TCA.

783. All of which is respectfully submitted on behalf of the European Union by:

Anthony DAWES

Daniela GAUCI

Bernhard HOFSTÖTTER

Josephine NORRIS

Laura PUCCIO

Legal Service,

European Commission