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 ANSWERS OF THE EUROPEAN UNION TO THE ARBITRATION TRIBUNAL'S QUESTIONS TO THE PARTIES

5 February 2025

Table of Contents

I.THE EU'S WRITTEN RESPONSE TO THE TRIBUNAL'S ADVANCE QUESTIONS OF 27 JANUARY 2025……...4

Advance question 1 4

Advance question 2 6

Advance question 3 7

Advance question 4 7

Advance question 5 9

Advance question 6 11

Advance question 7 12

Advance question 8 14

Advance question 9 16

Advance question 10 18

Advance question 11 18

Advance question 12 19

Advance question 13 20

Advance question 14 20

Advance question 15 29

Advance question 16 30

Advance question 17 32

II.THE EU'S WRITTEN RESPONSE TO THE TRIBUNAL'S ADDITIONAL QUESTIONS OF 30 JANUARY 2025……34

Additional question 1 34

Additional question 2 35

Additional question 3 36

Additional question 4 39

Additional question 5 42

Additional question 6 44

Additional question 7 45

Additional question 8 47

Additional question 9 48
Additional question 10 48
Additional question 11 50
Additional question 12 51
Additional question 13 53
Additional question 14 54
Additional question 15 54
Additional question 16 56
Additional question 17 58
Additional question 18 59
Additional question 19 61
Additional question 20 62
Additional question 21 63
Additional question 22 64

1. This is the written response of the European Union ('EU') to the Tribunal's: (i) advance questions of 27 January 2025; and (ii) additional questions of 30 January 2025.

2. When referring to evidence on the Tribunal's record, the EU uses the same abbreviations as in the joint core bundle for the hearing.

I. The EU's written response to the Tribunal's advance questions of 27 January 2025

Advance question 1

Paragraph 9 of the European Union's Written Submission reads: "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' and are challenged by the EU as a single measure." Paragraph 11 of the United Kingdom's Written Submission reads: "The EU seeks to characterise the decision of the UK Government in respect of English waters and that of the Scottish Government in respect of Scottish waters as 'a single measure'. That is inaccurate. The English and Scottish measures apply to different waters, were taken by different Governments, following different decision-making processes, and were implemented by different methods. Both measures are of course attributable to the UK, but they are two measures, not one, and should be analysed accordingly."

Having due regard to the manner in which the European Union has particularised its claim:

> **a. How precisely does the European Union's challenge to the prohibitions on the fishing of sandeel as a single measure, as opposed to two measures, impact the Arbitration Tribunal's analysis of the European Union's claims?**

3. While the Tribunal is not bound by either Party's characterisation, the starting point should be the manner in which the EU, as the complainant, has characterised the measure in its Request for Arbitration (Exhibit R-0123) and submissions. The singular nature of the measure implies that the Tribunal should conduct a holistic assessment.

b. To the extent the measure challenged by the European Union has two distinguishable parts, must each part, taken individually, be analysed for consistency with the TCA?

4. The Tribunal will have to decide whether there is one measure or whether there are two. If the Tribunal holds that there are two measures, it can analyse each of them individually. If the Tribunal agrees that there is only one measure, it still has to analyse each aspect of the measure, and what, if any, part of the measure is inconsistent with the rights and obligations under Heading Five of Part Two and Annex 38 TCA. It should not matter, for that analysis, how major or minor an aspect of a measure is that is incompatible with the TCA. If the Tribunal finds that any aspect of the measure is inconsistent with the TCA, then the measure as a whole is inconsistent.

c. To the extent the measure forming the basis of the European Union's claim is to be regarded as a single measure, must the entirety of the measure be consistent with the TCA? Hypothetically, to the extent such measure may be found to be partially inconsistent with TCA, does the Arbitration Tribunal's remedial power extend to severing the measure and declaring part of the measure to be inconsistent with the TCA?

5. In line with the EU's response to advance question 1(b), if the Tribunal finds that any aspect of the measure is inconsistent with the TCA, then the measure as a whole is inconsistent. This does not have a bearing on the remedial powers of the Tribunal. The Tribunal may order a Party to bring its measure into compliance. To the extent that the Tribunal has determined that only part of the measure is giving rise to an inconsistency with the obligations under Heading

Five of Part Two and Annex 38 TCA, it would be sufficient for the UK to address that aspect of the measure in order to bring itself into compliance.

6. Nevertheless, responsibility for bringing the measure into compliance and the means by which this is to be achieved would be for the UK. This is clear from Article 746 TCA which sets down that it is for a Party found to have acted inconsistently with its obligations under the TCA to take the necessary measures to comply with the ruling of the Tribunal to bring itself into compliance.[1] Therefore, the TCA should be read to confer responsibility on the Party to determine how to bring itself into compliance.

Advance question 2

What proportion of the English and Scottish waters in the North Sea was covered under the pre-existing prohibition on sandeel fishing and how did ICES take these pre-existing partial closures (as referred to in paragraphs 83-91 of the European Union's Written Submission) into account in the Advice on Fishing Opportunities in Sandeel Management Areas

7. Regarding the first part of advance question 2, there is no publicly available information regarding the proportion of English and Scottish waters of the North Sea covered under the pre-existing prohibition on sandeel fishing in stock assessment area 4 since 2000.

8. However, by digitising a map that is on the Tribunal's record,[2] that proportion can be estimated at approximately 11%:

    a. area of English and Scottish waters of the North Sea: 307 914 km2;

[1] In a similar vein, Article 409(9) TCA reads "For greater certainty, the Parties share the understanding that if the Panel makes recommendations in its report, the respondent Party does not need to follow these recommendations in ensuring conformity with this Agreement."

[2] Exhibit C-0011, Figure 3, page 4.

b. area of English and Scottish waters of stock assessment area 4 covered by the pre-existing prohibition on sandeel fishing: 33 757 km2; and

c. proportion of English and Scottish waters of the North Sea covered by the pre-existing prohibition on sandeel fishing: 337 57 divided by 307 914 = 0.1096 (11%).

9. Regarding the second part of advance question 2, while ICES notes in its advice on fishing opportunities the existence of the pre-existing prohibition on sandeel fishing in stock assessment area 4 since 2000, it does not take that prohibition into account as such. This is because ICES provides its advice at the broader level of sandeel stock assessment area 4:

a. ICES advice on fishing opportunities for 2024 in sandeel stock assessment area 4: "[i]n 2000, an area closed for sandeel fishing was introduced in SA4 to minimize the impact of low sandeel abundance on seabird productivity" (Exhibit C-0014, page 3); and

b. Scottish consultation document: "[t]he current ICES advice for sandeel indicates that the assessment model does not take account of the current area closure for sandeel" (Exhibit C-0049, page 22).

Advance question 3

How did ICES's Advice on Fishing Opportunities in Sandeel Management Areas take into account these pre-existing partial closures and their impact? Please identify the relevant paragraphs in the Advice.

10. The EU refers the Tribunal to its response to the second part of advance question 2.

Advance question 4

In relation to the operation of Annex 38 to the TCA, the European Union submits at paragraph 733 of its submission 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'". Quoting this submission, the United Kingdom contends at paragraph 426 that this demonstrates that the European Union agrees "that the manner in which the rights [referred to by the European Union] are reconciled is through compliance with Article 496 [of the TCA]." Further to these submissions, the Parties are invited to consider to what extent Annex 38 to the TCA operates to constrain the regulatory autonomy of a Party to decide on fisheries management measures. In addition:

a. Is Annex 38 a derogation?

b. Does the measure under consideration here constitute a derogation from the derogation?

11. The EU responds to advance questions 4(a) and 4(b) together.

12. As stated in Article 2(1) of Annex 38 TCA, the right of full access to the waters of the other Party to fish operates as a derogation from Article 500(1), (3), (4), (5), (6) and (7) TCA.

13. As stated in Article 778 TCA, the Protocols, Annexes, Appendices and footnotes to the Agreement form an integral part of the Agreement. Article 778(1) TCA and Article 778(2)(m) TCA specify that Annex 38 TCA forms an integral part of Heading Five of Part Two TCA. While the right of full access to the waters of the other Party to fish set down in Article 2(1)(a) of Annex 38 TCA operates as a derogation from Article 500(1), (3), (4), (5), (6) and (7) TCA, Annex 38 TCA must be read as an integral part of Heading Five of Part Two TCA as a whole.

c. If so, what impact does this have for the interpretation of relevant provisions of the TCA and the scope of regulatory autonomy?

14. The EU argues that, when determining whether there is a breach of Article 496 TCA, read together with Article 494 TCA, during the adjustment period established by Article 1 of Annex 38 TCA (1 January 2021 until 30 June 2026), the terms and rationale of Annex 38 TCA must be considered.

15. Those terms and rationale inform the nature and extent of the rights that have been impaired and are relevant legal context when considering whether regard was had by the UK when deciding on a measure that impedes those rights.

16. The EU reiterates that the UK's position that regulatory autonomy has primacy over all other considerations would mean that a marine conservation measure could always justify a full impairment of rights conferred under other provisions of Heading Five of Part Two TCA. That position cannot be accepted because it would devoid other provisions of Heading Five of Part Two TCA of their purpose and meaning. The UK's position becomes even more difficult to accept in view of the fact that the measure was adopted, and is being applied, during the adjustment period in Annex 38 TCA, which is an integral part of the TCA and of Heading Five of Part Two TCA specifically.

Advance question 5

Regarding the Call for Evidence on future management of Sandeels and Norway pout published on 22 October 2021, what is the justification for having a measure for sandeel but not for Norway pout or other forage fish?

17. The main forage fish in the North Sea are sandeel, Norway pout, sprat and herring (EU Written Submission, paragraph 58).

18. The Call for Evidence published on 22 October 2021 consulted on "new management measures" for two of those forage, "the North Sea sandeel and Norway pout stocks" (Exhibit C-0043, page 4).

19. The Call for Evidence summarised as follows the justifications for considering "new management measures" for sandeel and for Norway pout (Exhibit C-0043, page 4):

> "Forage fish such as sandeels and Norway pout play a key role in the health of the wider marine ecosystem, acting as a food source for many commercial fish stocks and vulnerable marine species including seabirds, cetaceans and seals. For

example, there is evidence that increased fishing pressure on certain North Sea sandeel stocks is linked to a reduction of breeding success of kittiwakes.

Sandeels are highly sensitive to changing environmental conditions and the increased effects of climate change is negatively impacting on the health of the North Sea sandeel stocks. This additional pressure combined with the continued removal of sandeels through industrial fishing methods could result in further declines of threatened and vulnerable species in the wider marine environment which rely on sandeels as a food source. For 2021 the UK has not allocated sandeel or Norway pout quotas.

Despite the introduction of management measures aimed at increasing the resilience to the stocks, there is limited evidence of either the recovery of the relevant stocks or the wider ecosystem as a result of these measures. This is hindering the UK's ability to reach Good Environmental Status of seabirds and marine food webs within the UK Marine Strategy. As a result, urgent action is required to protect stocks and the wider ecosystem from these increasing pressures.

As an independent coastal state, the UK Fisheries Administrations will consider new management measures such as fishing restrictions to provide additional resilience and protection for the North Sea sandeel and Norway pout stocks and the wider ecosystem. We want to gather further evidence to better understand the interaction between these stocks and the ecosystem, whether new measures (including restrictions on fishing these stocks) would be beneficial and if so, what the most appropriate measures would be."

20. Moreover, since 2024, the UK is considering "ecosystem-based management approaches" for sprat (UK Written Submission, paragraph 422.1, and Exhibit R-0128).

21. The EU is unaware whether the UK is currently considering "new management measures" for herring.

Advance question 6

What evidence on the record analyses and/or quantifies fisheries displacement, if any, as a result of pre-existing measures adopted in relation to the fishing of sandeel in the North Sea? Was there any analysis devoted to possible displacement under a future partial closure as an alternative to the complete closure of UK waters?

22. There is no evidence on the Tribunal's record that analyses or quantifies fisheries displacement as a result of the pre-existing prohibition on sandeel fishing in stock assessment area 4 since 2000.

23. In particular, contrary to what the UK argued during the hearing, there is no evidence on the Tribunal's record of vessels "fishing the line"[3] between the closed and open parts of stock assessment area 4. Figure 11 of the Scottish Scientific Report (Exhibit C-0050, page 18), to which the UK drew the Tribunal's attention during the hearing, shows only one year between 2013 and 2021 where fishing took place "closer"[4] to the border between the closed and open part of stock assessment area 4. Moreover, the Scottish Scientific Report notes that "[t]he information [in Figure 11] is presented as heat maps to avoid inference about specific vessel locations (as these data can be viewed as commercially confidential)" (Exhibit C-0050, page 17).

24. Equally, there is no evidence on the Tribunal's record that analyses possible displacement under one or more additional partial prohibitions of sandeel

[3] See UK oral submissions, transcript of 29 January 2025, pages 96-97: "Could I ask though that we look at bundle tab 8 (C-50). This is the Scottish scientific report (…) Could I then ask you to look just at the facing previous page; it's page 18 of the report. Those diagrams are heat maps for vessels fishing for sandeel. The most recent data available before this report was written was for 2021. And it shows a clear example of fishing the line."

[4] Exhibit C-0050, page 17: "Fishing was most widespread in these waters during 2015, but generally focussed on two areas during the years depicted: directly east of Aberdeen (Turbot Bank) and adjacent to the Scottish border with England. The fishing pattern was rather different in 2021, however, with a westward shift of both locations so that fishing was closer to the boundary of the closed area" (emphasis added).

fishing in UK waters of the North Sea as an alternative to the prohibition of sandeel fishing in all UK waters of the North Sea.

Advance question 7

Please identify upon whom the burden of proof lies in respect of each of the elements of the European Union's claims and of each of the defences of the United Kingdom. Does the burden of proof shift and in what circumstances in relation to these claims and defences?

25. The EU agrees with the UK that a measure is presumed consistent with the requirements of the TCA unless it is shown otherwise.

26. In accordance with well-established principles, the EU has to establish its claims that the measure at issue (the sandeel fishing prohibition) breaches the UK's commitments under the TCA.

27. To the extent that the UK asserts that its measure is justified under other provisions of the TCA or advances a defence, it has the burden of proof as regards that contention. In that sense, the burden of proof may shift between the Parties. The precise allocation of the burden of proof and when it shifts, depends on the provisions at issue and the relationship between them.

28. In support of its position, the EU refers the Tribunal to the findings of the Appellate Body in DS 33 Wool Shirts and blouses at page 14.[5] Although this is authority in the framework of international economic law, in reaching its position, the Appellate Body referred to other sources of law including the position that has been expressed by the ICJ:

"we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might

[5] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323.

amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

29. As regards the meaning of a prima facie case, the EU considers that this requires the complainant (here the EU) to raise a presumption that what is claimed is correct. A prima facie case must be based on evidence and legal argument put forward in relation to each of the elements of the claim. If the complainant adduces evidence sufficient to raise that presumption, the burden then shifts to the respondent, who will fail unless it adduces sufficient evidence to rebut the presumption.

30. In relation to Claim 1, the EU has the burden of proof to establish a prima facie case that the sandeel fishing prohibition is not based on the best available scientific advice. That burden does not impose as an evidential requirement that the EU must adduce alternative scientific advice which it positively asserts is the best available scientific advice. The TCA is not prescriptive as to how an evidential burden is to be met and hence, the fact that the EU did not adduce an alternative model is not "dispositive"[6] of Claim 1.

31. In relation to Claim 2, the EU has the burden of proof to establish a prima facie case that the UK acted inconsistently with its obligation to decide on fisheries management measures that have regard to the principle of applying proportionate and non-discriminatory measures. The EU also has the burden of

[6] See UK oral submissions, transcript of 29 January 2025, page 2.

proof to establish a prima facie case that a proportionate alternative measure was reasonably available to the UK. The UK has the burden of rebutting the EU's case and notably of showing why the alternative proportionate measure identified by the EU was not reasonably available.

32. In this context, the EU disagrees that it is only in circumstances where there is a separate 'general exceptions clause' as is the case in the GATT 1994 that the burden of proof shifts.[7] This shift has been held to apply under other WTO Agreements, including under the Agreement on Technical Barriers to Trade, where there is no such structure. This reflects precisely that the alternative measure is a mechanism which can inform the assessment of whether the impugned measure meets the proportionality standard.

33. In relation to Claim 3, the EU has the burden of showing that its right of full access to UK waters of the North Sea to fish sandeel has been breached. The UK has the burden to prove that the fisheries management measure is consistent with Article 496 TCA, read together with Article 494 TCA, and taking into consideration the specific nature of the adjustment period established by Annex 38 TCA. In particular, it is for the UK to show that Annex 38 TCA was taken into consideration when deciding on and applying the measure.

Advance question 8

Regarding the disciplines set out in Article 496(2) of the TCA

a. Is "available advice" advice that exists at the time that the measure is under consideration, or is it advice that could be procured and, if the latter, what duty is implied to procure advice in order to comply with Article 496(2) of the TCA?

[7] UK Written Submission, footnote 620; and UK oral submissions, transcript of 30 January 2025, pages 39-40.

34. Regarding the first part of advance question 8(a), "available advice" is not limited to advice that exists at the time the measure is under consideration but also extends to advice that could reasonably have been obtained at that time based on existing scientific evidence. This interpretation is confirmed by the Virginia Commentary on Article 119(1)(a) UNCLOS according to which "available" denotes "that measures should be based on whatever evidence is at hand or reasonably obtainable" (Exhibit R-0136, page 7).

35. Regarding the second part of advance question 8(a), the duty on the Parties to obtain advice is twofold and consists of: (i) a duty to request advice from a scientific body (to the extent that no such advice is already available); and (ii) a duty to ensure that the body requested to provide the advice bases its advice on existing scientific evidence.

b. Does "best" connote a comparative judgment? Does compliance require a showing that the advice is the best of the universe of advice that was or could have been available?

36. Regarding the first part of advance question 8(b), the EU's short response is yes, "best" entails a comparative assessment of "available advice".

37. Regarding the second part of advance question 8(b), "best" and "available advice" are separate notions:

    a. "best" entails a comparative assessment of "available advice"; and

    b. "available advice" is not limited to advice that exists at the time the measure is under consideration but also extends to advice that could reasonably have been obtained at that time based on existing scientific evidence (see the EU's response to advance question 8(a)).

c. If the advice is clear or unequivocal, what room does the Party have to deviate from it in compliance with Article 496(2) of the TCA?

38. Even if advice is clear and unequivocal, it does not necessarily determine the content of the measure. While a Party must attach a particular weight to the best

available scientific advice, it does not preclude consideration of other factors.[8] "Based on" does not mean "conform to".[9]

Advance question 9

In accordance with Article 494(3) of the TCA, the Party taking the measure is required to have regard to certain principles set out in Article 494. In this connection:

a. the chapeau to Article 494(3), what meaning should be ascribed to "principles" in the phrase "having regard to the principles"?

39. A principle informs and guides the interpretation of the corresponding obligation, in this precise instance, in Article 496 TCA. This does not detract from the importance that such principles may have when interpreting obligations. These principles are the means through which the Parties have chosen to operationalise and frame how they will exercise regulatory autonomy to ensure a balance between the rights and obligations under Heading Five of Part Two TCA and Annex 38 TCA.

b. Do the various principles in Article 494(3) of the TCA interact with each other? What value should be attached to the principles?

40. There is no hierarchy between the various principles. Certain principles may interact with one another and some may not be applicable to a specific measure that has been 'decided on'. To the extent that more than one of the principles is applicable, the Party deciding on a fisheries management measure should have regard to all of them.

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[8] This is confirmed by the terms of Article 498(2)(a) TCA, which provides that "The Parties shall hold consultations annually to agree, by 10 December of each year, the TACs for the following year for the stocks listed in Annex 35. This shall include an early exchange of views on priorities as soon as advice on the level of the TACs is received. The Parties shall agree those TACs: (a) on the basis of the best available scientific advice, as well as other relevant factors, including socio-economic aspects".

[9] See EU oral submissions, transcript of 28 January 2025, page 95.

41. As explained in the EU's Written Submission, paragraph 258, the principles have been accorded a different function as reflected in the terms in which those principles are formulated.

42. Article 494(3)(f) TCA refers to "applying proportionate and non-discriminatory measures". The EU considers that the use of the word "applying" demonstrates that this principle is not limited purely to the conduct of the decision-making process (on which see further the EU's response to additional question 12).

c. In particular, in what precise manner should the "precautionary approach" referred to in Article 494(3)(a) of the TCA be taken into account vis-à-vis the principle of "basing conservation and management decisions for fisheries on the best available scientific advice" (Article 494(3)(c) of the TCA)?

43. The EU refers the Tribunal to its response to additional question 20.

d. Should the precautionary approach be applied only if the best available scientific advice leaves room for uncertainty?

44. The EU's short answer to advance question 9(d) is yes, the precautionary approach should be applied only if the best available scientific advice leaves room for uncertainty. This follows from the terms of Article 495(1)(b) TCA: "absence of adequate scientific information" (emphasis added). It also follows from the fact that best available scientific advice covers both existing advice and advice that could reasonably have been obtained at the time the measure was under consideration based on existing scientific evidence (see the EU's response to advance question 8(a)). The precautionary approach cannot therefore apply where a Party omits to base its measure on advice that it could reasonably have been obtained at the time the measure was under consideration.

e. Is there a relevant conceptual distinction between "precautionary approach" and "precautionary principle", as the term is used in other international instruments, for the purposes of this case?

45. The precautionary approach is a manifestation of the precautionary principle. The EU refers the Tribunal to footnote 52 TCA, which clarifies that:

> "For greater certainty, in relation to the implementation of this Agreement in the territory of the Union, the precautionary approach refers to the precautionary principle."

Advance question 10

Article 496(1) of the TCA provides "[e]ach Party shall decide on any measures […]". May a Party decide the level of protection it requires and select a singular measure that it considers warranted, such as prohibition, for decision rather than a range of possible alternatives?

46. Each Party determines the level of protection that it wishes to achieve. When deciding on a measure intended to give effect to that level of protection, a Party is required to have regard to the principle of applying proportionate and non-discriminatory measures. Since that obligation arises during the decision-making process and precedes the determination of a measure, to the extent that a fisheries management measure will impact the Party's rights under the TCA (for instance those set down in Article 2(1)(a) of Annex 38 TCA), a Party would need to consider whether an impairment of those rights is a proportionate way to achieve the objectives. Typically, that would in turn prompt a Party to consider other alternatives as was the case in the consultation procedures that preceded the adoption of the sandeel fishing prohibition.

Advance question 11

What are the essential attributes that make advice "scientific advice"? Does the lack of any one of these attributes render the advice not scientific, and therefore not "best available scientific advice", as required by Article 496(2)?

47. In response to the first part of advance question 11, the EU considers that the essential attributes that make advice "scientific" are scientific and methodological rigour (EU Written Submission, paragraph 466).

48. The essential attributes that inform the scientific and methodological rigour required by Article 496(2) TCA can be inferred from the essential attributes of the advice provided by ICES (to which Article 494(3)(c) TCA affords a principal role).

49. Advice provided by ICES has the following essential attributes: (i) scientific objectivity and integrity; (ii) quality assurance, including peer review as appropriate; and (iii) transparency (Exhibit C-0054, page 1).

50. In response to the second part of advance question 11, the EU argues that the lack of any one of these essential attributes does not necessarily render the advice not scientific. For instance, advice may still be scientific despite the lack of peer review.

Advance question 12

Is there any relevant conceptual distinction between "advice" and "evidence"? Is it possible for advice to be the best available if it is not also grounded in the best available scientific evidence?

51. In response to the first part of advance question 12, the EU considers that there is a conceptual difference between "advice" and "evidence", in that advice consists of different, individual items of scientific evidence, which, collectively are relied upon as the basis for a measure (EU Written Submission, paragraph 478).

52. In response to the second part of advance question 12, the EU considers that "advice" cannot be considered the "best available" if it fails to have regard to key observations in existing scientific evidence.

Advance question 13

Does the principle of proportionality in Article 494(3)(f) require (i) an assessment as to whether the least restrictive measure would be likely to achieve substantially the same result, or (ii) an assessment as to whether a less restrictive measure would be likely to achieve substantially the same result?

53. The EU's short response to advance question 13 is neither. Although the concept of proportionality has been used in different ways in international law, the EU considers that, as used in Article 493(3)(f) TCA, it implies a multi-stage assessment.

54. Thus, the Tribunal must assess a measure in terms of its 'suitability' or 'aptitude' in relation to the objective it pursues – i.e. is the measure apt to achieve its objective?

55. The Tribunal must also weigh and balance the benefits and the costs of a measure. Within that assessment, there is a consideration of whether a measure is the least restrictive means to achieve its objective insofar as a measure that is more restrictive of rights than 'necessary' cannot be considered proportionate. The EU is not therefore, arguing that a Party must adopt the least protective measure However, one of the differences between a proportionality and a necessity standard, is that the benchmark is not whether another measure would achieve an equivalent contribution to the objective.

Advance question 14

How were the economic and social implications of the sandeel fishing prohibition taken into account in the process of deciding on the fishing prohibition? Please identify where in the record such consideration is to be found.

56. The EU makes three preliminary points in response to advance question 14.

57. First, the EU has met its burden of establishing a prima facie presumption that the economic and social impacts of the sandeel fishing prohibition were not

taken into account by the UK. Moreover, this is a situation in which the evidential burden falls primarily on the UK in the sense that the evidence demonstrating the alleged 'taking into account' is in the UK's possession. The UK has adduced evidence that it considers demonstrates such 'taking into account' and that evidence forms part of the Tribunal's record.

58. Second, the Tribunal should scrutinise not only whether the economic and social impacts of the sandeel fishing prohibition were taken into account by the UK in the process of deciding on the sandeel fishing prohibition, but also whether those impacts were properly weighed by the UK and, if so, whether the measure could or could not have been adopted.

59. Third, when identifying the economic and social impacts of the sandeel fishing prohibition, the UK was not entitled to consider that those impacts were mitigated by the ability of EU vessels to access UK waters of the North Sea to fish stocks other than sandeel and to access EU waters of the North Sea to fish sandeel. Article 2(1)(a) of Annex 38 TCA grants the Parties the right of full access to the waters of the other Party to fish each and every stock for which a TAC has been agreed (and sandeel in the North Sea is one of those stocks). It was therefore the economic and social impacts associated with the nullification of the EU's right of full access to UK waters of the North Sea to fish sandeel that the UK was required to identify and weigh against the benefits of the measure (see also the EU's response to additional question 16).

60. Against that backdrop, the EU has identified the following elements on the Tribunal's record that refer to (but do not either properly consider or weigh) the economic and social impacts of the sandeel fishing prohibition.

Ministerial submission of 16 January 2023 (Exhibit R-0074)

- "In terms of commercial value, over 300,000 tonnes of sandeels are landed from the North Sea (UK, EU and Norwegian waters) annually at a value of around £60 million. The UK, however, holds less than 3% of the total quota and has only one vessel which has historically targeted this fishery. Most industrial fishing is carried out by Denmark and Norway" (paragraph 10);

- "The proposals set out in the consultation are estimated to have a small negative impact (£0 - £0.5m each year) on UK businesses who would have otherwise industrially fished sandeels" (paragraph 18);

- "Most vessels impacted by the proposals will be non-UK vessels who would have otherwise industrially fished sandeels in the proposed areas. They are estimated to lose up to £41.2m in revenue each year. There will also be indirect employment impacts to overseas factories, in Denmark for example, who would have otherwise processed the sandeels" (paragraph 19); and

- "The European Union, particularly Denmark, have economically important fisheries for sandeel in English waters. Over 99% of the sandeel landed from English waters has historically been landed by EU vessels" (paragraph 21).

English consultation document, March 2023 (Exhibit R-0061)

- "Although the focus of Defra's assessment has been on UK businesses, vessels registered in other countries, such as Denmark, also industrially fish sandeels in UK waters. EU vessels landed 240,000 tonnes of sandeels from English waters on average between 2015 and 2019, worth £41.2 million annually in 2021 prices. The estimated direct cost to non-UK businesses are the reduced profits, considered a small proportion of the annual £41.2 million revenue, for fishers who are no longer able to industrially fish sandeels in the proposed management areas. There will also be indirect impacts to overseas sandeel processing sectors".

- "Exact quantification of the impact of the spatial measures is unknown, particularly in reference to non-UK businesses. A more detailed assessment of the economic impact is set out in the De-Minimis Assessment, accompanying this consultation. This consultation process in needed to help understand those impacts" (page 7).

De Minimis Assessment (DMA) for Defra's Consultation on Spatial Management Measures for Industrial Sandeel Fishing, March 2023 (Exhibit C-0044)

- "[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)" (paragraph 66);

"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" (paragraph 66);

- "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 in estimated to be £354 million" (Annex 1);

- "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" (Annex 1); and

- "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 sources" (Annex 1).

Ministerial submission of 14 September 2023 (Exhibit R-0077)

- "The EU fishing industry, principally Danish vessels, will be most affected by a prohibition. EU vessels landed 240,000 tonnes of sandeels from English waters on average between 2015 and 2019, worth £41.2 million a year in revenue at 2021 prices. Over the same period, UK vessels landed an annual average of just 1,000 tonnes, worth £0.2M a year from English waters" (paragraph 19);

- "A prohibition may negatively impact European fishmeal and fish oil factories who use sandeels as one of their inputs. Danish fishmeal and fish oil businesses responded to our previous Call for Evidence suggesting they directly employ about 500 workers and derive additional economic activity in the local communities. The Danish Ministry of Food Agriculture and Fisheries have also shared the same evidence with the British Embassy in Copenhagen. This employment and economic activity will likely be reduced if fish processing businesses do not find alternative sources" (paragraph 20);

- "The response from the EU also questioned whether a full closure could lead to a large negative impact on industry compared to the possible proposed benefits outlined in the report. We have considered these comments and remain in our position that a full closure would be the best available option in order to support delivery on our aims" (paragraph 24);

- "the portion of the Danish fleet that targets sandeels, also targets pelagic species for consumption (mackerel and herring) as well as other industrial species such as sprat and blue whiting. Therefore, it is likely these vessels currently fish other pelagic and industrial stocks and would continue to be able to do this" (paragraph 25); and

- "This would suggest that while there will be an impact on Danish and other EU vessels if English waters are closed to sandeel fishing for vessels >10m, those vessels do not rely solely on English waters or solely on sandeel for their fishing activity or revenues. Based on the subset of data we have from relevant vessels, we would expect the EU sandeel fleet to primarily target herring when outside

the sandeel season – and some vessels may target other pelagic stocks such as mackerel" (paragraph 26).

Ministerial submission of 6 February 2023 (Exhibit R-0091)

- "Sandeel is a jointly managed stock between the UK and the EU. Under the Trade and Cooperation Agreement (TCA), and during a transition period lasting until 30 June 2026, the UK and the EU have full mutual access to their respective EEZs (i.e., 12 – 200 nautical miles); as well as access to specific English, Welsh and Channel Island waters in the 6-12 nautical mile area. Sandeel is an important fishery to some EU member states, in particular Denmark, who regularly fish the stock in UK waters in May and June. In the case of UK vessels, historically, the stock has been targeted primarily by one Scottish vessel, although no quota was allocated to UK vessels for sandeels in 2021 or in 2022, and a major sandeel fishing area in the North Sea has been closed to UK and EU vessels, except for a limited monitoring fishery in some years, since 2000 (see Figure 1)" (paragraph 8);

- "Any closure of the sandeel fishery in Scottish waters would involve extending the current closed area in the North Sea by way of a general prohibition on fishing for sandeels by all vessels, including EU vessels. As noted previously, UK vessels are not allocated quota from the UK for this fishery, so the primary impact of any closure would be on Danish vessels, which hold 96% of the EU sandeel quota (on average 128,546 tonnes from 2020 to 2022), with 35% of this being allocated to areas almost entirely within UK (and primarily Scottish) waters" (paragraph 16).

Ministerial submission of 27 April 2023 (Exhibit R-0092)

- "Sandeel is a jointly managed stock between the UK and the EU. Under the Trade and Cooperation Agreement (TCA), and during a transition period lasting until 30 June 2026, the UK and the EU have full mutual access to their respective Exclusive Economic Zones (i.e., 12 – 200 nautical miles), as well as access to specific English, Welsh and Channel Island waters in the 6-12 nautical mile area. Sandeel is an important fishery to some EU member states, in

particular Denmark, who regularly fish the stock in UK waters between May and July. In the case of UK vessels, historically, the stock has been targeted primarily by one Scottish vessel, although no quota has been allocated to UK vessels for sandeels since 2021 and a major sandeel fishing area in the North Sea has been closed to UK and EU vessels, except for a limited monitoring fishery in some years, since 2000" (paragraph 5);

- "Any closure of the sandeel fishery in Scottish waters would involve extending the current closed area in the North Sea by way of a general prohibition on fishing for sandeels by all vessels, including EU vessels. As noted previously, UK vessels are not allocated quota from the UK for this fishery, so the primary impact of any closure would be on Danish vessels, which hold 96% of the EU sandeel quota (on average 128,546 tonnes from 2020 to 2022), with 35% of this being allocated to areas almost entirely within UK (and primarily Scottish) waters" (paragraph 14);

Scottish consultation document, July 2023 (Exhibit C-0049)

- "Under the TCA and during a transition period lasting until 30 June 2026, the UK and the EU have full mutual access to their respective exclusive economic zones (EEZs) (i.e. waters adjacent from 12 – 200 nautical miles); as well as access to specific English, Welsh and Channel Island waters in the 6-12 nautical mile area. Sandeel is an important fishery to some EU member states, in particular Denmark, who regularly fish the stock in UK waters in May and June" (page 5);

- "Sandeel quota has not been allocated to UK vessels since 2021, therefore only a partial Business and Regulatory Impact Assessment (BRIA) has been produced. It summarises the expected impact on Scottish, UK and non-UK businesses of the proposals presented in this consultation. The 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. We would anticipate that the outcome of the consultation could

clarify the assumptions underlying the BRIA assessment. This assessment can be found along other supporting documents to this consultation" (page 22).

Partial Business and Regulatory Impact Assessment, July 2023 (Exhibit C-0051)

- "Under the TCA and during a transition period lasting until 30 June 2026, the UK and the EU have full mutual access to their respective exclusive economic zones (EEZs) (i.e. waters adjacent from 12 – 200 nautical miles); as well as access to specific English, Welsh and Channel Island waters in the 6-12 nautical mile area. Sandeel is an important fishery to some EU member states, in particular Denmark, who regularly fish the stock in UK waters in May and June.

EU sandeel fishery

Denmark is the largest shareholder, holding 96% of the EU quota. From 2020-22, Denmark's total quota for North Sea sandeel has been on average 128,546 tonnes, worth approximately £36 million based on latest (2020) Scottish prices. 35% of this quota has been allocated to areas almost entirely within UK, primarily Scottish, waters (sandeel areas 4 and 3r); the remaining 65% has been allocated to areas either straddling UK and EU waters, or in EU waters exclusively (sandeel areas 1r and 2r, and 6).

UK sandeel fishery

In the case of UK vessels, the stock has historically been targeted primarily by one UK vessel, although no quota has been issued to UK vessels for sandeel since 2021, and a major sandeel fishing area in the North Sea has been closed to UK and EU vessels since 2000, except for a limited monitoring fishery in some years" (page 6)

- "EU registered vessels "will face the largest cost as they are the main catchers of sandeel in Scottish waters" (page 13);

- "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%" (page 13); and

- "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" (page 13).

Ministerial submission of 26 January 2024 (Exhibit R-0098)

- "Our considerations on these and other key elements, including the current scientific evidence base, ICES advice and compliance with the Trade Cooperation Agreement (TCA), are set out in full in Annex F for Ministers consideration" (paragraph 7);

- "Sandeel is a jointly managed stock between the UK and the EU. Under the UK/EU TCA, the UK has a 3.11% share and the EU a 96.89% share of the parties' combined sandeel quota in 2024. Additionally, the Total Allowable Catch (TAC) is set during in-year annual consultations, following the publication of ICES advice. Under the TCA and during a transition period lasting until 30 June 2026, the UK and the EU have full mutual access to their respective exclusive economic zones (EEZs); as well as access to specific English, Welsh and Channel Island waters in the 6-12 nautical mile area. The TCA Article 496 provides that both the UK and the EU may decide on the management measures applicable to their respective waters to achieve relevant objectives and principles (such as the conservation of marine living resources)" (pages 15-16);

- "Officials have noted the views regarding financial considerations, in particular feedback received through the consultation on the partial Business and Regulatory Impact Assessment (BRIA) that was published alongside the consultation document. In preparing the final BRIA (which takes account of feedback provided during the consultation), officials consider that there is no additional impact on the Scottish catching sector from the proposals to close fishing for sandeel, as no sandeel quota has been allocated to Scottish vessels

since 2021. Additionally, no sandeel has been landed into Scottish ports since 2020 so minimal impacts are expected on the Scottish onshore sector.

However, it is expected that there will be an impact on EU vessels, primarily the Danish fleet. The estimated net present cost of the closure to these vessels is £32.8 million over a ten-year period. However, this does not account for the likelihood that EU vessels will move their fishing of sandeel to other waters and therefore offset the loss of a closure in Scottish waters.

There is expected to be minimal additional costs to the Scottish Government, as any monitoring of a closure of fishing for sandeel in Scottish waters will be absorbed by regular compliance operations" (page 17).

Scottish Government response to the consultation analysis report, January 2024 (Exhibit R-0096)

- "The Scottish Government has considered all views submitted on the partial BRIA and, have used these to help shape and inform the final BRIA. We recognise that no quota for sandeel has been allocated to UK vessels since 2021, therefore the introduction of measures will not impact additionally on Scottish businesses. Any measures will also apply to all vessels fishing in Scottish waters, both UK and EU, therefore remaining aligned with Article 496 of the TCA."

Advance question 15

The TAC for sandeel in Sandeel Management Area 4 was set to zero in 2024. What economic consequences for the Parties stem from this decision?

61. The economic consequences stemming from the decision to set the TAC for sandeel in stock assessment area 4 to zero in 2024 is that no catches of sandeel were possible in that area during that year. By way of comparison, the TAC in stock assessment area 4 in 2023 was set at 33,969 tonnes (Exhibit C-0003, page 4). Moreover, according to the evidence on the Tribunal's record, the landed value of a kilo of sandeel in 2023 was DKK 2.95 (Exhibit C-0025, page 14).

62. Those economic consequences were borne exclusively by the EU, given that: (i) in 2024, the EU's share of the North Sea sandeel TAC was 96.89% (EU Written Submission, paragraph 721); and (ii) since 2021, the UK has not allocated its share of the North Sea sandeel TAC to its vessels (EU Written Submission, paragraphs 8, 174 and 737).

Advance question 16

With respect to Article 494(3)(f) of the TCA on non-discrimination:

a. What distinguishes permissible differential treatment from discrimination?

63. The EU has not argued that all differential treatment should be understood to equate to discrimination (EU Written Submission, paragraph 761). Similarly, it is not because a measure has a differential impact that it is discriminatory. A difference in treatment, giving rise to a differential impact that stems exclusively from a legitimate regulatory distinction that is designed and applied in an even-handed manner, would be permissible.[10]

b. What impact, if any, does the nature of sandeel as a shared stock have on the assessment of *de facto* discrimination?

c. What impact does the disproportionate allocation of the sandeel fishing quota have on the determination of whether there is any *de facto* discrimination?

64. The EU responds to advance questions 16(b) and 16(c) together.

65. Sandeel in North Sea is a jointly managed stock between the UK and the EU. Under Annex 35 TCA, the UK had a 3.11% share and the EU a 96.89% share of

[10] See by analogy, Appellate Body Report, US – COOL, paras. 267-271 (Exhibit CLA-0055).

the North Sea sandeel TAC in 2024. Any measure addressing sandeel would, hence, have a differential impact on the EU.

66. Given the reference in Article 494(3)(f) TCA to "regulatory autonomy", the exercise of regulatory autonomy is a factor that should be considered in the context of assessing whether there is discrimination. Difference in treatment that stems exclusively from a legitimate regulatory objective would be permissible differential treatment. The EU does not argue that a differential treatment in itself is enough to establish discrimination.

67. However, 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 the legitimate objective pursued by the measure, in this case the sandeel fishery prohibition, then the measure is discriminatory.

d. Is it relevant to a consideration of *de facto* discrimination that the measure is confined to sandeel as a species, which is overwhelmingly fished by EU vessels?

68. The EU considers that it is relevant to a consideration of de facto discrimination that the measure is confined to sandeel as a species which is overwhelmingly fished by EU vessels because:

    a. the UK relied on the differential impact of the sandeel fishery prohibition as a ground for concluding that the economic and social impacts are minimal (EU Written Submission, paragraph 737); and

    b. sandeel is not the only forage fish consumed by predators. Other forage fish include Norway pout, sprat and herring (EU Written Submission, paragraphs 58 and 673). The UK has not explained its policy choice of commencing the legitimate objective of marine conservation and fisheries management with a fish stock in respect of which the share in Annex 35 TCA is allocated to such a significant proportion to the EU.

Advance question 17

In light of the fact that Article 1 of Annex 38 to the TCA provides that the adjustment period shall apply "until 30 June 2026", the Parties are invited to comment on whether there was any urgency involved in implementing the challenged measure and, if so, how such urgency interacts with the amount of time remaining in the adjustment period.

69. The EU is unaware of any urgency involved in implementing the measure. It is, therefore, for the UK to show that there was 'urgency' warranting the adoption of the measure during the adjustment period established by Annex 38 TCA and notwithstanding the terms and rationale of that period.

70. At paragraph 392.3 of its Written Submission, the UK argues that "at the time of the adoption of the measures, there was a real and pressing need to take appropriate measures to protect sandeel abundance and resilience". However, while the UK's Written Submission, paragraph 392.3, cross-refers back to paragraphs 392.1 and 392.2 of that submission, neither of those paragraphs supports the UK's argument of a "real and pressing need" to act.

71. Regarding paragraph 392.1 of its Written Submission, the UK argues that "even with low levels of fishing, there is a risk of sandeel stock collapse". However, this is not the case regarding the North Sea sandeel fishery. Since 2011, that fishery is managed according to an escapement strategy designed to avoid the risk of stock collapse and thus ensure that the fishery can be continued in a sustainable manner. Moreover, the only scientific evidence to which paragraph 392.1 indirectly cross-refers (through UK's Written Submission, Sections IV and V) is a 2004 study referred to in footnote 103 of the UK's Written Submission (Exhibit R-0027). That study assumed that fishing mortality would be the same every year whereas the current management strategy since 2011 is designed to reduce fishing mortality in years where sandeel stock size might be lower in a given stock assessment area.

72. Regarding paragraph 392.2 of its Written Submission, while the UK makes four uncontroversial statements, those statements do not holistically support the UK's argument about a "real and pressing need" to act:

    a. "the UK is home nationally and internationally to important seabird populations, but there has been a general decline in their populations";

    b. "This was accelerated by the outbreak of avian flu in recent years which has had adverse consequences on their populations";

    c. "Declines in the abundance of sandeel due to industrial fishing has been shown to impact the breeding success of UK seabirds, most notably in kittiwakes"; and

    d. "The best available scientific evidence shows that spatial sandeel fishing closures may build seabird resilience as well as having wider ecosystem benefits".

73. More generally, there is no evidence on the Tribunal's record supporting the need for a "real and pressing need" to act:

    a. while the Call for Evidence of October 2021 (Exhibit C-0043, page 4) contains a reference to "urgent action" being "required to protect stocks and the wider ecosystem from these increasing pressure", there is no similar language in the English or Scottish consultation documents; and

    b. while the ministerial submission of 14 September 2023 (Exhibit R-0077, paragraph 17) notes a statement by an environmental NGO according to which "there is an urgent need to build resilience in these populations and therefore, a clear imperative to take immediate action on tractable pressures like sandeel fishing", there is no indication that urgency was a factor taken into account by the UK when deciding on the measure.

74. The absence of any "real and pressing need" to act can be contrasted with the relevant context in which the measure was adopted, namely the adjustment period established by Annex 38 TCA, whose rationale 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).

II. The EU's written response to the Tribunal's additional questions of 30 January 2025

Additional question 1

For both Parties: There is a difference of view between the Parties as to whether or not domestic law constitutes relevant context for the interpretation of the TCA. If domestic law does constitute relevant context, how does this fit with the requirements of Article 4 of the TCA? If domestic law does not constitute relevant context under the VCLT, can it nevertheless be taken into account as part of the underlying legal framework of the Parties?

75. The EU maintains that it would not run counter to Article 4(2) and 4(3) TCA for the Tribunal to consider the meaning ascribed to the principle of proportionality as it has been understood and applied in the domestic law of the Parties when interpreting the term "proportionate" in Article 494(3)(f) TCA in so far as that may form part of the relevant context for that interpretative exercise.

76. The EU has not suggested that domestic law is dispositive or that it displaces other sources of law for the purpose of that exercise. However, both Parties agree that this term does not find a direct analogue either under international environmental law or under international economic law. At the same time, it must have a meaning.

77. The EU's interpretative approach identifies common principles that may be derived from different sources of obligations. For instance, the idea that there should be a weighing and balancing between the rights of the parties is common

to UNCLOS (Article 56(2)), the interpretation of the Agreement on Technical Barriers to Trade (Article 2.2) and the GATT 1994 (Article XX).

78. At the same time, Article 4(2) TCA does not preclude the possibility that domestic law may provide relevant context within the meaning of customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. This is particularly relevant when a specific term has been construed under the domestic law of both Parties in a similar way and where it is a term which, prior to the adoption of the TCA, had been accorded a meaning in the relations between the Parties. The UK has not provided any convincing explanation as to why the manner in which the apex courts of the UK (the Supreme Court) and of the EU (the European Court of Justice) have understood and applied this term should not be one of the factors to which the Tribunal may have regard.

Additional question 2

For both Parties: What is the impact of the context of the adjustment period on the interpretation of the legal framework of Articles 494 and 496 of the TCA and their application? Does the adjustment period set out in Annex 38 require that this context be taken into account when interpreting and applying the obligations in question?

79. Article 778 (2)(m) TCA specifies that Annex 38 TCA forms an integral part of Heading Five of Part Two TCA.

80. The adjustment period established by Article 1 of Annex 38 TCA, as well as the terms and rationale of the annex as a whole, must be taken into account when interpreting and applying the legal framework of Article 494 TCA and Article 496 TCA in the present dispute.

81. The EU recalls that, in accordance with the general rule of interpretation set down in customary international law, codified in the Vienna Convention on the Law of Treaties and given expression in Article 4 TCA, when interpreting a

provision, regard should be had to the context and purpose of a provision in the treaty of which it forms part. Article 496 TCA and Article 494(3) TCA cannot be read in isolation from Annex 38 TCA. It is therefore, inherent to the task of the Tribunal, as it should have been inherent to the task of the UK, to consider the nature and objectives of other provisions conferring rights on the EU when deciding on a measure that, by design, impair those rights.

Additional question 3

For both Parties: The EU challenges the English modelling on three main points: overestimation of the fishing mortality, aggregation of functional groups (eg sandeel size and age), and failure to consider the spatial distribution of predators. The last point is central to the disagreement over the relevance of partial and more geographically restricted closures.

a. How does the model address the third element above? What is the UK position on this?

82. The EU's short response to additional question 3(a) is that the model used in the English Scientific Report does not address the spatial distribution of predators.

83. The model that was granted key run status by ICES in 2015 is an Ecopath with Ecosim ('EwE') ecosystem model of the North Sea. It does not, however, contain an Ecospace dimension, which needs to be parameterised by way of a separate model extension. The purpose of parameterising the Ecospace model extension is to, *inter alia*, evaluate possible spatial management measures on the distribution of species and fishing activity[11]. Such a parameterised extension to the EwE model of the North Sea has been available since at least 2013 (Exhibit R-0161, page 81).

84. It was unnecessary for the EwE model of the North Sea that was granted key run status by ICES in 2015 to contain an Ecospace dimension because the

[11] Exhibit R-0161, page 83: "Ecospace: Evaluation of spatial management strategies and changes in environmental conditions on the distribution of species and fishing activity."

purpose of the model was not to evaluate spatial management measures such as predator biomass responses associated with a prohibition on sandeel fishing. Indeed, when the EwE model of the North Sea was first published in 2007, it was already foreseen that "the models may be further developed in their application to specific problems"[12].

85. To simulate and quantify predator biomass responses associated with a prohibition on sandeel fishing, the parameters of the EwE model of the North Sea would need to be adjusted to cover relevant parameters such as age (or 'sandeel size-structure') and predator location (or 'predator spatial distribution').

86. Despite both the English and Scottish Scientific Reports highlighting the relevance of age and predator location, the model used in the English Scientific Report does not consider either of these elements when simulating and quantifying the biomass responses of predators to a prohibition of sandeel fishing in all UK waters of the North Sea. Rather, the model used in the English Scientific Report:

    a. does not account for the fact that predators take sandeels that are unaffected by the fishery in the North Sea (EU Written Submission, paragraph 488); and

    b. assumes that predators that compete with the North Sea sandeel fishery are uniformly and homogenously distributed throughout the North Sea whereas different predators have different foraging ranges (on which, see the EU's response to additional question 4).

b. Given that the UK considers that its measure would be lawful and scientifically justified even in the absence of the modelling, how does the

[12] Exhibit R-0107, page 6: "[b]ased on strong foundations, the models are useful tools for exploring dynamic change in ecosystems and macroecological patterns. The models may be further developed in their application to specific problems such as evaluating the relative influence of climate and fishing on ecosystem change, evaluating the effects of Marine Protected Areas (MPAs), predicting fish stock recovery and evaluating harvesting strategies".

UK measure, apart from the modelling, specifically address these concerns?

87. The EU makes three points in response to additional question 3(b).

88. First, while Heading Five of Part Two TCA does not require modelling for the purpose of "best available scientific advice", where such modelling is undertaken, it must be done on the basis of scientific and methodological rigour (on which see the EU's response to advance question 11).

89. Second, the English and Scottish Scientific Reports summarise what is understood in the scientific literature about the role and functioning of sandeel in the North Sea ecosystem. Both the English and Scottish Scientific Reports observe what is eating sandeel, where sandeel is being eaten, how much sandeel is being eaten and the degree of dependency of predators on sandeel. The English and Scottish Scientific Reports also observe that the age of sandeel, the location of sandeel and the location of predators are key elements.

90. For a model to have scientific and methodological rigour, it must therefore be parameterised based on those key observations from the scientific literature.[13] It is not possible to hermeneutically divorce the parameters of a model and the scientific literature.

91. Third, to the extent that a model were to simulate that a prohibition of sandeel fishing in all UK waters of the North Sea may not lead to an increase in the biomass of a given predator, this would be relevant in assessing whether there is a 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 the measure, which covers all UK waters of the North Sea.

[13] Exhibit R-0236, page 4: "There are three key attributes of "good" models spanning the range from stock specific through multi-species up to ecosystem models intended for supporting decision making: (i) they are based on generally accepted science and methods, (ii) they serve the intended purpose, and (iii) they behave similarly to the actual system" (emphasis added).

Additional question 4

For the EU: If the best available scientific advice challenge rests on the errors in the modelling, and that challenge is only directed to the English measure, what remains of the basis upon which claim 1 still impugns the Scottish measure? If there is no substantive challenge on this score to the Scottish measure, does claim 1 then rest upon the proposition that if claim 1 prevails against the English measure, the Scottish measure must also fail because it is one measure? And is that so, even if there is nothing the UK would be required to do under claim 1 to bring the Scottish measure into conformity?

92. The EU challenges the sandeel fishing prohibition as a single measure and (as the EU explains in its response to advance question 1(a)), while the Tribunal is not bound by either Party's characterisation, the starting point of the Tribunal should be the manner in which the EU, as the complainant, has characterised the measure.

93. The EU also acknowledges that, while the scientific advice identified by the UK as the base for the sandeel fishing prohibition differs between the English and the Scottish parts of the measure, the English and Scottish Scientific Reports both observe that the age of sandeel, the location of sandeel and the location of predators are key elements in the context of spatial management measures.

94. Notwithstanding the above, to the extent that the measure challenged by the EU has two distinguishable parts, the EU makes three points in response to additional question 4.

95. First, Claim 1 does not rest on the flaws and caveats in the model used in the English Scientific Report. As explained in the EU's Written Submission, paragraphs 493-511, 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*), both the English and the Scottish parts of the measure 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.

96. Second, the flaws and caveats that the EU has identified in the model used in the English Scientific Report are relevant both to the English and the Scottish parts of the measure. As explained in the EU's response to additional question 3, the model used in the English Scientific Report, which seeks to simulate and quantify average predator biomass responses to a prohibition of sandeel fishing in all UK waters of the North Sea, is not parameterised based on the key observations in the English and Scottish Scientific Reports regarding the age of sandeel, the location of sandeel and the location of predators.

97. Third, given that the flaws and caveats in the model used in the English Scientific Report are relevant both to the English and the Scottish parts of the measure, if Claim 1 prevails against the English part of the measure, Claim 1 should also prevail against the Scottish part of the measure, which is based on the ICES Technical Service Report and the Scottish Scientific Report.

98. Like the literature review in the English Scientific Report, the ICES Technical Service Report and the Scottish Scientific Report essentially indicate that: (i) a prohibition on sandeel fishing can bring about benefits to the extent there is a localised depletion of sandeel, and that the relevant predators that are dependent on sandeel cannot forage outside of any such locally depleted area; and (ii) the only predators that are dependent on sandeel and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.[14]

[14] The EU explained during the hearing (EU oral submissions, transcript of 28 January 2025, pages 100-101) why, in paragraphs 297-298 of its written submission, the UK is wrong to argue (based on evidence that was not part of the advice that the UK identified as the basis for the measure) that the foraging range of chick-rearing black-legged kittiwakes covers most of the UK waters of the North Sea. That argument is contradicted by the advice that the UK identifies as the basis for the measure. See Scottish Scientific Report, page 51: "[k]ittiwake have a mean foraging range of 55km and a mean maximum foraging range of 156km (Woodward et al. 2019). For many seabird colonies along the east coast of Scotland, this means that a typical foraging range would not regularly include foraging outside of the existing closed area".

99. Regarding the ability of seabirds other than chick-rearing black-legged kittiwakes to forage outside of any locally depleted area:

    a. ICES Technical Service Response: seabirds "are the most sensitive predators to changes in sandeel abundance, with terns and kittiwakes the most sensitive among seabirds" (Exhibit C-0022, page 8);

    b. Scottish Scientific Report: "Both Daunt et al. (2008) and Searle et al. (2023) did not detect any increase in breeding success following the Wee Bankie sandeel closure for any species other than kittiwake. Daunt et al. (2008) concluded this was because some species feed close inshore in unfished areas (terns, shag) or can dive in the water column (guillemot, razorbill and puffin) and so are less affected by a decrease in absolute abundance of sandeel than surface feeders" (Exhibit C-0050, page 53); and

    c. Scottish Scientific Report: "Prey 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" (Exhibit C-0050, page 55).

100. Regarding the ability of marine mammals to forage outside of any locally depleted area:

    a. ICES Technical Service Report: "the availability of prey to predators may be at a smaller scale. While some predators (e.g. minke whales) have a high degree of mobility and can forage over large areas, others (especially nesting seabirds) have a strictly limited foraging range" (Exhibit C-0022, page 3); and

    b. ICES Technical Service Report: "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" (Exhibit C-0022, page 3).

101. Regarding the ability of other fish to forage outside of any locally depleted area:

a. English Scientific Report: "[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" (Exhibit C-0045, page 13); and

b. Scottish Scientific Report: "Predatory 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" (Exhibit C-0050, page 35).

Additional question 5

For both Parties: The UK submits that advice may be scientific, without modelling. Can it however be the best available scientific advice when the science has developed a model, recognized by ICES, and adopted by the UK to assist its decision-making? If the modelling (EwE) enjoys ICES 'Key Run' status, developed over 6 years, why is that not a scientific advance that constitutes the basis for best available scientific advice?

102. The EU makes three points in response to additional question 5.

103. First, the EU accepts that advice may be scientific, without modelling. However, where modelling is undertaken, it must be done on the basis of scientific and methodological rigour (on which see the EU's response to advance question 11).

104. Second, the EU does not argue that a model need enjoy ICES key-run status. Rather, what the EU argues is that, when the purpose of a model is to simulate

and quantify predator biomass responses to a prohibition on sandeel fishing in certain waters, that model must be parameterised based on the key observations from the scientific literature. This is not the case of the model used in the English Scientific Report (on which see the EU's response to additional question 3).

105. Third, the UK is in any event wrong to claim that the fact that, in 2015, ICES granted the EwE model of the North Sea 'Key Run' status, means that the model used in the English Scientific Report is "still the key run model"[15]. Given the UK inputted into the EwE model of the North Sea additional data regarding the period until 2020[16], ICES would need to assess the updated model used in the English Scientific Report to check whether it can be granted key-run status:

    a. "a version of Mackinson and Daskalov's model was reviewed and granted Key Run status by the ICES WGSAM. That version of the model had been updated and calibrated using data from 1991 to 2013. As part of the process for being granted Key Run status, the model underwent rigorous evaluation by ICES, involving a full review of all of the model's underlying assumptions, input data quality and parameterisation" (UK Written Submission, paragraph 238, emphasis added);

    b. "[a]s the Key Run version of the model was only updated to 2013, it was necessary to update the model to extend it to 2020 (the most recent year for which data was available when the modelling was undertaken in 2022)" (UK Written Submission, paragraph 239.1); and

    c. "[k]ey runs are typically run every three years, or alternatively, when a substantive change is made to the model parameters, when sufficient new

[15] UK oral submissions, transcript of 29 January 2025, page 114.

[16] Exhibit C-0045 page 21: "[t]he North Sea model was once again updated 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)." See also UK Written Submission, paragraph 239.1: "As the Key Run version of the model was only updated to 2013, it was necessary to update the model to extend it to 2020 (the most recent year for which data was available when the modelling was undertaken in 2022)."

data becomes available, or when the previous key-run is deemed out of date" (Exhibit R-0108, page 41, emphasis added).

Additional question 6

For both Parties: On the first criticism of the modelling exercise: is the difference between the data in the model and the ICES data, a difference of the inclusion of the Norway's catch? If so, how is that relevant to a comparison of the EU / UK catch (ie why is Norway's catch counted at all as it is not an EU Member State)? If Norway's catch is to be counted, what is its size that it creates so large a difference to the proportion of the UK catch?

106. Regarding the first part of additional question 6, like the EwE model of the North Sea that was granted key-run status by ICES in 2015, the model used in the English Scientific Report covers the entire North Sea, including EU, UK and Norwegian waters of the North Sea.

107. The model used in the English Scientific Report sought to simulate and quantify average predator biomass responses to a prohibition on sandeel fishing in all UK waters of the North Sea[17]. In order to do so, it was therefore necessary for the authors of the English Scientific Report to estimate the average amount of sandeel caught in UK waters of the North Sea compared to all waters of the North Sea (EU waters, UK waters and Norwegian waters).

108. However, as the EU explained during the hearing[18], the English Scientific Report estimated the average amount of sandeel caught in UK waters compared only to sandeel catches in EU and UK waters of the North Sea and not also compared to sandeel catches in Norwegian waters of the North Sea.

109. This error means that the assumption in the English Scientific Report that a prohibition of sandeel fishing in all UK waters of the North Sea would reduce

[17] Exhibit C-0045, page 24.

[18] EU oral submissions, transcript of 30 January 2025, pages 20-22.

by an average of 58% the amount of sandeel catches in the North Sea effectively overestimated the amount of those catches. The EU addresses the impact of that overestimation in its response to additional question 7.

110. To give an illustrative example, if North Sea sandeel catches in EU waters amounted to 100 tonnes, UK waters 100 tonnes and Norwegian waters 100 tonnes, this would mean that one-third would have been caught in UK waters ($100tonnes_{UK}$ divided by ($100tonnes_{EU}$ plus $100tonnes_{UK}$ plus $100tonnes_{NO)}$) = 33.33%). However, comparing only catches in EU and UK waters of the North Sea (like the English Scientific Report did) would indicate that half of sandeel catches took place in UK waters ($100tonnes_{UK}$ divided by ($100tonnes_{UK}$ plus $100tonnes_{EU}$) = 50%).

111. Regarding the remainder of additional question 6, according to the evidence on the Tribunal's record, between 2011 and 2020, sandeel catches in Norwegian waters of the North Sea varied between approximately 30 400 tonnes in 2013 and 244 000 tonnes (in 2020) whereas total sandeel catches in EU, UK and Norwegian waters of the North Sea varied during that same period between approximately 73 500 tonnes (in 2017) and 446 800 tonnes (in 2020).[19] Thus, when sandeel catches in Norwegian waters of the North Sea are taken into account, the amount of sandeel catches in UK waters during that period corresponded to an average of 39% of total sandeel catches in the North Sea.

Additional question 7

For the EU: Even if the ICES data is used and the UK catch drops to 39%, that is within the lower bound of the model used by the UK to support the measure taken by way of prohibition. Why then does the correction, even if warranted, entail that the measure is not based on the best available scientific advice?

[19] Exhibit R-0238, Table 9.1.1, pages 549-550.

112. The failure of the English Scientific Report to take into account sandeel catches in Norwegian waters of the North Sea and the corresponding overestimation of the average amount of sandeel catches that the prohibition on sandeel fishing in UK waters of the North Sea would remove is one of the flaws that, when assessed holistically with the other flaws and caveats highlighted by the EU, deprives the model used in the English Scientific Report and the simulations generated based on that model of the "necessary scientific and methodological rigor to be considered reputable science".

113. Moreover, had the UK taken into account sandeel catches in Norwegian waters of the North Sea and, on that basis, properly estimated at 39% instead of 58% the average proportion of sandeel catches in UK waters of the North Sea that the prohibition on sandeel fishing would remove, the 39% average would not have been within the 38% lower "bound"[20] of the estimated proportion of sandeel catches set out in the English Scientific Report (Exhibit C-0045, pages 9, 23 and 26-27).[21] The lower bound is visualised in Figure 6 (mislabelled as Figure 5[22]) by the "right red line" (Exhibit C-0045, page 26).

114. As page 27 of the English Scientific Report explains,[23] the reference point for the upper and lower "bounds" of the estimated proportion of sandeel catches in the English Scientific Report was the 58% average proportion of sandeel catches in UK waters of the North Sea (see Tables 3 and 7 of the English Scientific Report).

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[20] While the English Scientific Report refers to those catches as "landings", nothing turns on this discrepancy.

[21] Contrary to what the UK argued during the hearing. See UK oral submissions, transcript of 30 January 2025, page 55: "And for the Norwegian data, about which the EU was so excited yesterday, even at the maximum possible assumption in favour of the EU's case, which is that there's no Norwegian fishing of sandeel in UK waters, even on that maximum possible assumption, the number on which they focused, based on that assumption, was within the confidence interval identified in the English scientific report on which the English measure was based".

[22] As confirmed by UK Written Submission, footnote 405, footnote 503 and paragraph 373.3.1.

[23] "Prohibition in UK waters was calculated based on the average proportion of landings taken from the UKs EEZ between 2003 and 2020 (58%). 95% confidence intervals are given for scenario 2 based on upper (73%) and lower (38%) proportions of landings taken from the UKs EEZ between 2003 and 2020. Annex 2 provides upper and lower uncertainty bounds for these estimates based on model parameter uncertainty".

115. When that reference point becomes a 39% average proportion, the corollary is that the existing lower "bound" (38%) essentially becomes the new average "bound" (39%) whereas the new lower "bound" falls below the current lower "bound".

116. Visually, this means that the red lines in Figure 6 (mislabelled as Figure 5) of the English Scientific Report will move leftwards and that the average simulated biomass responses from the sandeel fishing prohibition in Table 7 for the 12 identified "commercial stocks and guilds" will decrease accordingly.

117. Coupled with the other flaws and caveats in that model and the reasonable availability of other means to have applied a more scientifically rigorous model, this means that the advice that the UK identifies as the basis for the measure cannot be considered the "best available scientific advice" (EU's Written Submission, paragraph 480).

Additional question 8

For the EU: If the model used conforms to the ICES model on two of the caveats (sandeel size-structure and predator spatial distribution) why is that not best science, given ICES' special institutional standing in the TCA?

118. The EU disagrees with the premiss of additional question 8, namely that the EwE model of the North Sea that was granted key run status by ICES in 2015 "conforms to", or takes into account, "sandeel size-structure and predator spatial distribution".

119. The EwE model of the North Sea that was granted key run status by ICES in 2015 did not conform to, or take into account, either of these two elements. This is because, as the EU explains in its response to additional question 3(a), unlike the model used in the English Scientific Report, it was unnecessary for the EwE model of the North Sea to take into account these elements.

Additional question 9

For both Parties: The EU challenge is principally focused on the EwE ecosystem modelling in the English Scientific Report. Does this mean that the EU considers that the remainder of the English Scientific Report and the ICES Technical Services Response constitute 'best available scientific advice' on which the measure is based? If the EU considers that ecosystem modelling constitutes part of 'best available scientific advice', why does the absence of such modelling in the Scottish Scientific Report give rise to no complaint by the EU?

120. Regarding the first part of additional question 9, as the EU's Written Submission, paragraph 491, explains, the EU does not challenge the scientific and methodological rigour of the ICES Technical Service Response, the remainder of the English Scientific Report and the Scottish Scientific Report.

121. However, given that the model used in the English Scientific Report and the simulated biomass responses are an integral part of the base for the measure, the flaws and caveats in that model and the reasonable availability of other means to have applied a more scientifically rigorous model, mean that the advice that the UK identifies as the basis for the measure cannot be considered the "best available scientific advice" (EU's Written Submission, paragraph 480).

122. Regarding the second part of additional question 9, the EU refers the Tribunal to its response to additional questions 4 and 5.

Additional question 10

For both Parties: The EU has identified three classes of errors as flaws in the EwE ecosystem model used for the purposes of the English Scientific Report. Is the standard of 'best available scientific advice' in relation to such errors (if they were to be established) subject to a requirement of materiality? Do the errors identified by the EU meet a requirement of materiality, if such requirement is accepted?

123. As a matter of law, the EU accepts that the flaws and caveats in the model used in the English Scientific Report are subject to a requirement of materiality in that those flaws and caveats, holistically, would need to make a material difference.

124. As a matter of fact, the EU submits that the requirement of materiality is met. The flaws and caveats identified by the EU in the model used in the English Scientific Report would, holistically, make a material difference because:

    a. the model used in the English Scientific Report was not parameterised based on the key observations from the scientific literature as summarised in the English and Scottish Scientific Reports;

    b. the consequence of the failure to parameterise the model used in the English Scientific Report based on those key observations is that the simulated biomass responses to a prohibition of sandeel fishing in UK waters of the North Sea are likely to be overestimated. Correction of these likely overestimations would accordingly decrease the average simulated biomass responses from the sandeel fishing prohibition in Table 7 of the English Scientific Report for the 12 identified "commercial stocks and guilds"; and

    c. as the EU's response to additional question 4 explains, like the ICES Technical Service Report and the Scottish Scientific Report, the literature review in the English Scientific Report essentially indicates that: (i) a prohibition on sandeel fishing can bring about benefits to the extent there is a localised depletion of sandeel, and that the relevant predators that are dependent on sandeel cannot forage outside of any such locally depleted area; and (ii) the only predators that are dependent on sandeel and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.

Additional question 11

For both Parties: The Parties agree that the ICES Technical Service Response constitutes "best available scientific advice". The ICES Technical Service (Reviewer One) responded at p. 2:

"For 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). It is never going to be feasible for ICES to provide catch advice at a sufficiently fine scale to account for this local food requirement, and 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)."

And again at p. 7):

"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. There 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."

How do the Parties interpret these paragraphs, particularly with regard to their understanding of what is meant by the 'level of national regulations' in the context of the reference to "local food requirements", and "… closures or restricted quotas in given areas".

125. The EU interprets the paragraphs of the ICES Technical Service Response (Exhibit C-0022) referred to in additional question 11 as meaning that, to the extent that there is a localised depletion of sandeel and that the relevant

predators that are dependent on sandeel cannot forage outside of any such locally depleted area, this is a matter that should be addressed by fisheries management measures.

126. Such fisheries management measures can include "closures or restricted quotas in given areas (…) targeted to maximize the benefits while minimizing the costs" and that ensure that "local food requirements" are sufficient for the predators which are dependent on sandeel and which cannot forage outside of any locally depleted sandeel area.

127. However, as the EU explains in its response to additional question 4, the scientific advice identified by the UK as the base for the sandeel fishing prohibition essentially indicates that the only predators that are dependent on sandeel and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.

Additional question 12

For both Parties: With regard to the standard of review of the proportionality of the measure, the respondent argues that the phrase "having regard to" in the Treaty implies a deferential review by the Arbitration Tribunal, which should be limited to monitoring the decision-making process. To what extent does the wording of Article 494(3)(f), stating that Parties must 'have regard to… applying' proportionate measures, impact this standard of review? (ie. the measures as applied and not only as they are being developed?)

128. The UK's argument that that the phrase "having regard to" in Article 493(3)(f) TCA implies a deferential review by the Tribunal, which should be limited to monitoring the decision-making process, ignores the terms of both Article 496(1) TCA and Article 494(3)(f) TCA.

129. Article 494(3)(f) TCA must be read together with Article 496(1) TCA. Both provisions, taken together, determine the extent of the obligation and therefore,

of the standard and intensity of review by the Tribunal (EU Written Submission, paragraphs 513, 518-520, 530-531 and 551).

130. Article 496(1) TCA provides that the Parties shall "decide on any measures applicable to its waters … having regard to". This obligation relates to the decision-making process ("shall decide") and the measures themselves that are the outcome of that process ("any measures"). The obligation of "having regard to the principles referred to in Article 494(3)" applies to both.

131. Article 494(3)(f) TCA identifies that a principle which the Parties shall "have regard to" is "applying proportionate and non-discriminatory measures" (emphasis added).

132. The term "applying" implies that there is an obligation that extends beyond 'grappling' with factors that would inform an assessment of whether a measure would be proportionate or non-discriminatory. This means that the intensity of review by the Tribunal extends beyond monitoring the decision-making process by reference to whether or not factors were mentioned.

133. Accepting the narrow interpretation advocated for by the UK that does not take any account of the qualities of the measure that is the outcome of a decision-making process, would lead to an artificial interpretation which undermines the objective and purpose of Article 496(1) TCA and Article 494(3)(f) TCA. On the UK's case, the decision-maker has to think, grapple or contemplate the proportionate and non-discriminatory character of the measure, without this procedural engagement having to be reflected in the outcome of the decision-making process. However, given that the obligation is not limited to the conduct of the decision-making process, the Tribunal should have regard to the characteristics of the measure that is 'decided on'. Otherwise, it would be sufficient for a Party to refer to a check list of considerations and, in the absence of any real explanation of how they have been considered, simply apply a disproportionate or discriminatory measure notwithstanding the impacts this has on the other Party's rights and without any meaningful review of that exercise of regulatory autonomy.

Additional question 13

For both Parties: The UK submits that 'having regard to' the principle of proportionality is not the same as a measure conforming to the principle of proportionality. Following Question 12 above, is there a difference between 'having regard to … applying proportionate measures', and the measure conforming to the principle of proportionality, and if not, is 'having regard to' redundant?

134. The EU considers that the starting point should be the terms of the TCA itself and hence the requirement to "have regard to" the principle of "applying proportionate measures" as opposed to "the principle of proportionality" in a wider sense.

135. The EU also observes that the term 'conform' is more typically used where there is an obligation to ensure that a measure corresponds strictly to an existing and fixed rule or norm.

136. The terms "have regard to" and "having regard to" take into account that both Article 494(3) TCA and Article 496(1) TCA refer to "principles". This is to be contrasted with provisions in the TCA prescribing compliance with specific norms or requirements other than principles and where the term "shall comply with" is used instead.

137. This explains why the obligation in Article 496(1) TCA and Article 494(3) TCA, requires regard to be had to the attributes or qualities that the measure that is decided on should have – i.e. that what is applied is proportionate (and non-discriminatory). In that sense, the EU considers that since it is not open to a Party to decide on a measure that does not correspond to the requirement that, when applied, it will be proportionate and non-discriminatory, the term 'having regard to' cannot be read down to imply simply that, during the decision-making process certain factors were 'grappled' with.

138. This interpretation does not render the term "having regard to" redundant.

139. The obligation in Article 496(1) TCA mirrors that in Article 494(3) TCA. That latter obligation requires Parties "to have regard to" a number of enumerated principles.

140. The function of the term "having regard to" in Article 496 TCA is thus two-fold. First, "having regard to" creates an explicit link between Article 496(1) TCA and Article 494(3) TCA, which uses the term "have regard to". Second, "having regard to" in Article 496(1) TCA ensures consistency between these provisions.

Additional question 14

For the UK: In its oral submissions, the UK referred to a number of passages, in particular contained in Ministerial submissions and the Defra De Minimis Assessment, in which conclusions were reached that the benefits of the measure outweighed its costs. Where is the reasoning to be found as to how that weighing exercise was done to arrive at these conclusions?

141. Additional question 14 is addressed to the UK.

Additional question 15

For the EU: In undertaking a proper weighing of the benefits and impacts of a measure, the EU suggests that the tribunal must analyse 'what' is to be weighed and 'how' that weighing is undertaken. Does this mean that the tribunal must look for evidence of 'how' a Party weighed and balanced the benefits and detrimental impacts of a measure, and not simply at 'what' was weighed and the outcome in terms of a decision indicating that various factors were taken into account? How do you envisage such a demonstration can be shown? What implications does this position have for the standard of review?

142. The EU has identified that, when weighing and balancing different rights and interests, there are different analytical steps. The first is what is to be weighed. In that sense, a Party has an obligation to ensure that it ascertains fairly and

comprehensively the costs and the benefits. An error at this stage may plainly vitiate any subsequent weighing between the two.

143. The second stage implies a consideration of how the two relate to one another. It is not enough for a Party to simply list or identify factors – it should show, particularly in a case such as the present where rights have been nullified or impaired – how the Party decided on this measure and how it had regard to the requirement to apply a proportionate measure.

144. Since neither the terms nor the context of Article 494(3) TCA and Article 496 TCA supports a position that what is "proportionate" is self-judging, the Tribunal has a role in scrutinising closely both how the Party defined the benefits and costs and how the Party then weighed and balanced those benefits and costs.

145. The EU therefore agrees that the Tribunal must look for evidence of 'how' a Party weighed and balanced the benefits and costs of a measure, and not simply at 'what' was weighed and the outcome in terms of a decision indicating that a Party took various factors into account.

146. The measure itself may provide some evidence of whether the weighing has been done by a Party. On its terms, a measure may reveal itself to be disproportionate or discriminatory. In that sense, the greater the extent to which a measure impairs on a Party's rights, the greater the onus on the Party deciding on that measure to identify how it considered and evaluated whether those impacts are justifiable in the sense that they are commensurate to the benefits.

147. The TCA is not prescriptive as to the types of other evidence that a Party may adduce to prove that it duly conducted a weighing and balancing exercise. This may include regulatory impact assessments and other documents that substantiate how a Party applied its mind both to the identification of the benefits and costs of a measure and to the weighing and balancing of those benefits and costs. In this dispute, the UK has adduced the documentation provided to the decision-maker to support the decision-making process. The EU accepts that this is relevant evidence since the weighing and balancing exercise

may not be exclusively determined from either the terms of the measure (the legislation giving effect to the sandeel fishing prohibition[24]) or the scientific advice relied upon to support it.

148. The Tribunal must evaluate that documentation holistically to ascertain whether it discloses an actual weighing and balancing by the UK rather than just an enumeration of elements that formed part of a decision-making process. In other words, the documentation must disclose sufficient reasoning to explain both why the UK considered a cost or benefit to be significant or insignificant and how the UK actually balanced those costs and benefits in light of their significance.

Additional question 16

For the EU: Is the Tribunal correct in its understanding of your position that the fact that EU vessels, prohibited from fishing sandeel in UK waters, may fish sandeel outside UK waters or may fish for other stocks within UK waters is "irrelevant" to the weighing of the economic and social impacts of the sandeel prohibition because the prohibition constitutes an impairment or nullification of the rights of access of EU vessels under Annex 38 of the TCA? If so, are you seeking to disregard certain economic and social impacts on legal grounds, even though they may be relevant from a factual perspective? If so, how should the Tribunal undertake an assessment of whether certain facts are or are not relevant on legal grounds?

149. The EU's position is that, when prohibiting all sandeel fishing in UK waters of the North Sea, the UK nullified the right of full access of EU vessels to UK waters of the North Sea to fish sandeel as guaranteed under Annex 38 TCA, read together with Heading Five of Part Two TCA.

[24] This is particularly the case regarding the sandeel fishing prohibition as given effect to in English waters of the North Sea since, regarding those waters, 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 (EU Written Submission, paragraphs 154-158).

150. When considering whether that measure is proportionate, the costs and the benefits must be weighed. The UK argues that it could determine that the magnitude of the costs could be reduced from what would ordinarily follow from the loss of the right of full access to UK waters of the North Sea to fish sandeel by reference to the proposition that EU vessels prohibited from fishing for sandeel in UK waters of the North Sea, may fish sandeel in EU waters of the North Sea or may fish other stocks in UK waters.

151. The EU's position is that not only is this legally misconceived but factually it is unsubstantiated and the extent to which EU operators could mitigate economic losses would be for the UK to prove.

152. The rights guaranteed by the TCA in relation to the subject matter of the dispute are the following:

    a. Article 498(3) TCA provides that the Parties' shares of the TACs for the stocks listed in Annex 35 TCA shall be allocated between the Parties in accordance with the shares set out in that Annex. The TCA hence grants the EU the right to a fixed share of the TAC for each and every fish stock listed in Annex 35 TCA and for which a TAC is agreed. The EU recalls that: (i) the TCA guarantees the EU a share of any agreed North Sea 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 (EU Written Submission, paragraph 721); and (ii) a TAC for sandeel in the North Sea has been agreed by the Parties every year since 2021 (EU Written Submission, paragraph 7); and

    b. Article 2(1)(a) of Annex 38 TCA grants vessels of one Party the right of full access to the waters of the other Party to fish each and every stock listed in Annex 35 TCA for which the Parties have agreed on a TAC.

153. The fact that EU vessels may fish sandeel in EU waters of the North Sea does not attenuate, in legal terms, the impairment of the right of full access to UK waters of the North Sea to fish sandeel. That right existed prior to the adoption

of the measure and existed at the time the right of full access to UK waters of the North Sea to fish sandeel was negotiated and agreed upon.

154. The fact that EU vessels have the right of full access to UK waters to fish for other stocks also has no bearing on the impact of the sandeel fishing prohibition. The rights were negotiated and agreed upon on a stock by stock basis. The economic and social benefits derived from the rights linked to such fisheries are in law separate from those resulting from the right of full access to UK waters of the North Sea to fish sandeel. If this logic were followed to its extreme, the UK could simply erode the EU's rights stock by stock by referring to other rights.

155. As to the factual position, it is not accepted that EU vessels would be able to attenuate the costs and impacts to the extent argued by the UK. The EU has not adopted an extreme position – it accepts that the quantification of losses is difficult because EU vessels may be able to adapt by partially increasing sandeel catches in EU waters (EU Written Submission, paragraph 723). However, there are no guarantees. The same applies to the ability of the same EU vessels to avail themselves of rights to fish other stocks in UK waters. One cannot simply presume substitution and the effects that such substitution could have on other EU operators that do not fish sandeel. If the UK wished to seriously advance a position that the losses to the EU sandeel fishing industry could be attenuated, it should have undertaken a thorough assessment on how and the wider implications. It has never done that assessment. Therefore, there is no evidence on the Tribunal's record allowing it to accept the proposition that such costs could be attenuated or mitigated. This is not just an issue of law, but also of evidence.

Additional question 17

For both Parties: What is the relevance of the phenomenon of fisheries displacement, recognised by both Parties, to an assessment of the social and economic costs and benefits of a measure addressing sandeel? For example, the

United Kingdom has pointed to the fact that the TACs of sandeel in various sandeel management areas have varied widely over the last 5 years, with the TAC in some years being zero or only a small, monitoring, TAC. In these circumstances, do the Parties acknowledge that fisheries displacement takes place and that this may have economic and social consequences on the relevant fishing and processing industries which may vary from year to year

156. The EU acknowledges that, following a prohibition of sandeel fishing in a given area, fisheries displacement can take place, that this may have economic and social consequences on the relevant fishing and processing industries and that those consequences may vary from year to year.

157. Both the displacement itself and the associated economic and social consequences on the relevant fishing and processing industries can be addressed to a certain extent by other fisheries management measures:

    a. to the extent that displacement occurs between one or more sandeel stock assessment areas, TACs can be set at a lower level in the area or areas into which the displacement occurs; and

    b. to the extent that displacement occurs within one and the same sandeel stock assessment area, fishing can be prohibited in the part or parts of the area into which the displacement occurs.

Additional question 18

For both Parties: Regarding the burden of proof in relation to alternative measures, the United Kingdom argues that the EU should have (spatially) specified the proposed alternative measures and their concrete functioning, while the EU contends that the United Kingdom did not adopt the least restrictive measure and should therefore have demonstrated the legitimacy of its decision to impose a full closure. What is the clear position of the Parties as to how the standard of proof for alternative measures applies in this case?

158. The EU is surprised by the formulation of additional question 18 following its extensive submissions, including during the hearing.

159. The EU's position is not that "the United Kingdom did not adopt the least restrictive measure and should therefore have demonstrated the legitimacy of its decision to impose a full closure".

160. The EU's position is that the prohibition of sandeel fishing in all UK waters of the North Sea is inconsistent with the UK's obligation to have regard to applying proportionate measures because the measure is disproportionate.

161. The EU does contend that a measure that is more restrictive than 'necessary' to meet its objective would always be disproportionate – but other measures could be disproportionate as well. Proportionality implies a greater impact on a decision-maker's discretion than a necessity standard. It implies that a Party may no longer obtain its desired level of protection under all circumstances. Proportionality requires the Party to identify the measure that is optimal from the perspective of the relevant legal community's totality of interests – rather than with reference to one interest extinguishing the other.

162. The Tribunal is, therefore, required to consider the balance of rights and obligations between the Parties by reference to the costs and benefits.

163. To assist this task, and because the EU accepts that the objective of marine conservation may allow a Party to impair rights in accordance with the terms of Article 496 TCA and Article 494 TCA, the EU proposed an alternative measure that it contends could have been designed in such a way as to amount to a proportionate measure.

164. Notably, the EU relies upon the degree of the additional benefit gained when comparing the prohibition of sandeel fishing in UK waters of the North Sea with the EU's proposed alternative, as well as the degree of the difference in costs to illustrate why the sandeel fishing prohibition is disproportionate.

165. Since the EU has affirmatively asserted that there would have been an alternative and reasonably available measure to pursue the objective in a manner

that would have entailed costs that would be commensurate to the benefits (as opposed to disproportionate to them), the UK should rebut that contention.

Additional question 19

For both Parties: The EU considers that an alternative measure was available and would have met the UK's objectives, namely a prohibition on sandeel fishing in the foraging area of chick-rearing seabirds. How would such a prohibition meet the UK's objective to improve the resilience of sandeel stocks and the wider marine ecosystem in the North Sea area, not only seabirds?

166. For the reasons set out below, a prohibition on sandeel fishing in the foraging area of chick-rearing seabirds would be sufficient to meet the UK's objective of improving the resilience of sandeel stocks and the wider marine ecosystem in the North Sea area.

167. Regarding the resilience of sandeel stocks, since 2011, those stocks are managed according to an escapement strategy designed to avoid the risk of stock collapse and thus ensure that the fishery can be continued in a sustainable manner (EU Written Submission, paragraph 72).

168. Regarding the resilience of the wider marine ecosystem in the North Sea area, as the EU explained in its response to additional question 4, a prohibition on sandeel fishing in the North Sea can bring about benefits to the extent there is a localised depletion of sandeel and that the relevant predators that are dependent on sandeel cannot forage outside of any such locally depleted area. Hence, to the extent that there is either no localised depletion or that predators can forage outside of any locally depleted area, a prohibition on sandeel fishing would not meet the UK's objective of improving the resilience of the wider marine ecosystem in the North Sea area.

169. Moreover, as the EU explains in its response to additional question 4, the only predators that are dependent on sandeel and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.

Additional question 20

For both Parties: What is the position of the Parties on the procedural obligations implied/included in a precautionary approach under Heading Five? What are the procedural requirements that must be met prior to the adoption of a measure for a Party to subsequently invoke this approach? Once the measure has been adopted, are there any procedural obligations that require the Party invoking the precautionary approach to continue to gather evidence to justify its renewed/continuing relevance? If the approach is invoked as a subsidiary argument, does this not mean that one of the two branches of these procedural obligations is overlooked?

170. Regarding the first part of additional question 20 and the procedural requirements that must be met prior to the adoption of a measure for a Party to subsequently invoke the precautionary approach, in accordance with Article 495(1)(b) TCA, the starting point for the application of the precautionary approach is the "absence of adequate scientific information". The precautionary approach cannot therefore apply where, like in this case, a Party omits to base its measure on advice that could reasonably have been obtained.

171. Moreover, Article 356(2) TCA provides that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage. It follows that the precautionary approach cannot apply where, despite the absence of adequate scientific information, a Party fails to establish that there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment.

172. Regarding the remainder of additional question 20 and possible procedural obligations once a measure has been adopted, these obligations are not relevant in the present dispute. This is because the UK cannot rely on the precautionary

approach because it omitted to base its measure on advice that it could have reasonably obtained.

Additional question 21

For both Parties: The UK has submitted that Heading Five of the TCA concerns cooperation on natural living resources in respect of which the coastal state has sovereign rights in accordance with UNCLOS. Sandeel is a shared stock to which certain provisions of UNCLOS and UNFSA apply. What is the relevance of the fact that sandeel is a shared stock to the interpretation of the regulatory autonomy of a Party under the TCA, particularly in light of Annex 38?

173. In light of the specific objectives of the commitments on fisheries and the terms of Article 493 TCA, relevant rules of international law applicable to relations between the Parties include the law of the sea, in particular UNCLOS. The UK refers to UNCLOS to insist on the sovereign rights of the coastal state to exploit, conserve and manage the fish in its territorial sea and exclusive economic zone, and that it has jurisdiction with regard to the protection and preservation of the marine environment in those areas, while recognising that the coastal state can exercise those rights and jurisdictions by choosing to cooperate with others. The EU does not disagree with that. But UNCLOS also sets limits to the exercise of the rights of the coastal state which result from the rights of other states (see Article 56(2) UNCLOS).

174. In the present case, the EU and UK have entered into an international agreement which:

    a. defines ‘shared stocks’ as “fish, including shellfish, of any kind that are found in the waters of the Parties, which includes molluscs and crustaceans” (Article 495(1)(c) TCA); and

    b. provides for full access to waters of the other Party to fish for each and every stock listed in Annex 35 TCA, including sandeel in the North Sea, at

a level reasonably commensurate with the Parties' respective shares of any agreed TAC (Article 2(1)(a) of Annex 38 TCA).

175. In other words, the EU and UK agreed, through an international agreement, on specific provisions on fisheries, and hence on constraining their regulatory autonomy in relation to the management of fish found in their waters and covered by the Agreement. They moreover agreed, through a Protocol to the TCA, on an adjustment period (from 1 January 2021 until 30 June 2026), during which they grant each other's vessels full access to their waters to fish for each and every stock listed in Annex 35 TCA and for which a TAC is agreed.

176. By entering into an international agreement – the TCA – which includes Heading Five of Part Two TCA on fisheries and Annex 38 TCA on full access to waters to fish during an adjustment period, the Parties agreed to grant each other rights, the impairment of which cannot be justified by mere reference to regulatory autonomy. Any fisheries management measure that a Party adopts in its waters must be consistent with Article 496 TCA, read together with Article 494 TCA, and must take into consideration the terms and rationale of Annex 38 TCA.

Additional question 22

For both Parties: The Parties agree that the third claim under Annex 38 is a consequential claim, so that if a violation is found under either of the first two claims, there will be a breach under the third claim. Similarly, the claim is symmetrical in that if there is no violation under either of the first two claims, there will be no violation of the third claim. Is the European Union also seeking to argue that there is in addition a separate claim under Annex 38 such that if there is no violation under either of the first two claims, a breach of the TCA may nevertheless be found? If so, to what extent is this consistent with the EU request for the establishment of the arbitration tribunal, which includes the following in respect of the third claim:

"As a result, the sandeel fishing prohibition also constitutes an unjustified restriction on the access of EU vessels to UK waters, and in particular an unjustified restriction of the right of full access of EU vessels to UK waters pursuant to Annex 38 of the TCA"?

177. The EU argues that Claim 3 is a consequential claim, so that if a breach is found under either Claim 1 or Claim 2, there will be a breach under Claim 3 – namely a breach of Article 2(1)(a) of Annex 38 TCA.

178. The EU does not argue that, if there is no breach under Claim 1 or Claim 2, a breach of Article 2(1)(a) of Annex 38 TCA may nevertheless be found. What the EU argues is that Claim 3 is important because, if the Tribunal concludes that there is a breach of Articles 496(1) and 496(2) TCA, read together with Article 494(3)(c) and Article 494(3)(f) TCA, then as a consequence, there is necessarily also a breach of the right of full access to UK waters to fish sandeel set down in Article 2(1)(a) of Annex 38 TCA since the dispute takes place during the adjustment period.

All of which is respectfully submitted on behalf of the EU by:

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