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")

RESPONSES OF THE UNITED KINGDOM TO QUESTIONS POSED BY THE TRIBUNAL

5 February 2025

This document contains the following in accordance with the letter of the Tribunal of 30 January 2025:

(a) **Table A**: answers by the United Kingdom (or transcript references for answers already given) to the questions asked by the Tribunal on 27 January 2025 prior to the hearing;

(b) **Table B**: answers by the United Kingdom to questions asked by the Tribunal during the hearing where these were not addressed during the hearing itself; and

(c) **Table C**: answers by the United Kingdom to the questions asked by the Tribunal on 30 January 2025 following the hearing.

Where possible, references are given to documents in the Core Bundle in the form [CB/Tab/Page(s) in the core bundle]. Internal/original pagination of documents is also provided where it is deemed useful.

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
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."	N/A (chapeau to the questions)
1.a.	[…] 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	Transcript Day 2, p. 30, line 13 to p. 33, line 22. Concerning the exchange at p. 33, lines 10 to 21 the UK's position is that although each measure is to be considered in turn, where evidence is relevant to both, it may be considered for both.

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
	to two measures, impact the Arbitration Tribunal's analysis of the European Union's claims?	
1.b.	[…] Having due regard to the manner in which the European Union has particularised its claim: (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?	See response to question 1.a. above.
1.c.	[…] Having due regard to the manner in which the European Union has particularised its claim: (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?	See response to question 1.a. above.
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?	Transcript Day 2. p. 44, line 17 to p. 45, line 11. Transcript Day 2, p. 49, line 16 to p. 50, line 1. In spatial terms, the UK calculates that the part of the closed area in SA 4 which is in Scottish waters constitutes approximately 9.48% of Scottish waters of the North Sea, and the part of the closed area in SA 4 which is in English waters constitutes approximately 2.8% of English waters of the North Sea. The closed area in SA 4 constitutes approximately 8.78% of UK waters of the North Sea (i.e. English and Scottish waters of the North Sea combined).
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.	See transcript references provided in response to question 2, above. ICES stock advice does not take into account pre-existing partial closures and their impact. This is set out at para. 9.5.11 (p. 543) of the ICES Herring Assessment Working Group report [**C-0037**] on sandeel in SA 4:

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
		"However, it is important to acknowledge that the assessment model does not consider that a significant part of SA 4 (East coast of Scotland, sand banks covered by the dredge survey) is closed to fishing. Accordingly, the estimated TAC would in practice be achieved in a much smaller region than the whole SA 4 which raises concerns of local depletion." In the ICES 2024 stock assessment for SA 4 [**C-0014**], the 2000 closed area is noted (under the heading "[o]n conservation aspects"), but is not taken into account in the calculation of fishing opportunities [CB/8/125].
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:	Transcript Day 2, p. 148, line 23 to p. 149, line 2. The UK does not consider that Annex 38 operates to constrain the regulatory autonomy of a party to decide upon measures under Article 496 of the TCA. There is accordingly no need to 'reconcile' the rights granted under Annex 38 – or under Article 500 – with the right to decide on management measures. Any rights granted under Article 2(1) of Annex 38 to access waters to fish <u>are subject to</u> measures decided upon under Article 496(1), or agreed under Articles 498(4) or 500(2), or pre-dating the TCA, such as the 2000 closure.
4.a.	Is Annex 38 a derogation?	Transcript Day 2, p. 148, line 20 to p. 149, line 13.[1] The extent to which Annex 38 derogates from Article 500 is limited to what is set out in Article 2(1) of Annex 38.
4.b.	Does the measure under consideration here constitute a derogation from the derogation?	Transcript Day 2, p. 149, line 14 to p. 150, line 1. See response to questions 4 (chapeau). and 4.a. above.
4.c.	If so, what impact does this have for the interpretation of relevant provisions of the TCA and the scope of regulatory autonomy?	There is no impact on interpretation. First, the measure is not a derogation. Second, as noted in the response to question 4. (chapeau) above, the fact that Annex 38 is subject to Article 496 means that Annex 38 does not limit the Parties' exercise of regulatory autonomy when deciding on measures under

[1] The reference to "Article 502" on p. 149, line 11 should be read as "Article 500(2)".

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
		Article 496. The requirements of Article 496, read with Article 494, provide the agreed limits on regulatory autonomy.
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?	Transcript Day 2, p. 82, lines 2-23. See also Transcript Day 2, p. 61, lines 19-24 discussing the ICES Technical Service Response [**C-0022**], p. 5 [CB/4/91]. See further, on the importance of sandeel in the North Sea ecosystem, UK's written submission, paras. 108-110.
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?	Transcript Day 2, p. 42, line 22 to p. 44, line 1; p. 44, line 17 to p. 45, line 11; p. 49, line 16 to p. 50, line 1; p. 95, line 17 to p. 97, line 8; p. 181, line 22 to p. 183, line 5. See also (some of which are addressed in the above-given transcript references): - English Scientific Report [**C-0045**], pp. 34-38 and 41 [CB/15/233-237 and 240]. - English consultation document [**R-0061**], pp. 9-10 [CB/14/189-190]. - the De Minimis Assessment ("**DMA**") [**C-0044**], pp. 3-4, 12 (para. 30), 15-16 (paras. 52-55), 19 (paras. 67-68) [CB/13/161-162, 170, 173-174, 177]. - Summary review of the evidence presented by respondents to the consultation to prohibit industrial fishing in UK waters [**R-0076**], p. 7 [CB/16/267]. - Ministerial Submission of 14 September 2023 [**R-0077**], para. 24 [CB/17/273]. - Scottish Scientific Report [**C-0050**], p. 36 [CB/23/392] and see also Figures 11 and 12 on pp. 18-19 [CB/23/374-375]. - Scottish consultation document [**C-0049**], pp. 22-23 [CB/22/337-338]. - Scottish Strategic Environmental Assessment [**C-0052**], p. 4, pp. 21-22 (paras. 2.3.4-2.3.5), pp. 24-26, p. 83 (para. 5.2.33), pp. 85, 87 (paras. 5.3.2 and 5.3.5), pp. 93-97 [CB/25/472, 489-490, 492-494, 551, 553, 555, 561-565].

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
		- Partial Business and Regulatory Impact Assessment [**C-0051**], pp. 11-12, 14, 17 [CB/24/459-460, 462, 465]. - Final Business and Regulatory Impact Assessment [**C-0066**] [CB/28/602, 612].
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?	Transcript Day 3, p. 36, line 9 to p. 42, line 16.
8.a.	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?	Transcript Day 2, p. 80, line 14 to p. 81, line 15.
8.b.	Regarding the disciplines set out in Article 496(2) of the TCA: […] (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?	Transcript Day 2, p. 73, line 20 to p. 76, line 3. Transcript Day 2, p. 80, lines 3-13; p. 81, line 24 to p. 82, line 1.
8.c.	Regarding the disciplines set out in Article 496(2) of the TCA: […] (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?	To comply with Article 496(2) the Party must base a measure on the advice, but that does not mean that the measure must conform to the advice, as both Parties accept (EU: Transcript Day 1, p. 95, lines 4-9 and p. 111, lines 15-17; UK written submission paras. 219 to 220). Both Parties accept that there must be a rational or objective connection between the measure and the advice in order for a Party to have based the measure on the advice, but the test is not more demanding and may be satisfied even if the ultimate decision/measure deviates in some way from the advice. That is so even if the advice is clear or unequivocal.

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
9.a.	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) In the chapeau to Article 494(3), what meaning should be ascribed to "principles" in the phrase "having regard to the principles"?	Transcript Day 3, p. 90, lines 1-12. The word "principles" does not connote a requirement to comply in substance in the same way that a word such as "obligations" might. The "principles" listed in Article 494(3) are not themselves framed as mandatory rules of international law against which compliance can be measured. Rather, the word "principles" is a term to capture a series of provisions setting out goals or standards that it would be desirable to strive for through or in connection with the measure being decided on under Article 496 (not all of which will be relevant in each particular case). For example: - "promoting the long-term sustainability (environmental, social and economic) and optimum utilisation of shared stocks" (Article 494(3)(b)); - "ensuring selectivity in fisheries to protect juvenile fish and spawning aggregations of fish, and to avoid and reduce unwanted bycatch" (Article 494(3)(d)); - "taking due account of and minimising harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity" (Article 494(3)(e)); and - "ensuring compliance with fisheries conservation and management measures, and combating illegal, unreported and unregulated fishing" (Article 494(3)(h)) are all framed as goals or standards that it would be desirable to pursue through or in connection with a particular measure being decided upon. They are in this respect outcome-oriented principles because they concern the implementation of the measure being decided upon and what it may be designed to strive for or achieve. This also explains the outcome-oriented verbs at the start of a number of the principles (e.g. "applying", "ensuring"). The outcome-oriented nature of the principles does not, however, transform them into mandatory rules or obligations with which the measure must comply. They are factors that "Each Party" must have "regard to" when deciding on the measure.

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
		The *travaux* to the TCA supports this interpretation. Article FISH.1 of the draft TCA [**R-0120**] (p. 93) contained a long list of objectives, and technical (fisheries management) measures in Article FISH.5 (p. 95) were required to be "effective to attain the objectives set out in Article FISH.1". Following the Parties' negotiations and adoption of the final TCA, there were two key changes. First, there was a change from the measures being required "to be effective to attain the objectives" to be decided on "in pursuit of" the objectives. Second, the list of objectives that management measures under Article 496(1) are required to pursue is much reduced compared to the draft TCA – it is now limited to the two objectives in Article 494(1)-(2). The other objectives that were originally in Article FISH.1 now find reflection in the "principles" set out in Article 494(3), which management measures under Article 496(1) are not obliged to pursue, but which the relevant Party is obliged to have "regard to" when deciding on measures. This demonstrates that the Parties negotiated and agreed that the factors which now find reflection in the Article 494(3) "principles" are in the nature of objectives, goals or standards, but they are (i) not ones that the measures are obliged to pursue, and (ii) not ones that the measures are obliged to be effective to attain. This confirms the UK's interpretation of the word "principles" as being a reference to factors that are to be taken into account in the decision-making process. It also confirms the UK's interpretation of "having regard to the principles" as not requiring that the measure conform to those principles.
9.b.	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: […] (b) How do the various principles in Article 494(3) of the TCA interact with each other? What value should be attached to the principles?	Transcript Day 3, p. 90, line 13 to p. 91, line 23.

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
9.c.	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: […] (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)?	Transcript Day 2, p. 101, line 16 to p. 107, line 10. Transcript Day 3, p. 73, line 6 to p. 74, line 3.
9.d.	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: […] (d) Should the precautionary approach be applied only if the best available scientific advice leaves room for uncertainty?	In addition to the references immediately above, the Tribunal will wish to consider that "applying the precautionary approach to fisheries management" is a principle to which a Party must "hav[e] regard" (Article 494(3)(a)) in deciding on "any measures applicable to its waters" (Article 496(1)). This is not limited to cases of "uncertainty". The "precautionary approach to fisheries management" is defined in Article 495 as an approach according to which "the absence of adequate scientific information" does not justify postponing or failing to take management measures, including in respect of associated or dependent species and their environment. Where the scientific evidence is adequate, the precautionary approach to fisheries management will not be engaged. Applying this precautionary approach, a Party may still base conservation measures on the best available scientific advice where that advice contains an absence of adequate information.
9.e.	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: […] (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?	Transcript Day 2, p. 20, lines 4-9. See further the UK's response to question 20 of the questions asked by the Tribunal following the hearing in **Table C** below, in particular noting that "precautionary approach to fisheries management" is a defined term with Heading Five of the TCA on fisheries, and that it differs from, for example, the terms of the SPS Agreement, and is more aligned with the approach taken by ITLOS to Article 61 of UNCLOS in the *Climate Change Advisory Opinion*.

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
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?	Transcript Day 3, p. 94, line 18 to p. 95, line 13.
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)?	Transcript Day 2, p. 64, line 17 to p. 76, line 3. Transcript Day 2, p. 84, lines 3-16.
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?	Transcript Day 2, p. 34, lines 2-19.
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?	Transcript Day 2, p. 159, line 15 to p. 163, line 23.
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.	Consideration of the economic and social implications of the sandeel fishing prohibition is found in particular in the following documents: UK Government decision-making process: - DMA [**C-0044**], pp. 3-4, p. 12 (para. 34), pp. 13-14 (Table 1, paras. 45-47 (including preceding unnumbered)), pp. 18-19 (paras. 65-66), p. 20 (Table 4) [CB/13/161-162, 170-172, 176-178] and Annex I [CB/13/180]. - Defra's consultation document [**R-0061**], p. 7 [CB/14/187]. - Ministerial submission of 15 February 2023 [**R-0074**],[2] para. 19.

[2] Note that the date on the submission is incorrectly given as 16 January 2023 (see UK written submission, footnote 224).

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
		- Ministerial submission of 14 September 2023 [**R-0077**], para. 8 [CB/17/270], paras. 19-26 [CB/17/272-274]. - UK Government response to Defra's consultation [**R-0087**] [CB/19/285]. - Letter from UK Minister of State for Food, Farming and Fisheries to Danish Minister for Food, Agriculture and Fisheries, 27 February 2024 [**R-0085**]. Scottish Government decision-making process: - Ministerial submission of 6 February 2023, [**R-0091**], para. 16. - Partial Business and Regulatory Impact Assessment ("**pBRIA**") [**C-0051**], p. 6 [CB/24/454], p. 13 [CB/24/461] and p. 17 [CB/24/465]. - Ministerial submission of 27 April 2023 [**R-0092**], paras. 5 and 14. - Final Business and Regulatory Impact Assessment ("**fBRIA**") [**C-0066**], section 2.1.2 [CB/28/595-596], section 4.4 [CB/28/602-603], section 6.1 and Table 1 [CB/28/605], section 6.1.2 [CB/28/606-607] and Table 4 [CB/28/612]. - Ministerial submission of 26 January 2024 [**R-0098**], para. 7 and Annex F [CB/26/568 and 583]. Many of these references were provided at Transcript Day 2, pp. 169-176.
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?	Transcript Day 2, p. 191, lines 1-17.
16.a.	With respect to Article 494(3)(f) of the TCA on non-discrimination: (a) What distinguishes permissible differential treatment from discrimination?	Transcript Day 2, p.185, line 8 to p. 187, line 13. Permissible differential treatment is founded on a legitimate regulatory objective, whereas a measure might be *de facto* discriminatory if it applied differentially and was founded on a regulatory objective that is illegitimate. Whether or not that would be the case, and its consequences under the TCA, would depend on the circumstances, including the nature of the illegitimacy and how it was addressed by the Party. Such a scenario however is a long

Table A. Pre-hearing Tribunal questions		
	Question	**UK response, or location of UK response in the Transcript**
		way from the present dispute where there is no dispute over the legitimacy of the regulatory objective or the legitimacy of the reasons for the differential effects.
16.b.	With respect to Article 494(3)(f) of the TCA on non-discrimination: […] (b) What impact, if any, does the nature of sandeel as a shared stock have on the assessment of *de facto* discrimination?	In relation to the answer immediately above, it is very significant that (i) sandeel are a shared stock under the TCA, (ii) that is differentially allocated under the terms of the TCA and, for that reason, (iii) sandeel are overwhelming fished by EU vessels. The source of the differential impact is therefore not only the measures but also the terms of the TCA itself.
16.c.	With respect to Article 494(3)(f) of the TCA on non-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?	See response to question 16.b. above.
16.d.	With respect to Article 494(3)(f) of the TCA on non-discrimination: […] (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?	See response to question 16.b. above.
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.	Transcript, Day 2, p. 151, lines 10-22. Transcript Day 3, p. 98, line 8 to p. 99, line 13.

Table B. Questions asked by the Tribunal during the hearing		
T ref for the Q(s)	**Question**	**UK response**
Day 2, p. 183, lines 6-11	Chairperson to Mr Westaway: Yes, Mr Westaway, I think it would be useful in your later written [submission] to point us to the paragraphs where the precise – which you've just done, so thank you for that, in the previous tab – the precise partial closure that was looked at. That would be very useful. So thank you for that.	Some references were given at Transcript Day 2, p. 181, lines 10ff. The following options of partial closures (or spatially less extensive prohibitions) were considered by the UK Government and the Scottish Government in the decision-making process, as follows: UK Government decision-making process: • The UK Government formally consulted [**R-0061**] on (i) the closure of English waters within just SA4 and SA3r and (ii) the closure of waters within just SA1r [CB/14/189]. See also the DMA [**C-0044**], para. 13 [CB/13/166]. • The same consultation document also addressed in less specific terms the possibility of "[a] partial closure" such as a subdivision of a sandeel stock assessment area or a named area (such as the Dogger Bank), but set out that such partial closures are "likely to lead to displacement of fishing effort" and "to increase fishing activity outside the closed area creating a risk of sandeel depletion in certain locations" [CB/14/189]. • On this basis it was stated that "[p]artial closures … may reduce the ecosystem benefits of any closures and potentially cause additional problems if the abundance of sandeels in the remaining open areas falls below levels critical for successful predator foraging" [CB/14/190]. • These comments as to displacement were supported by the scientific evidence (see esp. English Scientific Report [**C-0045**], pp. 35 and 44 [CB/15/234 and 243]). • The comments were also supported by consultation responses [**C-0075**] [CB/20/294-295] (preference for full closure, "limited benefits" and "concern of displacement"). • The "other options such as a partial closure" raised in the consultation were addressed at [CB/16/266-267], which was reflected in the Ministerial submission of 14 September 2023 [**R-0077**] at para. 24 [CB/17/273]. The specific points made included that a more extensive closure brings wider benefits, "reduces the risk of displacement" and (regarding seabirds) better reflects "the high interannual variation in offshore foraging dispersion". Scottish Government decision-making process: • The Scottish Government consulted on and conducted a detailed assessment in its Strategic Environmental Report ("**SEA**") [**C-0052**] of a spatially less extensive option of closing sandeel area 4, but noted that this would "provide no further positive impact" and the "potential for

Table B. Questions asked by the Tribunal during the hearing		
T ref for the Q(s)	**Question**	**UK response**
		displaced fishing activity" [CB/25/555]. See more broadly para. 3.4.1 [CB/25/494-496], paras. 5.3.1-5.3.2 [CB/25/554-555] and Appendix A, Option 2, at pp. 93-94 [CB/25/561-562]. See also pBRIA [**C-0051**], pp. 14 and 17 [CB/24/462 and 465]. • The Scottish Scientific Report [**C-0050**] also included discussion of the limited success of the partial closure implemented from 2000 in part of sandeel area 4 (pp.48-49) [CB/23/404-405]. • In light of all consultation responses, the Scottish Government concluded in the fBRIA [**C-0066**] that the preferred option "is … most likely to achieve our aims" [CB/28/602], which related not just to seabirds. • The Scottish Government response to the consultation [**R-0096**] [CB/27/585], which was Annex C to the 26 January 2024 Ministerial submission [CB/26/575], addressed views offered by respondents on alternative or complementary measures, including the Norwegian model, which employs partial closures,[3] but concluded "since the Norwegian model would only result in partial restrictions of fishing, such alternative approaches would not be sufficient in moving towards achieving the envisaged ecosystem benefits that a full closure could bring" [CB/27/587-588]. • The SEA Post-Adoption statement [**R-0099**] confirmed that "none of the identified reasonable alternatives were likely to result in additional benefits compared to the proposed closure of all Scottish waters, and each carries additional risk when compared to the proposed closure" [CB/30/624]. Accordingly, a number of potential partial closures were considered by the UK (in addition to other measures such as temporal measures, technical gear measures and voluntary measures), but were rejected as not being effective at delivering the UK or Scottish Government's objectives and giving rise to problems such as displacement.

[3] Summarised in: ICES (2017). Report of the Benchmark Workshop on Sandeel (WKSand). ICES Expert Group reports (until 2018), [**C-0027**], section 1.5.7 (pp. 39-40).

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
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?	Domestic law does not constitute context for the purpose of interpreting the TCA and it thus does not meet the requirements of Article 4(1) of the TCA. It moreover cannot be taken into account for the purpose of interpreting the TCA in any other way, including "as part of the underlying legal framework of the Parties", which itself has no role to play in the interpretation of the TCA. "Context" is a defined term for the purpose of the customary rule on treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties [**CLA-0016**] and incorporated into the TCA through Article 4(1). Article 31(2) of the Vienna Convention provides that "context" comprises: (a) the text of the treaty, (b) the preamble to the treaty, (c) annexes to the treaty; (d) any agreement relating to the treaty which was made by all the parties in connection with the conclusion of the treaty; and (e) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. The domestic law of either or both Parties does not come within this meaning of "context". Article 31(3) provides three further categories of agreements, practice and rules that "shall be taken into account, together with the context", for the purpose of interpreting the treaty. They are: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties. The domestic law of either or both Parties does not fall within these additional categories. In particular, where the domestic law of the treaty parties contains a concept similar to one appearing in a treaty, that is not sufficient to satisfy the requirement of subsequent practice in Article 31(3)(b) because the practice must itself "establish the agreement of the parties regarding [the treaty's] interpretation". The application of domestic law concepts in one or both of the Parties' domestic legal systems is not a process involving the interpretation or application of the TCA such that any practice establishing an agreement as to the interpretation of the TCA could arise. Moreover, domestic law concepts in one or both of the Parties' legal systems are not "rules of international law applicable in the relations between the parties" and thus would not satisfy the requirements of Article 31(3)(c). It is therefore clear that domestic law does not constitute "context" for the purpose of the interpretation of the TCA, nor does it constitute an additional matter to be "taken into account, together with the context". It follows that domestic law does not meet the requirements of Article 4(1) of the TCA which reflects the customary rule reflected in Article 31 of the Vienna Convention.

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	Question	**UK response**
		There are good reasons why the customary rule on treaty interpretation accords no role to domestic law (absent express agreement of the parties), including (i) the potential for the parties' domestic law to differ; (ii) the potential for one or more parties' domestic law to change (or perhaps be intentionally changed with a view to affecting the interpretation of the treaty); and (iii) the very different context in which domestic law rules operate (e.g. proportionality in domestic public law and human rights contexts operates in a vertical relationship between the individual and the State where the State has undertaken to guarantee individual rights except where limitations are strictly necessary, cf. horizontal relationships between sovereign equals including carefully negotiated inter-State agreements where the same considerations are not applicable in the same way). There is no other way in which domestic law or the respective "underlying legal framework[s] of the Parties" may be used to interpret a term in the TCA. This is so even if the obligations in a treaty (i.e. to decide on measures under Article 496(1) of the TCA) will be implemented within a domestic law framework. For the avoidance of doubt, there is no presumption in international law that States intend to conclude treaty obligations that are consistent with domestic law frameworks. This is reflected in Article 4(2) of the TCA which states: "For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party." The fact that this is framed as being "[f]or greater certainty" confirms that there is no requirement in the applicable rules of treaty interpretation that the TCA be interpreted consistently with domestic law. The Tribunal is therefore not under an obligation to interpret the TCA consistently with the domestic law of either or both Parties. This also reflects the general position under international law that it is incumbent on a State to change its domestic law processes if they are inconsistent with a treaty obligation; it is not a matter of the domestic legal processes affecting the interpretation of the treaty. See also Transcript Day 3, p. 92, line 2 to p. 93, line 23.[4]
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	As to interpretation, the adjustment period in Annex 38 has no impact on the interpretation of Article 496, read with Article 494, of the TCA. This is because — as the Parties agree[5] — the right of access to waters during the adjustment period in Article 2(1)(a) of Annex 38 is subject to the right of the Parties to decide on measures under Article 496, read with Article 494, or as agreed by the Parties in annual consultations (Articles 498(4)(d) and 500(2)). It is therefore Article 496 read with Article 494 that

[4] In Transcript Day 2, p. 92, line 17, the words "must be either rules of international law or applicable in the relations between the parties" should be read "must be rules of international law applicable in the relations between the parties".

[5] For the EU's position see EU written submission, paras. 379-381 and 390; Transcript Day 1, p. 192, lines 5-11; Transcript Day 3, p. 4, lines 13-16. See also Transcript, Day 1, p. 196, lines 3-10.

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	Question	**UK response**
	account when interpreting and applying the obligations in question?	qualifies the interpretation and application of Annex 38, rather than the other way around. It follows that, irrespective of whether the Parties are in the adjustment period or not, each Party has a right to take measures under Article 496 read with Article 494, and the meaning of those provisions does not change. As to application, the EU contended on Day 1 of the hearing that the Party deciding on the measure must "consider the impairments of the rights of the other party"[6]. It is the UK's position that where a measure is adopted in accordance with the requirements of Article 496 (read with Article 494 where relevant), there is no restriction or impairment of the right of access in Annex 38. This is because the right of access during the adjustment period in Annex 38 only exists to the extent that the TCA does not provide otherwise, which the Parties agree is the effect of the right to decide on measures under Article 496. Accordingly, where a measure is adopted in accordance with the requirements of Article 496, there is no right of access to the extent of the measure, and thus no restriction to be taken into account. To the extent that there are social and economic impacts resulting from measures that restrict access, that is a factor to be weighed when having regard to "applying proportionate … measures" under Article 496(1) read with Article 494(3)(f). As to standard of review, in its written submission, the EU contended that the Annex 38 adjustment period required that any restriction of the right of access under Article 2(1)(a) should be "extraordinary" and that the Tribunal should exercise a "particularly high degree of scrutiny" in respect of a measure relied on to restrict that right (summarised at UK written submission, para. 427). The UK explained why these contentions were wrong at para. 428 of its written submission. It does not repeat those points here.
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.	N/A (chapeau to questions)
3.a.	[…] How does the model address the third element above? What is the UK position on this?	The North Sea EwE model utilised in the English Scientific Report [**C-0045**] does not account for the spatial distribution of sandeel or their predators. That was transparently acknowledged in Caveat 3 of the English Scientific Report (p. 33) which states that the models used "do not account for the spatial

[6] Transcript Day 1, p. 192, line 22. See also Transcript Day 1, p. 193, lines 13-16 (but then going on to impugn the launching of the English consultation 10 months after concluding the TCA, which would appear to have no bearing on compliance with Article 496 read with Article 494 (and the EU did not suggest otherwise)).

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	Question	**UK response**
		distribution of sandeels" [CB/15/232]. The EwE model is a model of the entire North Sea. As the model is not spatially structured, it proceeds on the basis of an even distribution of the different functional groups, including sandeel and their predators, throughout the North Sea (i.e. it treats the North Sea as an environment in which predators and prey overlap completely). The simulations in which sandeel fishing pressure is changed apply that reduction in fishing pressure equally across the North Sea ecosystem. Consequently, in the model, any change to fishing pressure of sandeel affects the sandeel population as a whole, leading to a uniform decline in sandeel availability. As explained in Caveat 3, the consequence of the model not being spatially distributed is that it "could mean we overestimate or underestimate some specific ecosystem impacts" (p. 33 [CB/15/232]). For example, local benefits may be underestimated if despite a fair abundance of sandeel across the North Sea, sandeel abundance is low at a specific location important for predation by a particular species. Conversely, local benefits to a particular species may be overestimated if despite a low abundance of sandeel across the North Sea, there is a higher abundance of sandeel in a specific location that is uniquely important for predation by that specific species. Three further points are relevant to this question: 1. The purpose of the modelling in the English Scientific Report was to explore broad trends with respect to the impact of different amounts of sandeel depletion on the North Sea ecosystem (English Scientific Report, p. 33 [CB/15/232]). The purpose of the modelling was not to compare a full prohibition within UK waters to a geographically restricted prohibition within UK waters. The modelling served its purpose and is not devoid of utility merely because it is not spatially distributed. 2. The 2015 ICES Key Run is not spatially structured i.e. it does not have an 'Ecospace' component. If the English Scientific Report had used a model which had an 'Ecospace' component, that model would no longer have been aligned with the ICES Key Run, which has "quality assured" status [**R-0108**]. 3. If a spatially distributed model of the North Sea did exist or were 'reasonably capable of being obtained', as the EU posits, then the following questions arise: a. Why did the ICES Technical Service Response [**C-0022**], produced in 2023, state that advice at the "level of individual feeding grounds … goes beyond the detail level of the stock assessment models" (p. 1 [CB/4/87])? Why does Reviewer 1 state that 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" (p. 2 [CB/4/88]) and that "[s]ite- and species-

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		specific studies would be required to ascertain what food supply is required in each case" (p. 3 [CB/4/89])? b. Why didn't the EU develop the North Sea EwE model (which is publicly available, see [**R-0108**] pp. 172 and 196ff) to include the spatial distribution of sandeel and their predators and put the resulting simulations into evidence?
3.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 UK measure, apart from the modelling, specifically address these concerns?	The UK understands the word "lawful" in question 3(b) to mean compliant with the relevant provisions of the TCA, which in the context of the question is Article 496(2) requiring that the measures be based on the best available scientific advice. The UK understands the term "UK measure" in question 3(b) to refer to the English and Scottish measures. Accordingly, the UK understands question 3(b) to be asking for information as to how the scientific advice relied upon in respect of the English and Scottish measures addresses (apart from the modelling): (i) overestimation of the fishing mortality, (ii) aggregation of functional groups (eg sandeel size and age), and (iii) spatial distribution of predators. As to the alleged "overestimation of the fishing mortality", this has no relevance other than in connection with the modelling. The following points are relevant: • As explained in response to question 6 below, the issue concerned how to account for a prohibition only in UK waters of the North Sea when the EwE model extended to the whole of the North Sea in circumstances where the UK cannot control the whole of the waters of the North Sea. In order to account for this, the model was run, which produced outputs concerning the whole of the North Sea (illustrated by, for example, the black biomass diagonal lines on Figure 6 of the English Scientific Report [**C-0045**], p. 26 [CB/15/225]). Using data external to the model, the average proportion of sandeel landed from UK waters as compared to non-UK waters was then separately calculated, with a confidence interval that acknowledged that there was uncertainty associated with that reference point. That reference point (58%) and its low (38%) and high (73%) confidence intervals were then plotted as red lines on the Figure 6 graphs and included in Table 3 of the English Scientific Report, pp. 27-28 [CB/15/226-227). This was also explained at Transcript, Day 2, p. 121, lines 5-8; Transcript Day 3, p. 109, line 7 to p. 110, line 7; and p. 113, line 21 to p. 115, line 3. • The UK has explained why (see the response to question 6 below) it used the European Commission's Scientific, Technical and Economic Committee for Fisheries data to calculate the 58% reference point and its confidence intervals. Even using the 39% reference point now favoured by the EU (the calculation of which it has never explained), that reference point is within the lower confidence interval range used in the English Scientific Report.

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	Question	**UK response**
		As to the aggregation of functional groups (e.g. sandeel size and age), this was a caveat to the modelling that was recognised and addressed in the English Scientific Report at p. 33 (Caveat 2) [CB/15/232]. Caveat 2 stated in relevant part: "Simulations may overestimate the impacts of forage fish depletion by not accounting for cases where: (1) predators take small forage fish that are unaffected by fishing[;] (2) forage fish and predators compete at different life stages (such as juvenile predator and adult forage fish)." This Caveat was able to be identified as a caveat precisely because the modelling was coupled with the wider scientific evidence which does include elements relative to predator species' preferences for different sizes and ages of sandeel. This is addressed at the following parts of the scientific advice: • English Scientific Report, p. 13, acknowledging preference for alternate age groups: "Kittiwakes from eastern England forage throughout this area (approximately 60% of their diet here is sandeels) and their productivity is sensitive to sandeel fishing mortality (Carroll et al, 2017), although the exact mechanism in some cases is unclear as kittiwakes and fishers often target different sandeel age groups (Frederiksen et al, 2004)" [CB/15/212]. • English Scientific Report, p. 33, explaining that forage fish and predators compete at different life stages and that some predators take small forage fish unaffected by fishing [CB/15/232]. • The review by the authors of the English Scientific Report (Natural England, Cefas and JNCC) of the responses to the sandeel consultation and specifically the responses received concerning the English Scientific Report [**C-0076**]: o "In a paper published since the release of the consultation, Searl[e] et al. (2023) found that fishing effort was associated with reduced kittiwake breeding success and a lower proportion of age-0 sandeel in their diets, despite the fishery targeting age 1+." [CB/16/262]. o "Respondents commented that there is no direct competition between kittiwakes and the sandeel fishery as kittiwakes target the age 0 group while fisheries harvest the age 1+ group. ▪ This is not entirely correct, as breeding adult kittiwakes eat sandeels aged one year or older during April and May and then switch to the younger age class in June and July, as juvenile sandeels become available (Harris & Wanless 1997; Lewis et al., 2001). As fisheries target 1+ group sandeels, they can directly compete with breeding kittiwakes in the months of March to July. The timing of the fishery relative to the timing of the switch in breeding kittiwake diet from 1+ group to 0 group sandeels can therefore be crucial in determining impacts on

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		both kittiwake breeding success and adult overwinter survival in the current year. Effects in subsequent years are also likely to accrue through the overall reduction in the abundance of older sandeels. If fishing reduces the spawning stock to the point where egg production limits the numbers of 0-group fish, recruitment of 0-group sandeels may be reduced in subsequent years, explaining therefore the two-year lag effect observed in Flamborough and Filey Coast SPA (Carroll et al., 2017).” [CB/16/262]. • Scottish Scientific Report [**C-0050**], p. 10: “[W]hile results should be considered with caution, age 1 sandeel seem to have a higher survival rate in the current fishery closure.” [CB/23/381]. • Scottish Scientific Report, p. 20: “Sandeel abundance for each age class estimated from these surveys was then found to be positively related to the breeding success of kittiwake between 1997 and 2003 (Daunt et al. 2008)” [CB/23/376]. • Scottish Scientific Report, p. 26: “Predation mortality is relatively high for this stock and is considerably higher than fishing mortality in younger ages. Young sandeel are preyed upon particularly by haddock, saithe, and birds, as well as by grey gurnard in recent years. Older ages (>2 years) are preyed upon to a larger extent by grey seal as well as haddock and saithe” [CB/23/382]. And see Figure 17 on p. 27 [CB/23/383], showing annual predation mortality by sandeel age class. • Scottish Scientific Report, p. 38: “During breeding many Scottish seabird populations exploit seasonal peaks in sandeel abundance, feeding on both adult (1+ year group) and juvenile (young-of-the-year; age 0) age classes” [CB/23/394]. • Scottish Scientific Report, p. 44: “Kittiwakes on the Isle of May had higher breeding success during 1986-1996 when age 0 sandeel made up a higher proportion of chick diet (Harris & Wanless, 1997)” [CB/23/400]. • Scottish Scientific Report, p. 45: “The extent to which availability of age 0 and age 1+ sandeel influences breeding success varies among seabird species. Kittiwake, guillemot, puffin, and shag breeding success was positively related to sandeel larval biomass in the previous year, implying seabirds were feeding on 1 year old sandeel (Frederiksen et al. 2006). Kittiwake tend to feed on age 1+ sandeel in April and May, shifting to age 0 sandeel in June and July, with highest breeding success occurring when age 0 sandeel appeared early in the season (Lewis et al. 2001)” [CB/23/401].

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	Question	**UK response**
		• Scottish Scientific Report, p. 47: "Fishing effort was also associated with a decrease in the relative proportion of age 0/age 1+ sandeel in diet of kittiwake, razorbill and puffin (Searle et al. 2023)" [CB/23/403]. • Scottish Scientific Report, p. 48: "Whilst seabirds generally feed on age 1+ sandeel during the first part of the breeding season and then switch to age 0 sandeel in May, the fishery targets only age 1+ sandeel in May, June and July. So, whilst there was some spatial overlap in foraging areas used by the fishery and seabirds (the extent of overlap varying among species) (Wanless et al. 1998), they were likely to be targeting different age classes (Daunt et al. 2008)" [CB/23/404]. • Scottish Scientific Report, pp. 48-49: "Following closure of the Wee Bankie sandeel fishery in 2000, sandeel abundance initially increased, as did kittiwake breeding success. Consumption rates of age 0 sandeel were higher after the fishery closure, despite the fishery not targeting age 0 sandeel (Daunt et al. 2008)" [CB/23/404-405]. • Scottish Scientific Report, pp. 54-55: "Kittiwake tend to feed on age 1+ sandeel in April and May, shifting to age 0 sandeel in June and July, with highest breeding success occurring when age 0 sandeel appeared early in the season. To be of most benefit to seabirds, the peak in sandeel abundance needs to coincide with the seabird chick rearing phase of the seabird breeding season. However, the timing of sandeel availability and absolute abundance shows inter-annual variation, which can result in a mismatch between peak sandeel availability and seabird chick rearing and negative effects on seabird productivity" [CB/23/410-411]. As to the "failure to consider the spatial distribution of predators", this was a caveat to the modelling that was recognised and addressed in the English Scientific Report p. 33 (Caveat 3) [CB/15/232]. As noted above in response to question 3.a., Caveat 3 stated: "The models used in this study do not account for the spatial distribution of sandeels. Fluctuations in forage fish abundance are often accompanied by changes in their distribution. Not accounting for this spatial component could mean we overestimate or underestimate some specific ecosystem impacts of fishing if, for example, even at low abundance forage fish occupy core areas local to important mammal or bird breeding sites. We may also underestimate localised benefits, which we might expect to be greater than the average benefit across the entire area due to the localised impacts of sandeel biomass on predator condition and reproduction." This Caveat was able to be identified as a caveat precisely because the modelling was coupled with the wider scientific evidence which does include elements concerning spatial distribution that may lead to localised impacts, including the following parts of the scientific advice:

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	Question	**UK response**
		• English Scientific Report, p. 12, acknowledging spatial dynamics: "Based on spatiotemporal energetic availability mapping for harbour porpoise (Phocoena phocoena) in the North Sea, it has been demonstrated that the distribution of porpoise is driven by availability of prey (Ransijn and others, 2019)" and "observations of minke whale redistribution within the North Sea may be related to a decline in sandeel availability elsewhere in the North Sea (De Boer and others, 2010), while the decline in sandeels in the northern North Sea and re-invasion of the southern North Sea by sardine species might be affecting the distribution of harbour porpoise (Mahfouz and others, 2017)" [CB/15/211]. • English Scientific Report, p. 13, acknowledging spatial dynamics: "The 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 (Frederiksen and others, 2005)" [CB/15/212]. • English Scientific Report, Table 1, acknowledging spatial dynamics: "Reported effects" for several species: "Reproductive success influenced by local sandeel abundance" and "Reported effects" for fish: "Positive correlations between local sandeel abundance and condition" [CB/15/214-218]. • Scottish Scientific Report, p. 26: "Whiting body condition was also found to be correlated with the amount of sandeel present in their stomachs (Engelhard et al. 2012) and their spatial distribution was found to be influenced by sandeel, with whiting found to aggregate near sandeel-rich areas (Temming et al. 2004, Engelhard et al. 2008)" [CB/23/382]. • Scottish Scientific Report, pp. 27-28: "The amount of sandeel consumed by predators will also depend on predator stock abundance and spatial distribution. Northern shelf haddock and North Sea whiting have shown a strong recent increase in stock size (ICES, 2022b), which could lead to increase in predation on sandeel. Spatial distributions for cod, haddock and whiting are illustrated for quarter 1 surveys in Figure 20, Figure 21, Figure 22, Figure 23, Figure 24, Figure 25" [CB/23/383-384]. • Scottish Scientific Report, p. 44: "Further evidence supporting the role of sandeel abundance in driving kittiwake breeding success at large spatial scales comes from synchronised variation in breeding success among multiple kittiwake colonies. Frederiksen et al. (2005) found that regional variation in prey availability had a stronger effect on kittiwake breeding success than local prey depletion. Olin et al. (2020) found the spatial structure in sandeel populations played a role in driving this synchrony within and among clusters of kittiwake colonies" [CB/23/400].

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		• Scottish Scientific Report, p. 51 addressing seabird foraging ranges [CB/23/407]; pp. 61-62 addressing distribution of marine mammals and their overlap with sandeel [CB/23/417-418]. • Scottish Scientific Report, p. 62, as regards grey seals: "Based on the probability of sandeel occurrence predicted by Langton et al. (2021), there will be significant spatial overlap in the waters around Orkney, the east coast, the Inner Moray Firth and the Inner Hebrides (particularly the waters north west of Islay)" [CB/23/418]. • Scottish Scientific Report, p. 65: "In terms of spatial overlap, the areas of high probability of sandeel occurrence that coincide with areas of high area usage by porpoise are the east coast, particularly the offshore regions adjacent to the Firths of Forth and Tay such as Scalp Bank, the waters to the north east of Islay. However, sandeel spatial overlap with porpoises should be expected in any areas of shallow, coastal water and for most areas of the North Sea wherever sandeel are present" [CB/23/421]. • Scottish Scientific Report, p. 68: "In summer, high use minke whale areas appear to be the Moray Firth, the waters north of Shetland and the entire west coast of Scotland. This is spatially coincident with identified sandeel hotspots in Scottish waters (Langton et al. 2021) and may reflect movement of minke whales targeting sandeel as they become more abundant in the water column during the summer months" [CB/23/424]. Thus it is clear that the scientific advice relied upon by the UK canvassed the existing body of scientific literature regarding (i) the interactions between predators and the fishery and sandeel of different age/size classes and (ii) the spatial interactions within the North Sea of sandeel and their predators. The EU has not contended that there was any error, omission or lack of methodological rigour in the Scottish Scientific Report or in the analysis of the literature in the English Scientific Report. None of the scientific literature addressing these size and spatial dynamics casts any doubt on the conclusions arrived at in the scientific advice. Nor did that literature indicate that a prohibition on sandeel fishing would <u>not</u> be expected to produce any benefits for seabirds, marine mammals, predatory fish, and the broader marine environment.
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	N/A The UK does not provide an answer to this question which is directed at the EU, but it does wish to observe that the language of "errors" in the question is inapposite. The issues identified by the EU reflect <u>limitations</u> of the North Sea EwE model as it stood when the English Scientific Report was produced, as well as two factors exterior to the model (aggregating, for the purposes of presentation in the English

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	Question	**UK response**
	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?	Scientific Report, the output of the model in respect of diving seabirds and surface-feeding seabirds, and the issue about calculation of the reference point). None of the criticisms advanced by the EU can properly be described as involving "errors in the modelling".
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?	The UK wishes to clarify that it was the initial EwE model of the North Sea published in 2007 by Mackinson and Daskalov that took 6 years to develop. The ICES Report of the Working Group on Multispecies Assessment Methods (2015) does not state how long it took for the Working Group to produce the 2015 North Sea EwE Key Run, but indicates that it was presented and reviewed in detail by four experts, approved by the Working Group in plenary and then verified again by the experts ([**R-0108**], p. 28). The 2015 Key Run was an update of an earlier 2011 Key Run ([**R-0108**], p. 105). Modelling is not a necessary component of 'best available scientific advice' (see UK written submission, paras. 211.3.3 to 211.3.4). Indeed, the ICES Framework for Ecosystem-Informed Science and Advice states that ecosystem-informed advice may involve "(i) qualitative and expert-based syntheses of the available knowledge and information, (ii) an empirical data-mining approach, and/or (iii) the development of full ecosystem models" ([**R-0103**], p. 10). The 2015 ICES Key Run was not an 'off the shelf' product that could be used to provide advice on the impact in UK waters of a prohibition on sandeel fishing in UK waters. The North Sea EwE model that had ICES Key Run status was a model of the entire North Sea.[7] That is the reason why the authors of the English Scientific Report had to calculate a reference point for how much sandeel fishing in the entire North Sea might be expected to reduce as a result of a prohibition on sandeel fishing in UK waters (i.e. the 58% figure with the 95% confidence interval of 38% and 73%). The predicted biomass responses set out in Table 3 of the English Scientific Report (in the second column from the right) are the predicted benefits in the entire North Sea of a prohibition on sandeel fishing in UK waters.[8] Highly-qualified

[7] Specifically ICES Area IV (not to be confused with the 7 different sandeel stock assessment areas within Area IV which are referred to as 1r, 2r, 3r, 4, 5r, 6 and 7r). ICES Area IV can be seen on the figure on p. 26 of the EU's written submission (comprising areas IVa, IVb and IVc on that figure) and in a larger scale on Figure 3 in the pBRIA [**C-0051**] on p. 10 [CB/24/458] (that page also contains Figure 2 which shows the original 7 sandeel stock assessment areas before they were revised in 2016, at which point in time the revised areas were renamed with an "r" (i.e. 1r, 2r, 3r, 5r and 7r)).

[8] In Table 3 [CB/15/226-227]: the biomass responses set out in the column second from the left are the biomass responses in the entire North Sea to a prohibition on sandeel fishing in the entire North Sea (a scenario that is not within the UK's power since it can only control fishing in UK waters). The biomass responses set out in the column third from the left are the biomass responses in the entire North Sea to a prohibition on sandeel fishing in UK waters using the 58% reference point. The biomass responses in the

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	Question	**UK response**
		scientists may arrive at different views regarding the necessity or utility of conducting such modelling in circumstances where: (a) the predicted benefits to the UK (as opposed to the entire North Sea ecosystem) could not be ascertained using the simulations generated by the EwE model; and (b) there was already extensive scientific literature, dating back decades, on the role and importance of sandeel in the North Sea ecosystem (with over 170 scientific papers analysed in the Scottish Scientific Report).
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?	The UK wishes to emphasise, as was stated at the hearing (Transcript, Day 2, p. 121, lines 5-8; Transcript, Day 3, p. 114, lines 4-12) , that the 58% reference point is not a component of the model (nor is it a parameter of the model, an output of the model or data that is input into the model). The model was used to generate simulations ranging from: - 0% depletion of sandeel in the North Sea i.e. no fishing of sandeel across the entire North Sea (a scenario which is not within the UK's power as it can only control fishing in UK waters). Having regard to Figure 6 in the English Scientific Report [CB/15/225], the simulations for that scenario are shown on the left-hand side of the figures and are aligned with the first unit of measurement on the x axis which is 0. - All the way up to a 50% depletion of sandeel in the North Sea, i.e. an increase in sandeel depletion from the current level of sandeel depletion (which is 20% - shown as the black dotted line). By reference to Figure 6 [CB/15/225], simulations for that scenario are shown on the right-hand side of the figures aligned with the last unit of measurement on the x axis which is 50. - Simulations were generated for all the levels of depletion of sandeel in between those two extremes. The reference point (i.e. the 58% figure) was calculated outside the model in order to answer the following question: out of all the different levels of sandeel depletion that were simulated using the model, which is most likely to reflect the level of sandeel depletion that would result from a prohibition on sandeel fishing in UK waters? Thus the reference point was used to assist in narrowing down which of the outputs from the model were relevant to the question under consideration. The authors of the English Scientific Report used publicly available data published by the European Commission's Scientific, Technical and Economic Committee for Fisheries ("STECF") which discloses how much sandeel was caught by the EU and the UK and where it was caught by reference to what is called "ICES rectangles" of the North Sea (the grid of ICES rectangles is illustrated on Figure 9 of the

right-hand column are the biomass responses in the entire North Sea to a prohibition on sandeel fishing in UK waters using the 38% lower bound of the confidence interval and the 73% upper bound of the confidence interval, respectively. (Annex 2, Table 7 [CB/15/258-259] provides upper and lower uncertainty bounds for those estimates.)

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	Question	**UK response**
		Scottish Scientific Report [CB/23/370]). The EU in its written submission made no criticism of the English Scientific Report for using data from STECF. The information that was made available by STECF and was used by the authors of the English Scientific Report to calculate the reference point was as follows: - Where in the North Sea (whether EU, UK or Norwegian waters) sandeel landed by EU or UK vessels were caught. The information which was not publicly available and was not therefore used to calculate the reference point was as follows: - Where in the North Sea sandeel landed by Norwegian vessels were caught. The ICES data that the EU referred to during the hearing shows a different total amount of sandeel caught in the North Sea because it appears to include within that total the Norwegian landings. However, the ICES data does not disclose where in the North Sea those Norwegian landings were caught. Consequently, it is not clear how the EU has arrived at its competing 39% reference point (which it advanced for the very first time at the hearing). After it was observed in the UK's opening submission that the EU had not explained how it had calculated its 39% reference point (Transcript, Day 2, p. 125, lines 1-6), the EU provided no explanation in its reply submissions the following day. This has left the UK in a disadvantaged position in terms of understanding and responding to the EU's competing reference point. Through a process of reverse engineering, the UK surmises that the EU has taken the EU and UK sandeel landings of sandeel caught in UK waters (that the UK calculated) and instead of dividing that by the total EU/UK catch, it has divided it by the total EU/UK/Norway catch.[9] The difference in the two approaches can be summarised as follows. The UK process for calculating the average proportion of sandeel landings of sandeel caught within the UK's waters: $$\frac{EU\ and\ UK\ sandeel\ landings\ from\ UK\ waters}{EU\ and\ UK\ sandeel\ landings\ from\ North\ Sea}$$

[9] However, even using that method, the UK has arrived at a slightly different figure (41%) than the 39% figure posited by the EU.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		What appears to have been the EU's approach: $$\frac{EU \text{ and } UK \text{ sandeel landings from } UK \text{ waters}}{EU, UK \textbf{ and Norwegian } \text{sandeel landings from North Sea}}$$ If that is indeed what the EU has done, then it has assumed that all Norwegian landings resulted from sandeel caught outside the UK's waters (since the actual location of Norwegian landings is not publicly disclosed). That is an assumption which it may regard as favourable to it in this arbitration since it leads to a lower reference point, but is not one which it has sought to support by reference to any evidence. Thus to answer the Tribunal's question: 1. The difference in absolute numbers of total catch in the ICES data compared to the total catch used by the UK to calculate the reference point is attributable to the Norwegian landings. The ICES data reports total catch for EU, UK and Norwegian landings of sandeel caught in the North Sea. The STECF data reports total catch for EU and UK landings of sandeel caught in the North Sea. 2. That difference does not however translate to the difference between the UK's 58% reference point to the EU's 39% reference point. Without knowing where Norwegian catches have come from within the North Sea, it is not possible to calculate a reference point that takes into account Norwegian catches. The EU appears to have arrived at its reference point by making an (unstated) assumption that 100% of Norwegian catches occurred outside the UK's EEZ. The authors of the English Scientific Report made no such assumption. Instead they used the actual historical data which was publicly available, which was the data about where, within the North Sea, the EU and UK's catches have taken place from 2003-2020. They accounted for uncertainty associated with that figure by calculating its confidence interval (38% on the lower end and 73% on the upper end). (For the avoidance of doubt, the UK reiterates that this Norwegian catch issue has no bearing on the North Sea EwE model itself. The EwE model is of the whole North Sea so it uses total catch data that includes EU, UK and Norwegian landings. Precisely where those landings occurred within the North Sea is not data that is input into the model or that has any relevance to it because it is a model of the entire North Sea and because the model is not spatially distributed. The Norwegian catch issue is only relevant to the calculation outside the model of the reference point).

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	Question	**UK response**
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?	N/A
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?	N/A
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?	The UK refers to and repeats its answer to question 5 above as to why the absence of modelling from the Scottish Scientific Report has no bearing on whether it is the "best available scientific advice" for the purposes of the TCA.
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	For the reasons given above in relation to question 4, the UK considers the language of "errors" in the question to be inapposite. As regards question 10, the answers are yes, there would be a requirement of materiality, and no, the EU would not have met it. In this respect the UK relies on the answers it gave at Transcript Day 3, p. 55, line 10 to p. 56,[10] line 21 and p. 65, line 19 to p. 66, line 10 (together with the three examples of the scientific

[10] On Transcript Day 3, p. 59, lines 19-20, the words "to predict the impact in the UK part of the North Sea" should be read as "to predict the impact of prohibiting sandeel fishing only in the UK part of the North Sea".

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	Question	**UK response**
	identified by the EU meet a requirement of materiality, if such requirement is accepted?	literature relied on by the EU discussed between those two extracts, especially at p. 63, line 6 to p. 64, line 2) and p. 134, line 12 to p. 136, line 16.
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	The UK confirms its position that the ICES Technical Service Response [**C-0022**] forms part of the "best available scientific advice". It understands the block quotes in the Tribunal's question as follows. As a general point, the concept of what counts as "local" (and therefore what constitutes an appropriate "given area") will vary depending on the foraging habits and ranges of each different predator species. For instance, while chick-rearing seabirds are likely to forage preferentially close to nesting sites, they will travel further afield when necessary. If, therefore, a fluctuation in sandeel abundance meant a lack of sandeel within the "preferred" foraging radius, the "local" feeding ground will become more distant. It is less easy to describe more mobile predators such as marine mammals and predatory fish as having a "local" food requirement as they are not constrained by nesting sites in the same way as seabirds. Marine mammals and predatory fish have larger feeding ranges that may encompass multiple different areas in which sandeel are found in the North Sea. Even those larger feeding ranges may increase or change depending on the abundance of sandeel in those different areas or increased competition with other predators. The first quote is made in the context of explaining that ICES' stock advice does not involve an analysis of whether forage fish biomasses are kept high enough to provide adequate food supplies "for particular predator populations", which analysis would be "complex and would need to be conducted for specific predator populations". The reviewer then refers to "nesting seabirds in particular" as an example of a specific predator population with particular predation needs that are well-accepted to be spatially limited by reference to nesting locations. This is the context in which the reference is made to "this local food requirement" and "these local ecosystem services". The reference to "national regulations" in this context is a reference to the fact that if national authorities were to take specific measures for the purpose of supporting nesting seabirds as particular predator populations, it would be for the national authorities to identify the spatial scope of predation needs for one or more particular nesting bird species, and to direct measures towards those "given areas". The reviewer confirms that it is not feasible for ICES to provide catch advice at a spatial scale fine enough that it may be relevant for nesting seabirds. The reviewer does not identify how "local" / large the "given areas" might be. If the Tribunal considers it necessary to look specifically at the size of foraging ranges of nesting seabirds, the Tribunal has evidence of this at: UK written submission, paras. 297-298 and Figures 3-4; Transcript Day 2, p. 93, line 7 to p. 95, line 16 (see also Day 2 slides 39 to 42). The UK also notes the reference to local food requirements mattering "more" than forage fish (especially sandeel)

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	Question	**UK response**
	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*".	abundance in a whole management area or the whole of the North Sea; meaning that abundance beyond "local" areas still "matters" to nesting seabirds, which is consistent with, among other things, the UK's position on the relevance of non-breeding season predation needs (see for example UK written submission, para. 299.1). The UK also reiterates its position that the measures were not for the sole benefit of nesting seabirds, and reiterates that marine mammals and predatory fish are often migratory and capable of foraging over wider areas, confirming that the concept of "local" requirements for particular predator populations is relative. The second block quote in the question appears to come both from p. 1 and p. 7 of the ICES Technical Service Response [CB/4/87 and 93]. It is also referring to the fact that ICES catch advice does not account for the predation needs of specific predator populations ("cannot function at the level of individual feeding grounds"). The reference to "at the level of national regulations" means that an assessment of whether management is supporting ecosystem functions should be undertaken by national authorities, rather than by ICES. Reference is then made to "one possible example" of measures to provide ecosystem services being "closed sandeel areas" (plural), meaning the seven sandeel areas into which ICES divides the Greater North Sea. This gives an indication of the scale of the closures the reviewer had in mind, even without considering the specific needs of any particular predator population. At the time of producing this ICES Technical Service Response (and now), there is currently only one sandeel area in English or Scottish waters for which ICES is not giving zero catch advice (SA 1r), just on the basis of the maximum sustainable yield approach, without regard to predator needs as such.
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?)	The UK's position is that the question of whether a measure is in conformity with Article 496(1) of the TCA, taken together with Article 494(3)(f), is only whether it has been demonstrated by the complainant Party that the respondent Party decided on the measure without having regard to the relevant principle – i.e. of "applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties". This is not a matter of the standard of review. It concerns what it is that is being reviewed. There ought to be no question over the EU's burden: it is for the EU to demonstrate that the UK has breached the obligation of conduct, i.e. that the UK did not have regard to the relevant principle or principles. As far as the standard of review is concerned, the UK observes that Article 742 of the TCA provides that the Tribunal "shall make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity of the measures at issue with, the covered provisions." In the present case, this requires the Tribunal objectively to assess

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	Question	**UK response**
		the record in order to determine whether the EU has demonstrated that the UK did not have regard to applying proportionate measures. The Tribunal should consider the question holistically. The Tribunal also should be conscious in this regard of the role of regulatory autonomy. In circumstances where the record indicates that factors relevant to proportionality – and the question of proportionality itself – were engaged with by the UK Government and the Scottish Government, the Tribunal should not come to the conclusion that no such regard was had. The UK does not consider that the inclusion of the word "applying" immediately before "proportionate and non-discriminatory measures" alters the analysis. As the UK explains at para. 334 of its written submission, whatever verb commences each sub-para. of Article 494(3), they all come under the umbrella of the obligation in Article 496(1) to decide "having regard to" the principles referred to in Article 494(3), which itself lists the principles to which the Parties "shall have regard". Having regard to applying proportionate measures simply does not establish an obligation to apply proportionate measures. The word "applying" suggests that the focus should be, for example, on what the impacts and benefits of the measure are expected to be. The UK agrees that the consideration should be on the measure "as applied" and not only as it is being developed. In this respect, see also the response to question 9.a. of the pre-hearing questions in **Table A** above as regards the outcome-oriented nature of the Article 494(3) principles. The key consideration here is the predicted effect of the measure. However, (i) that is not surprising and (ii) it is not unique to Article 494(3)(f): other principles also require consideration of the effect of the measure, where different verbs are used, such as "promoting" long-term sustainability (Article 494(3)(b)), "ensuring" selectivity in fisheries (Article 494(3)(d)) and "minimising" harmful impacts (Article 494(3)(e)).[11]
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?	For the reasons set out in the UK's written and oral submissions[12] there is a very clear difference between 'having regard to' a principle and 'conforming to' the principle. The EU overlooks this difference at numerous places in its submissions. If the EU were correct that the relevant standard is that a measure <u>be</u> proportionate and non-discriminatory, it would render the words "having regard to" in

[11] See also Transcript Day 3, p. 139, line 13 to p. 140, line 10.

[12] UK written submission, paras. 321-334; Transcript Day 2, p. 153, line 17 to p. 155, line 22 and p. 156, line 15 to p. 158, line 20. Note that "an aberration" on p. 153, line 22 should read "elaboration".

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	Question	**UK response**
		Article 496(1) and Article 494(3) redundant. That would be contrary to the fundamental principle that the words of a treaty should be given meaning and effect.[13] In the context of this case, it would undermine an express and deliberate limitation on how the principles of proportionality and non-discrimination are to be considered under Heading Five. It would also have wider implications given that "having regard to" applies to all nine principles listed in Article 494(3). This may include situations in which some of those principles could point in different directions. The difference between 'having regard to' and 'conforming to' for the TCA is also apparent from the *travaux* to the TCA, as noted by the UK at paras. 335-338 of its written submission and at the hearing.[14] The EU did not provide any reply to this point. To recall, the EU's Draft TCA included in a Chapter on "Conservation and Sustainable exploitation of fisheries resources", Article FISH.5(2), which stated: "New technical measures, or changes to existing technical measures shall be based on the best available scientific advice and shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1 [Objectives]" ([**R-0120**] p. 95). It also contained in Article FISH.6 a provision that permitted emergency conservation measures to be taken which "shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1 [Objectives]" (p. 96). The change from these provisions, which would have required measures to be proportionate and non-discriminatory, to an obligation requiring the Parties to "hav[e] regard to" "applying proportionate and non-discriminatory measures" confirms the intention of the Parties not to impose a more stringent obligation than taking the principles into account. That is all the more clear in light of the Parties' express choice to use language elsewhere in the TCA that does require that domestic rules or laws be proportionate or non-discriminatory or that requires them to be applied in such a manner.[15] One such example is Article 75(5) of the TCA, which states that the relevant Party "shall ensure that its import conditions are applied in a proportionate and non-discriminatory manner".

[13] See in this regard, Appellate Body Report, *US – Gasoline* [**CLA-0022**] p. 23 "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."
[14] Transcript Day 2, p. 154, line 25 to p. 155, line 22; Transcript Day 3, p. 86, line 24 to p. 87, line 22.
[15] See UK's written submission, para. 331.

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	Question	**UK response**
		See also the response given to question 9.a. in **Table A** regarding the changes from the draft TCA that demonstrate that the Article 494(3) "principles" are in the nature of objectives, but are (i) not ones that the measures are obliged to pursue, and (ii) not ones that the measures are obliged to be effective to attain – the latter change plainly being relevant to the distinction between 'having regard to' and 'conforming to'. At the hearing, the EU stated that the UK "characterises Article 494(3) as setting an optional obligation of conduct as regards the decision-making process only".[16] This is a mischaracterisation of the UK's position. The UK does not consider that Article 494(3) sets forth an "optional" obligation of conduct. Article 496(1) read with Article 494(3) sets forth a mandatory obligation of conduct; specifically, an obligation that requires the Parties to give good faith consideration to the principles identified under Article 494(3), but which does not mandate a particular outcome or result of such consideration. This is not a surprising or unusual position. The UK's interpretation is in accordance with numerous other contexts where the language of "having regard to" or "taking into account" is used to impose an obligation of consideration, without requiring – or implying – any particular outcome as a result of that consideration.[17]
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?	The UK will answer this question with a summary of the material on the record that goes to a weighing exercise having been done for the English measure and the Scottish measure separately. In the case of both measures, it is important to observe that they were the subject of consideration and development over a number of years, starting with the Call for Evidence in October 2021 [**C-0043**] [CB/12/149-158]. The Call for Evidence sought information on the benefits and impacts of potential measures (see questions 8b and 8c [CB/12/156]). Respondents to the Call for Evidence included Danish organisations representing fishery and industrial interests (see [**R-0071**], pp. 16-17) and the information from the Call for Evidence was taken forward in the development of the measures. Two separate consultation exercises were carried out in 2023, all intended to facilitate decision-making and ensure that a proper weighing and balancing was carried out before the measure was decided upon. This case is very far from arbitrary or peremptory decision-making without due process or without taking into account

[16] Transcript Day 1, p. 23, lines 22-24.

[17] See the examples referred to in the UK's written submission (paras. 330-330.1) and the analogies to procedural obligations discussed at the hearing (Transcript Day 3, p. 84, line 19 to p. 86, line 23 referring to obligations to negotiate (in respect of which see *North Sea Continental Shelf Cases* [**CLA-0046**], para. 85(a)) and the environmental impact assessment process. For completeness, the same distinction is familiar within WTO case law, where obligations to "take into account", for example in Article 5 of the SPS Agreement [**CLA-0041**] have been held not to require any particular result.

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	Question	**UK response**
		relevant considerations. Careful and iterative consideration was given over time to the benefits and impacts. It is also important to note that the objective pursued by the UK for both measures was to contribute to achieving good environmental status and as part of that to provide ecosystem resilience in light of (i) recognition of the particular importance of sandeel for the wider marine ecosystem,[18] (ii) concerns about the failure to achieve good environmental status for seabirds and marine food webs[19] and (iii) recognition of the need for resilience given pressures on the ecosystem from climate change and other factors.[20] The EU does not challenge the UK's regulatory objective or its chosen level of protection. The EU was at pains to emphasise that it attaches "significant importance" to the objective of marine conservation[21] and "is not seeking to impeach the UK for seeking to pursue a high level of protection for the ecosystem of which sandeel form part".[22] The EU accepts that the UK measures were decided on for the purposes of meeting the UK's chosen objective and are "apt" to contribute towards it.[23] In those circumstances, the starting point must be an acceptance that the UK Government and Scottish Government were entitled to place considerable weight on the ecosystem benefits arising from the measures. As far as the weighing exercise is concerned, for the English measure, the 2023 consultation materials explain (i) the anticipated benefits of full closure (relying upon scientific advice) and (ii) the anticipated adverse impacts. The DMA [**C-0044**] was deliberately extended to ensure that non-UK impacts on EU vessels and industry be included in the assessment (see esp. para. 65 [CB/13/176-177] and Annex I [CB/13/180], which included a "worst-case scenario" assessment of financial impact to EU vessels). The adverse impacts (on non-UK vessels and industry) were also specifically drawn to the attention of the Minister in the 15 February 2023 submission approving the consultation ([**R-0074**], para. 19). As far as reasoning is concerned, the UK draws attention to:

[18] See, in the decision-making records, Defra's consultation document [**R-0061**], section 3.2 [CB/14/185] and fBRIA [**C-0066**], p. 2 ("particularly important component of the North Sea ecosystem" [CB/28/594] and p. 12 ("key prey species") [CB/28/604].
[19] See Call for Evidence p. 4 ("hindering the UK's ability to reach Good Environmental Status of seabirds and marine food webs") [CB/12/152]; fBRIA, p. 12 [CB/28/604]; and Policy Note [**C-0065**], para. 4.
[20] See e.g. DMA, pp. 3-4 ("[t]he primary environmental benefit is improvements in the resilience of sandeel stocks and the wider marine ecosystem") [CB/13/161-162]; fBRIA, p. 6 [CB/28/598].
[21] EU written submission, para. 692.
[22] Transcript Day 3, p. 2, lines 1-3.
[23] EU written submission, paras. 698 and 699 respectively.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		- The structure of the DMA, setting out impacts/costs and benefits separately. - The tabulated summaries of impacts (including to non-UK vessels) (DMA, Table 1 [CB/13/171]) and benefits (DMA, Table 3 [CB/13/176]). - The recognition that benefits are "difficult to value" so are described as "non-monetised costs" (DMA, para. 59 [CB/13/175]). In those circumstances, it is clear that those putting forward the English measure for consultation considered the socio-economic impacts against the benefits and concluded that the impacts were justified by the benefits of the full closure. Consultation responses reiterated the impacts on EU vessels and industry, but did not suggest that the UK Government's analysis of their extent was wrong. On the final decision-making, the Tribunal was taken to the 14 September 2023 Ministerial submission [**R-0077**] [CB/17/269-280] that provides further evidence of the weighing undertaken. Like all Ministerial submissions, it should not be read in isolation; it followed a careful process of policy development by the same Department and Minister in light of legal advice. However, it records the key post-consultation consideration, and puts beyond doubt that the socio-economic impact on EU vessels was carefully taken into account (see esp. paras. 19-26 [CB/17/272-274]). In doing so, the Minister considered the EU's argument that the full prohibition would have "a large negative impact on industry" (para. 24). The matter was engaged with, but the conclusion taken that (i) "a full closure would be the best available option to support delivery on our aims" and (ii) "a closure would be a proportional measure in terms of the effectiveness of this measure and delivery of Good Environmental Status for Seabirds and Marine food webs". The "impact on EU industry" was further assessed at paras. 25-26. The reasoning again is clear: the impact is justified given the importance of the measure to deliver on its aims. The scientific support for the full prohibition was an important part of this. Finally, the UK draws attention to the UK Government's response to the consultation [**R-0087**], which records: "Measures to increase food availability will therefore improve the resilience of marine life for which sandeels are a crucial source of nutrients. We acknowledge the responses from some stakeholders who will be directly affected by a prohibition and recognise the impact it could have on their businesses. However, there is sufficient evidence supporting an increase of benefits to the marine ecosystem to introduce a spatial closure" [CB/19/285].

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		For the Scottish measure, the partial Business and Regulatory Impact Assessment ("**pBRIA**") [**C-0051**] directly recognised the significance of the EU sandeel fishery (p. 6 [CB/24/454]) and set out benefits and costs against the different management options assessed (pp. 8-14 [CB/24/456-462]), including the impacts on non-UK vessels (p. 13 [CB/24/461]). The impacts were also specifically raised in associated Ministerial submissions: see [**R-0091**], para. 8 and [**R-0092**], para. 14. As far as reasoning is concerned, notwithstanding the impacts, the pBRIA concluded that "Option 1 [full prohibition] is the preferred option as it is expected to be able to deliver the environmental objectives of the Scottish Government with regards to sandeel" (p. 16 [CB/24/464]). As with the English measure, this conclusion was based upon the scientific advice published with the consultation. The UK draws attention to the "Summary costs and benefits table" on p. 17 of the pBRIA [CB/24/465], which sets out costs and benefits against the different options considered. The decision-making is evidenced in the final Business and Regulatory Impact Assessment ("**fBRIA**") (January 2024) [**C-0066**] [CB/28/593-614] and the 26 January 2024 Ministerial submission [CB/26/567-584] to which it was annexed (as Annex B). The fBRIA set out the benefits (section 5) and costs (section 6). On benefits, it noted that the majority are "non-monetisable ecological benefits" [CB/28/603]. On costs, it included a careful discussion of those to the non-Scottish catching sector: Table 1 and section 6.1.2 [CB/28/605-607]. It therefore followed a structured process. In section 4.3 under the heading "Reasoning" for the conclusion following consideration of different options, the fBRIA stated: "the Scottish Government is of the view that the preferred option to close fishing for sandeel in all Scottish waters, is the most likely approach to achieve our aims, as the potential ecosystem benefits are expected to outweigh the negative impacts identified" [CB/28/602]. The overall conclusion at section 16 is significant and it is worth reminding the Tribunal of its terms: "In recognition of the role that sandeel play in the marine environment and after weighing up the above business and environmental costs and benefits, the Scottish Government's position is to prohibit fishing for sandeel. This BRIA therefore recommends that The Sandeel (Prohibition Of Fishing) (Scotland) Order 2024 be created to bring about the preferred option of closing all Scottish waters to sandeel fishing. This recommendation is made on the basis of the expected costs and benefits set out in this report. Primarily, the recommendation to proceed with the preferred option is based on the expected benefits to the sandeel stock and the wider marine ecosystem. The monetary costs associated with the closure are deemed to not outweigh the potential non-monetary gains expected" [CB/28/612].

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		Table 4 below section 16 of the fBRIA [CB/28/612] contains a summary of benefits (in the left-hand column) and costs (in the right-hand column). The benefits of full closure were set against the costs, in particular, to the EU fishing industry. The associated Ministerial submission [**R-0098**] provides further evidence of the consideration given, especially the setting out of "key considerations" in Annex F, including the impacts on EU vessels [CB/26/583]. As is explained in the main body of the submission, the recommendation to proceed with the Scottish measure was "based on the potential wider ecosystem benefits could bring to a range of species in the longer term as well as resilience to the marine environment" (para. 8 [CB/26/568-569]) and, as regards issues raised by the EU and Denmark, "our analysis is that the recommended approach is appropriate and proportionate given the current evidence base and the precautionary principle" (para. 9 [CB/26/569]). The evidence is therefore clear that in each case a weighing exercise was undertaken. Both the UK Government and the Scottish Government had regard to the costs and benefits – indeed they went further and carried out a weighing exercise, concluding that the measures were both justified and "proportional" or "proportionate". There is no need for the UK to demonstrate precisely 'how' the weighing was done. It is clear what was done and that relevant factors – in particular the economic and social impacts – were not "essentially disregarded" as the EU argues.[24] They were considered not to outweigh the ecosystem benefits of proceeding with the measures. There is in this case express evidence of such weighing in the submissions to the Minister and Cabinet Secretary, but the UK does not accept that it is necessary – or will always be possible – for a Party to provide evidence of how a decision-maker balances different factors. It will often only be possible for a reviewing tribunal to look at what factors were considered that informed a balanced judgment. Nor is it possible for a tribunal in an inter-State arbitration to have a perfect understanding of the thought processes of the relevant minister making the relevant decision having considered all of the relevant advice and information. All that can be shown is that the relevant benefits and impacts were considered in light of the UK and Scottish Government's legitimate objectives and a judgment taken on that basis. That is amply demonstrated in the record in this case. There are two final points to make in this connection.

[24] EU written submission, para. 736; see also Transcript Day 1, p. 175, line 23 (that the UK's evidence "does not disclose any weighing") and see also p. 176, lines 4-8.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		First, it is important to reiterate that the burden is on the EU to show that the measures were adopted without having regard to "applying proportionate … measures", including their arguments on the adequacy of the weighing exercise. There is nothing to show any such inadequacy. Second, at the hearing, the EU's agent stated that the evidence that the EU relies upon to show that "there was no real weighing and balancing between the interests" is "the measure itself".[25] That appears to be an alternative way of encouraging the Tribunal substantively to assess proportionality, rather than the question under Article 494(3)(f) of whether the UK had regard to applying proportionate measures. However, the argument does not assist the EU as a matter of substance. The UK measures pursue a legitimate regulatory objective that the EU does not challenge and are based upon and justified by the best available scientific advice. The financial impacts are relatively limited and the potential benefits of genuine importance to the marine ecosystem. It cannot be said that the nature of the English or Scottish measure is objectively so disproportionate that the measures could not be decided upon by the respective Governments. If necessary to do so the Tribunal can, and should, find that the measures are proportionate. The UK reminds the Tribunal of its submissions on proportionality at the hearing, see Transcript Day 2, p. 189, line 15 to p. 195, line 8.
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?	N/A
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	N/A

[25] Transcript Day 3, p. 146, lines 11-13.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
	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?	
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?	Fisheries displacement is relevant to an assessment of social and economic costs and benefits for two primary reasons. First, it provides a means by which those affected by any measure to prohibit sandeel fishing may mitigate the impact upon them by fishing in different areas (i.e. open waters in the same sandeel area or, where permissible, in other sandeel areas) and/or for different species. This is something that was recognised by the UK Government and the Scottish Government in considering the impacts on EU vessels (see [CB/17/273-274], [CB/26/583] and [CB/28/603]). Second, the particular variability of total allowable catches (and actual catches) in the North Sea sandeel areas to which the UK measures apply, demonstrates the precarious nature of the social and economic benefits that the EU relies upon.[26] For the background data, see Table 1 in the UK's written submission (p. 49) and for the most recent assessments, see Transcript Day 2, p. 5, line 14 to p. 8, line 10 (referring to [**C-0011**] to [**C-0017**] in [CB/5-11]).
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	In answering this question, it is appropriate to set out the UK's position, before addressing the EU's case. First, the UK is not required to adopt the least restrictive measure, or – as the EU developed its position at the hearing – a measure that "would have better reflected the balance of rights and obligations between the parties" (Transcript Day 1, p. 138, lines 19-22). Under the TCA, the UK is simply required to have regard to applying proportionate measures. There is no requirement of necessity (see the UK's written

[26] See also Transcript Day 2, p. 191, lines 1 to 17.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
	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?	submission, paras. 349-350; Transcript Day 2, p. 160, line 19 to p. 163, line 23[27]). There is accordingly no requirement for the UK to meet any particular standard as regards possible alternative measures. No question of standard of review in respect of alternative measures arises on this first limb of the UK's position. Second, the question for the Tribunal is whether the UK considered the factors relevant to applying a proportionate measure. Alternative measures are not a mandatory factor in that regard.[28] No question of standard of review in respect of alternative measures therefore arises on this second limb of the UK's position. Third, in any event, in assessing whether the measures were proportionate – an exercise that goes further than required by the duty to "hav[e] regard to" "applying proportionate … measures" – the UK and Scottish Governments did consider a range of different possible alternative measures, including spatially smaller prohibitions. They considered these alternatives as tools (but not mandatory requirements) in the proportionality weighing exercise.[29] They concluded that the full prohibition was more likely to achieve their aims than any alternatives considered or raised in representations: see e.g. 14 September 2023 Ministerial submission para. 16 ("There are currently no known alternative management interventions that could produce the same potential beneficial effect as closing the sandeel fishery" [CB/17/272]) and fBRIA section 4.3 [CB/28/593]. See also the UK's response to the Tribunal's question on Day 2, p. 183 in **Table B** above. The Tribunal may look at the above reasoning in considering whether or not the UK Government and the Scottish Government had regard to applying proportionate measures under the TCA. However, the UK is not required to demonstrate that there was no lesser alternative and the Tribunal should not hold the UK to that standard. Nonetheless, the Tribunal may find, in light of the UK's objectives and the scientific evidence underpinning the reasoning, that the conclusions set out above were reasonably open to the UK Government and the Scottish Government. As alternative measures are not a mandatory factor in a proportionality weighing exercise, no question of standard of review in respect of alternative measures arises in this scenario either.

[27] See also Transcript Day 3, p. 79, line 19 to p. 81, line 1.
[28] See Transcript Day 1, p. 189, lines 4-8, where the EU states that the relevance of alternative measures on the EU's case comes directly from trade law and the domestic law of the Parties. For the UK's position that trade law does not assist in the interpretation of the term "proportionate measures" (not least because the Parties both agree it contains a test of necessity, not proportionality) see UK's written submission, paras. 349 and 355, and see EU written submission, paras. 611-612. For the UK's position that domestic law cannot be used to interpret the TCA, see the response to question 1 above and UK's written submission, paras. 340-343.
[29] See footnote immediately above.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		Underlying question 18 is the fact that the EU in these proceedings puts forward an alternative measure comprising "one or more spatially targeted prohibitions on sandeel fishing in parts of UK waters of the North Sea that would coincide with the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet" (EU written submission para. 746). As explained above, the UK rejects the relevance (as a mandatory factor) of that purported alternative measure to the legal test that the Tribunal will apply. Even if it were relevant, the UK considers that there are fundamental problems with the EU's argument, of which the failure to specify or define the alternative measure (or measures) is only one part. Most critically, the alternative does not meet the UK's regulatory objectives – or the level of protection sought. The UK's position is set out at para. 403 of its written submission and Transcript Day 2, p. 179, line 14 to p. 180, line 20. The UK's submissions on the burden on the EU for Claim 2 are at Transcript Day 3, p. 40, line 25 to p. 42, line 13 and p. 36, line 9 to p. 42, line 14. The EU has and retains the burden of establishing that the UK did not have regard to applying proportionate and non-discriminatory measures, including any fact that it relies upon for that purpose. Specifically on the standard of proof, it must be shown by the EU on an objective assessment of the materials before the Tribunal that the UK in the decision-making process did not have regard to applying proportionate measures. Putting forward a suggested alternative measure after that decision-making process has concluded is inapt so to demonstrate. Even were the *post facto* identification of an alternative relevant, it would be necessary for the EU to define the alternative, to demonstrate that it would meet the UK's regulatory objective, and that it would have fewer socio-economic impacts. None of these points has been demonstrated by the EU. Moreover, given that the duty under Article 496(1) read together with Article 494(3)(f) is one of conduct, it would be necessary for the EU to demonstrate that the UK could not have had regard to applying proportionate measures without considering the alternative now raised. This is a high threshold that the EU has clearly not met.
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	On the basis that the EU is presumably seeking to imply, without establishing, that a prohibition on sandeel fishing in the foraging area of chick-rearing seabirds would be lesser in scale than a prohibition in all UK waters, then that would not meet the UK's objective to improve the resilience of sandeel stocks and the wider marine ecosystem, not only seabirds.[30] The UK has, however, demonstrated that even if the prohibition was tailored to the foraging range of nesting kittiwakes, that would alone justify a

[30] See UK written submission, paras. 13.3, 294-300, 402-403; Transcript Day 2, p. 89, line 9 to p. 99, line 11; p. 179, line 18 to p. 180, line 20.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
	improve the resilience of sandeel stocks and the wider marine ecosystem in the North Sea area, not only seabirds?	prohibition in all UK waters in the North Sea (see e.g. Day 2, Slide 42). That is not, however, the UK's objective. The EU was at pains to emphasise that it did not take issue with the UK's regulatory objective in this regard, yet it relies upon an alternative measure that does not pursue the same objective.
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?	In Chapter Two, Heading Five of the TCA, the term defined in Article 495 and used in Article 494(3)(a) is the "precautionary approach to fisheries management". This is more specific than just the "precautionary approach" or "precautionary principle" in general terms. When a Party is making a decision under Article 496 it is this approach as defined to which regard is to be had, together with other relevant principles in Article 494(3). As defined, it does not include any procedural requirements and it does not need to be specifically invoked in order to be applicable. In this respect the "precautionary approach to fisheries management" is different from, for example, Article 5.7 of the SPS Agreement set out by the EU in its written submission at para. 451. More relevant is the recent ITLOS *Climate Change Advisory Opinion* [**CLA-0021**], in particular at para. 418 and in the dispositive at page 152, para. (e). In these passages ITLOS was considering Article 61 of UNCLOS insofar as it imposes obligations on States to take measures necessary to conserve living marine resources. Article 61(2) of UNCLOS refers to a coastal State "taking into account the best scientific evidence available to it" and Article 61(4) refers to consideration of effects on associated or dependent species. In opining on this Article, ITLOS referred to the precautionary approach together with the ecosystem approach, without any suggestion of the precautionary approach having any procedural content or needing to be invoked in order to be applicable. There is no authority for the proposition that the "precautionary approach to fisheries management" in the TCA has or should be interpreted as having any procedural content. In the TCA the key element determining whether the precautionary approach is engaged is an "absence of adequate scientific information". That is an objective matter which the Tribunal can determine whether relied on by a Party to an arbitration as part of a primary or a subsidiary argument.
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?	Article 495(1)(c) of the TCA defines "shared stocks" for the purpose of the TCA as meaning "fish, including shellfish, of any kind that are found in the waters of the Parties, which includes molluscs and crustaceans". As sandeel are associated with sand banks located in both UK and EU waters, the UK understands sandeel to be a "shared stock" for the purpose of the TCA. The primary relevance of sandeel being a shared stock under the TCA in the present context is that the objectives in Article 494(1)-(2) and a number of principles in Article 494(3) refer to "shared stocks". Accordingly, the Parties may decide on management measures under Article 496(1) in pursuit of the objectives in Article 494(1)-(2) and having regard to the principles in article 494(3), which relate to "shared stocks".

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	Question	**UK response**
		Article 63(1) of UNCLOS [**CLA-0023]** refers to where "the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States", which the UK understands to be a category known as a "shared stock", although that term is not used in UNCLOS. Article 63(1) provides that the two States in whose EEZs the shared stock exists "shall seek … to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part", one such provision being Article 56(1)(a) concerning the exclusive sovereign right of the coastal State to explore, exploit, conserve and manage the natural resources of its EEZ. The ability of the Parties to agree on technical and conservation measures under the TCA is catered for in Article 500(2), which is expressly stated to be without prejudice to the Parties' right to decide on measures under Article 496. If sandeel in the North Sea were a shared stock under UNCLOS, Article 63(1) would therefore not limit the interpretation of Article 496 of the TCA, including the Parties' regulatory autonomy when exercising their rights thereunder. The attachment of sandeel to specific sandbanks, however, means that it is not at all obvious that at least most sandeel stocks in the North Sea would qualify as shared stocks under Article 63(1) of UNCLOS. It is not necessary to determine that question, since it matters only that they are "shared stocks" under the definition of the TCA. Article 63(2) of UNCLOS and the UNFSA [**CLA-0028**], in contrast, apply in respect of "straddling stocks" (although UNCLOS does not use that term), which are understood by the UK to be stocks that occur in both (i.e. 'straddle') a State's EEZ and an area beyond national jurisdiction adjacent to the EEZ (i.e. the high seas). The UNFSA also applies to highly migratory stocks. Sandeel in the North Sea are neither straddling nor highly migratory stocks: they are characterised by site-attachment to banks within the EEZs of the UK and EU; there are no areas of the high seas within the North Sea. Neither the UK nor the EU has contended in these proceedings that sandeel are a straddling stock such that Article 63(2) of UNCLOS or the UNFSA would apply to them. Articles 63(1) and (2) of UNCLOS and the UNFSA thus have no bearing on this dispute.
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	The UK does not understand the EU to have argued that there is a separate violation of Article 2(1)(a) of Annex 38 which is not consequential on its Claim 1 or 2. The following references to the EU's Written Statement and oral submissions at the hearing confirm this position: • EU written submission, paras. 379-381 and 390; paras. 772, 774 and 781. • Transcript Day 1, p. 193, lines 6-7. • Transcript Day 1, p. 196, lines 3-10. • Transcript Day 1, p. 199, lines 21-24.

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	Question	**UK response**
	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."?	• Transcript Day 1, p. 201, lines 9-13. • Transcript Day 1, p. 202, line 15 to p. 203, line 6. • Transcript Day 3, p. 4, lines 13-16; and p. 4, line 23 to p. 5, line 1. The UK understands the EU's reference to an "additional" and "separate" breach of Annex 38[31] to be a reference to the fact that the alleged consequential breach of Article 2(1)(a) of Annex 38 would formally be a discrete breach, i.e. the Tribunal would be asked to declare the existence of that breach, even though it would be one that flows automatically from the breach argued in Claim 1 and/or Claim 2. In other words, the UK understands the EU to be seeking to avoid a situation where the Tribunal declares one or more breaches of Article 496 read with Article 494 and stops there, with any further breach of Article 2(1)(a) of Annex 38 being implied. If, contrary to the above, the EU were to respond to this question by seeking to raise for the first time a separate non-consequential breach of Article 2(1)(a) of Annex 38, it would be outside the request for the establishment of an arbitration tribunal. That request premised the alleged breach of Annex 38 on the other alleged breaches of Article 496, evidenced by the language "As a result, the sandeel fishing prohibition also constitutes an unjustified restriction on the access of EU vessels to UK waters … pursuant to Annex 38 of the TCA" [**R-0123**] [CB/3/84]. Accordingly, a separate breach of Annex 38 not consequential on Claims 1 or 2 would not be a "matter before" or "the matter referred to" the Tribunal for the purposes of Article 742(a) and Article 743(1) of the TCA. Accordingly, the Tribunal would have no jurisdiction to consider this claim, or alternatively the claim would not be admissible. Moreover, the EU has pleaded no facts and advanced no argument to support such an independent claim of breach. Nor has the EU explained how Annex 38 is even capable of being breached in circumstances where it is subject to the adoption of measures compliant with Article 496 read with Article 494. It would be inappropriate and unfair to the UK for the EU to be permitted to raise a new argument after the close of written and oral proceedings. The UK's position is that, in any event, reliance upon Annex 38 to establish a separate breach would add nothing to the analysis. As rights of access under Annex 38 are subject to measures taken under Article 496, if the UK is found not to have acted in conformity with the TCA as alleged under Claim 1 and/or Claim 2, the extent of non-conformity with Annex 38 would therefore necessarily be limited to the extent to which those measures were not properly decided upon under Article 496 itself, read together with Article 494(3), which is the subject of Claims 1 and 2. If, in contrast, the UK is held to have decided on a measure in conformity with Article 496 read with Article 494, there would be no right

[31] Transcript Day 1, p. 194, line 20; p. 200, lines 13-14; p. 202, lines 3-11.

Table C. Post-hearing Tribunal questions		
	Question	**UK response**
		of access under Annex 38 to the extent of the measure (as noted above in the UK's response to question 2). Accordingly, and in such circumstances, there could be no legal basis for an independent claim of breach of Article 2(1)(a) of Annex 38.