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")

COMMENTS OF THE EUROPEAN UNION ON THE WRITTEN RESPONSE OF THE UNITED KINGDOM TO THE ARBITRATION TRIBUNAL'S QUESTIONS TO THE PARTIES

10 February 2025

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1. These are the comments of the European Union ('EU') on the written response of the United Kingdom ('UK') to the Tribunal's: (i) advance questions of 27 January 2025; (ii) question during the hearing; and (iii) additional questions of 30 January 2025.

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

I. The EU's comments on the UK's written responses to the Tribunal's advance questions of 27 January 2025

Advance question 1

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

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

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

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?

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?

3. The EU notes that the UK maintains its position that the Tribunal should not analyse the measure as defined by the EU in its request for arbitration and in its Written Submission, but rather should split that measure to reflect *inter alia* devolved powers in the legal order of the UK. The EU further notes that, as indicated in the transcript to which the UK refers, its position is that "as a matter of state responsibility and international law generally that analytically, for the Tribunal, it doesn't matter in the end, because the analytical steps the Tribunal will need to take are the same" **[Transcript Day 2, page 30]**.

4. The EU recalls in this respect that the TCA, of which the Annexes form an integral part, is an international agreement that binds the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.[1]

5. A measure that may form the subject of arbitration between the Parties cannot be narrowly or exhaustively defined *ex ante* but should be understood to cover acts or omissions attributable to either Party. How a measure is defined is, in the first instance, a question for the complainant, and depends on the facts of the dispute. In that sense, whilst the UK indicates that, from its perspective, "the distinction therefore matters in this case, and potentially in other

[1] Exhibit CLA–0001.

circumstances", the Tribunal need only have regard to this dispute **[Transcript Day 2, page 30]**.

6. The UK, in response to questions from the Tribunal in the hearing, indicated that its position is that, even if the evidence is not neatly segmented and there is evidence that has relevance for both parts of the measure, the Tribunal should nevertheless examine the two parts separately, including the evidence that is applicable to each and address the consistency question separately **[Transcript Day 2, page 30]**.

7. The EU underscores precisely that there is a significant overlap in the evidence relied upon. Indeed, when deciding on the sandeel fishing prohibition as given effect in all Scottish waters, the UK explicitly referred to the decision to prohibit sandeel fishing in English waters of the North Sea.[2] Moreover, as the UK argued in its Written Submission, "the English Scientific Report contains scientific advice which supports both the English and the Scottish measure (since it evaluated the effects of a prohibition in sandeel fishing in all UK waters in the North Sea)".[3]

8. The EU therefore maintains its position that the analytical exercise, including the assessment of proportionality, should look at the costs and benefits of the measure holistically. In this regard, it recalls that the right of full access to waters to fish sandeel as provided for in Annex 38 TCA does not distinguish between English waters of the North Sea and all Scottish waters.

[2] Ministerial submission of 26 January 2024 [Exhibit R-0098, paragraph 32]: "As noted in paragraph 17, the UK Government will be publicly announcing their intentions to close fishing for sandeel (sandeel area 4 of the North Sea) in English waters on 31 January 2024 alongside other announcements. Should the Cabinet Secretary be minded to approve the recommendation in this advice, then an announcement on the same day as the UK Government would enable Scotland to remain on the front foot of this good news story, while sharing the burden of any sensitivities."

[3] UK Written Submission, paragraph 258.

Advance question 2

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

9. The EU makes two comments on the UK's written response to advance question 2.

10. First, regarding the proportion of the English and Scottish waters in the North Sea covered under the pre-existing prohibition on sandeel fishing, the UK states (page 3) that it:

    a. "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"; and

    b. "[t]he 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)."

11. The origin of the discrepancy between the UK's (8.78%) and EU's calculations (approximately 11%) seems to be that, in its calculations, the UK took into account only the pre-existing prohibition on fishing in sandeel stock assessment area 4 whereas, in its calculations, the EU took into account the pre-existing prohibition on fishing in both sandeel stock assessment areas 1r and 4 (see Exhibit C-0011, Figure 3).

12. Second, regarding how ICES takes into account these pre-existing partial closures in its advice on fishing opportunities, the EU agrees with the UK's statement that ICES's advice does not take account of the existence of a closed area within the overall sandeel area for which the advice was being given

[Transcript Day 2, page 44, line 17 to page 45, line 6; Transcript Day 2, page 49, line 16 to page 50, line 1].

Advance question 3

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

13. The EU refers to its comments on the UK's written response to advance question 2

Advance question 4

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

14. The EU notes that the UK responded in writing to advance question 4 (chapeau) with reference to its oral submissions **[Transcript Day 2, page 148, line 23 to page 149, line 2]**, and by explaining that 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".

15. The EU agrees with the UK that the right to full access to waters to fish set down in Article 2(1)(a) of Annex 38 TCA does not systematically take precedence over other objectives of Heading Five of Part Two TCA **[Transcript Day 1, page 196, lines 3 to 23].**

16. The EU disagrees, however, that there is "no need to reconcile" the right of full access to waters to fish set down in Article 2(1)(a) of Annex 38 TCA with regulatory autonomy to decide on fishing management measures. Measures that derogate from the right of full access to waters to fish must be decided on and applied in a manner that is consistent with Article 496 TCA, read together with Article 494 TCA, and taking into consideration the terms and rationale of Annex 38 TCA.

In addition:

a. Is Annex 38 a derogation?

17. The EU notes that the UK responded in writing to advance question 4(a) with reference to its oral submissions **[Transcript Day 2, page 148, line 20 to page 149, line 13]**, and by stating that "[t]he extent to which Annex 38 derogates from Article 500 is limited to what is set out in Article 2(1) of Annex 38".

18. The EU agrees that the derogation in Article 2(1)(a) of Annex 38 TCA from Article 500 TCA is limited to Article 500(1), (3), (4), (5), (6) and (7) TCA.

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

19. The EU notes that the UK responded in writing to advance question 4(b) with reference to its oral submissions and its written response to advance questions 4 (chapeau) and 4(a). The UK explains that [the measure] is "not a derogation. And nor would any other measure, properly justified under Article 496, having

regard to Article 494, be a derogation. That wouldn't be the correct analysis" **[Transcript Day 2, page 149, lines 23 to page 150, line 1]**.

20. The EU comments that, during the adjustment period, a measure that prohibits fishing of a stock listed in Annex 35 TCA and for which a TAC has been agreed, by its very nature, derogates from the right of full access to waters to fish under Article 2(1)(a) of Annex 38 TCA. For such a measure to be justified, it must be consistent with Article 496 TCA, read together with Article 494 TCA, and taking into consideration the terms and rationale of Annex 38 TCA.

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

21. The UK's written response to advance question 4(c) states that "[t]here 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 Article 496. The requirements of Article 496, read with Article 494, provide the agreed limits on regulatory autonomy".

22. The EU does not agree with this statement. As the EU explained in its written response to advance question 4(c), the fact that the sandeel fishing prohibition was adopted during the adjustment period means that the terms and rationale of Annex 38 TCA must also be taken into consideration when determining the scope of the UK's regulatory autonomy to adopt the measure.

23. The EU adds that the UK's reference to the first recital of Annex 38 TCA **[Transcript Day 2, page 148, line 23 to page 149, line 2]** does not strengthen its argument that "regulatory autonomy is not compromised by Annex 38". To the contrary, the first recital of Annex 38 TCA is a good indication that the Parties were mindful of their sovereign rights and obligations as independent coastal States, and nevertheless agreed on detailed provisions, establishing an adjustment period and granting each other full access to their respective waters

to fish the stocks listed in Annex 35 TCA and for which TAC have been agreed **[Transcript Day 3, page 3, lines 9-17].**

Advance question 5

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

24. The EU makes two comments on the UK's written response to advance question 5.

25. First, the EU observes that the UK has not responded to the Tribunal's question, which concerns specifically the Call for Evidence of October 2021 [Exhibit C-0043] and not the other evidence on the Tribunal's record:

    a. **Transcript Day 2, page 82, lines 2-23**, refers only to:

        i. the "scientific reports [the English and Scottish Scientific Reports – Exhibits C-0045 and C-0050] and the ICES Technical Service response" [Exhibit C-0022];

        ii. "the Engelhard article" [Exhibit C-0019]; and

        iii. "figures (…) in paragraph 422.2 of the UK's [Written] Submission, with references", none of which is the Call for Evidence;

    b. **Transcript Day 2, page 61, lines 19 to 24**, discusses only the ICES Technical Service Response [Exhibit C-0022]; and

the UK's Written Submission, paragraphs 108-110, discusses only "the importance of sandeel in the North Sea ecosystem"

Advance question 6

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

26. In its written response to advance question 6, the UK has referred to a large number of passages from its oral submissions and to evidence on the Tribunal's record, without providing any explanation of how those passages and evidence "analyse and/or quantif[y] fisheries displacement (…) as a result of pre-existing measures adopted in relation to the fishing of sandeel in the North Sea" or show that there was "analysis devoted to possible displacement under a future partial closure as an alternative to the complete closure of UK waters".

27. In order to assist the Tribunal, the EU will comment in turn on each identified passage from the transcript and on each piece of evidence to which the UK has referred.

Transcript Day 2, page 42, line 22 to page 44, line 1[4]

28. To the extent that, as the UK argues in the identified passage, a partial closure may lead to displacement into one or more open areas, this cannot, in and of

[4] "The treatment of the modelling then finishes on page 34 of the document, where the topic begins "Risks of displacement". That topic continues on to page 35. I know from the Tribunal's question that it's a topic of interest to the Tribunal, and with that in mind, if I could ask the Tribunal to turn to page 35 of the document, 234 of the bundle. I'm focusing on the first paragraph after the bullet points, which says: "Experience with partial stock closures where effort is simply displaced into open areas suggest that the anticipated benefits to stocks and predators may not materialise. Whilst the northeast UK closed area covers habitat which accounted for approximately 50% of the catch for Sandeel Area 4, the stock assessment and reference points are based on the entire stock including those sandeels distributed in the closed areas. As a result, the advised Total Allowable Catch ... is disproportionately large relative to the available area open to the fishery." And the second paragraph notes in the first sentence that ICES warns about the risk of that. Just going back up to the second bullet point, the risk identified there is not within UK waters, but that a prohibition in UK waters will increase fishing effort in EU waters. With that in mind, the Tribunal may wish to note that the UK has encouraged the EU to take its own measures, with resilience of the North Sea ecosystem as a whole as the objective. The reference to that is C-58 at page 2: that's a ministerial letter".

itself, justify a prohibition of all sandeel fishing in UK waters of the North Sea. Otherwise, displacement could always be a valid justification to prohibit in full each and every fishery. Moreover, as the EU explained in its response to additional question 17, any displacement can be addressed by fisheries management measures other than a prohibition of all sandeel fishing in UK waters of the North Sea:

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

b. to the extent that displacement occurs into other fish stocks, fishing of those other stocks can be prohibited in the part or parts of the area into which the displacement occurs.

Transcript Day 2, page 44, line 17 to page 45, line 11[5]

29. As the identified passage confirms, this essentially relates to the UK's oral response to advance questions 2 and 3. The EU therefore refers to its written response to advance questions 2 and 3 and to paragraphs 9-13 above.

Transcript Day 2, page 49, line 16 to page 50, line 1[6]

[5] "On page 41, there's a heading halfway down the page, "TAC accounting for partial closures", and then the paragraph under that explains that the TAC for a sandeel area does not account for partial closures; that this results in what it calls, at the end of the third line, "fish[ing] the line" delimiting the closed area, with accompanying depletion in the open area. It notes that the UK has experience of that in sandeel area 4, which is the closure extending from the Firth of Forth. So, members of the Tribunal, the answer to your second and third questions is that ICES's advice did not take account of the existence of a closed area within the overall sandeel area for which the advice was being given, and you've seen the scientific advice on the consequences of that. Displacement is a topic on which you heard precious little from the EU yesterday, despite its obvious importance, both as a matter of science and policy, for any suggestion that a partial closure might be a credible alternative".

[6] "On page 36, under the heading "Displacement of fisheries", the Tribunal has already seen this point in the English scientific report, and so I won't labour it. But given your second and third questions, I'd just note for the Tribunal the sentence five lines down, beginning halfway along: "The current ICES advice for sandeel indicates that the assessment model doesn't take account of the current Scottish closure, meaning that the available TAC must be taken from a smaller area than intended. This situation would be exacerbated if the closure was extended."

30. As the identified passage confirms, the UK is essentially making the same argument as in the passage from Transcript Day 2, page 42, line 22 to page 44, line 1, namely that a partial closure may lead to displacement into one or more open areas. The EU therefore refers to its comment in paragraph 28 above.

Transcript Day 2, page 95, line 17 to page 97, line 8[7]

31. As the identified passage confirms, this essentially relates to the UK's argument during its oral submissions about vessels "fishing the line" between the closed and open parts of sandeel stock assessment area 4. The EU therefore refers to paragraph 23 of its written response to advance question 6, in which it has already addressed the UK's argument.

[7] "That brings me, members of the Tribunal to the topic of displacement. A partial closure may tend towards the mere displacement of fishing effort from one area to another. That is a rational and objective basis for preferring a full prohibition to a partial one. I've already taken you to the treatment of displacement in connection with the ICES advice in the English scientific report and the Scottish scientific report, and there is no need to return to it. But I'm conscious that your question on displacement asked for reasons, and an additional one is the Strategic Environmental Assessment conducted by the Scottish Government at C-52, where the same point is made at paragraph 2.3.4. Could I ask though that we look at bundle tab 23 (C-50). This is the Scottish scientific report. And on bundle page 375, you'll find figure 12, which you know by now very well indeed. The point that I seek to emphasise for present purposes is the location of the Turbot Bank. You'll see that marked in a yellow colour as one of the grounds for sandeel, with the source as the Jensen paper from 2011. I'd ask you to consider the location of the Turbot Bank specifically in connection with the edge of the area that is presently closed. One can see from that relationship how "fishing the line", as the Scottish scientific report referred to it, could occur. Could I then ask you to look just at the facing previous page; it's page 18 of the report. Those diagrams are heat maps for vessels fishing for sandeel. The most recent data available before this report was written was for 2021. And it shows a clear example of fishing the line I'd ask the Tribunal to bear in mind in this connection that ICES is now providing zero-catch advice for all of sandeel area 4, in which most of that closed area falls. One can readily see, members of the Tribunal, why the EU had so little to say about displacement yesterday, notwithstanding your question specifically on that topic

Transcript Day 2, page 181, line 22 to page 183, line 5[8]

32. As the identified passage confirms, the UK is essentially making the same argument as in the passage from Transcript Day 2, page 42, line 22 to page 44, line 1, namely that a partial closure may lead to displacement into one or more open areas. The EU therefore again refers to its comment in paragraph 28 above.

English consultation document **[R-0061]**, pages 9-10[9]

33. As the identified passage confirms, the UK is essentially making the same argument as in the passage from Transcript Day 2, page 42, line 22 to page 44, line 1, namely that a partial closure may lead to displacement into one or more open areas. The EU therefore again refers to its comment in paragraph 28 above.

[8] "The Tribunal can see there, on internal page 9, that there's consideration of spatially lesser alternatives in three ways: first of all, "Closure of English waters [just] within SA4 and SA3r", that's option 2; secondly, "Closure of English waters within SA1r"; and then thirdly, discussion of "Partial closures", for example of an area such as Dogger Bank, et cetera. So in specific and general terms, there's consideration of spatially less extensive partial measures. And one can see that that's, in this consultation document, rejected, among other things, because of the displacement issue, which I think was one of the questions the Tribunal asked in advance as well. So one can see that: "... likely to increase fishing activity outside the closed area ..." Then it goes on, over the page, to say that's a recognised issue. And then the second paragraph, over the page on page 10: "Partial closures ... may reduce the ecosystem benefits ..." So that's the first reference. There is consideration of spatially lesser measures. The second, in response to the question, is the ministerial submission that we were just at, so it's the 14 September ministerial submission. That's tab 17 (R-77), and within that, it's the paragraph -- I ask the Tribunal to read paragraph 24. But there one finds -- and this is based upon a submission that went in, I think. But there one finds, about seven lines down, reference to: "... a more extensive closure would have a higher chance of success when prioritising the need for seabird recovery.""

[9] "Partial closures. A partial closure of, for example, one sandeel management area such as SA1, or subdivision of it, say the Dogger Bank, would lead to displacement of fishing effort. This is likely to increase fishing activity outside the closed area creating a risk of sandeel depletion in certain locations. This is a recognised issue and ICES for example caveated their advice for sandeels in SA4 by acknowledging the closed area off the east Scotland and Northeast England. They advise that this closure should be considered and that full advised catch limits for SA4 should not be taken as it could increase the risk of local depletions (ICES 2017, 2018). Partial closures therefore may reduce the ecosystem benefits of any closures and potentially cause additional problems if the abundance of sandeels in the remaining open area falls below levels critical for successful predator foraging."

De Minimis Assessment ("**DMA**") **[C-0044]**, pages 3-4[10], 12 (paragraph 30[11]), 15-16 (paragraphs 52-55[12]), 19 (paragraphs 67-68)[13]

34. The EU has no comments on pages 3-4 and paragraphs 12 and 52-55 of the DMA.

35. As for paragraphs 67-68 of the DMA, they support the EU's argument that any displacement can be addressed by setting TACs for sandeel or other stocks at a lower level ("If the total allowable catch (TAC) is not reduced").

[10] "Closure of industrial sandeel fishing is expected to bring about environmental benefits. The primary environmental benefit is improvements in the resilience of sandeel stocks and the wider marine ecosystem, including marine mammals, seabirds, and predatory fish in the North Sea area. The extent to which these benefits are realised will depend on the size of the spatial closure, if industrial fishing activity is reduced as opposed to displaced, the time it takes for the sandeel stocks to increase and external factors such as the continued negative impacts of climate change."

[11] "30. The closure of industrial sandeel fishing in English waters may result in the following costs: a. Direct costs to the fishing industry from reduced access to fishing grounds b. Direct cost of fisheries patrol vessels and inspections c. Direct familiarisation costs to the vessels d. Indirect costs to the fishing industry associated with displacement to other fishing grounds; and e. Indirect costs to the fish processers and fishmeal importers associated with a decline in their factor input, sandeels."

[12] "52. This section qualitatively describes the potential direct cost of displacement, and indirect costs which may fall on the processing sector and fishmeal importers. Displacement 53. The closure of fishing grounds can lead to displacement of fishing activity which can result in various costs. Displacement is dependent on the intensity and distribution of fishing activity within the site before the closure and on external factors such as sandeel distribution, total allowable catch/quota, fuel prices. The closure of the sandeel fishery within English waters is therefore likely to lead to some displacement of fishing activity onto other locations and other species such as sardines.54. Given the uncertainty associated with possible displacement, it has not been possible to quantify these costs at consultation stage. Displacement impacts may however be reduced if the industrial sandeel fishery is also closed in Scottish waters, as is currently being considered by the Scottish government33. This will be reviewed after consultation, in the final stage DMA.55. The potential impact of displacement does not remove the requirement to ensure that industrial sandeel fishing is managed to pursue environmental protection measures".

[13] "67. There is a small risk that displacement of industrial fishing to other areas and other species could reduce the overall ecosystem benefits and fishing industry benefits. This is a small risk as Scotland are also considering the closure of industrial sandeel fishing in Scottish waters42. If this is put in place, it is unlikely industrial sandeel fishing activity would be displaced within the UK. It is likely that sandeel fishing effort will be displaced into EU waters of the sandeel management areas. If the total allowable catch (TAC) is not reduced, as we have witnessed previously, then overall removals of sandeels may remain the same the impact merely shifts. 68. Displacement onto other species may still occur. It is possible that, in response to reduced harvest opportunities for sandeels, vessels may shift focus to other species such as sprat in the English Channel. This risk has the potential to be harmful if stocks, where data is limited, are overexploited".

Summary review of the evidence presented by respondents to the consultation to prohibit industrial fishing in UK waters [**R-0076**], page 7[14]

36. As the identified passage confirms, the UK is essentially making the same argument as in the passage from Transcript Day 2, page 42, line 22 to page 44, line 1, namely that a partial closure may lead to displacement into one or more open areas. The EU therefore again refers to its comment in paragraph 28 above.

Ministerial Submission of 14 September 2023 [**R-0077**], paragraph 24[15]

37. As the identified passage confirms, the UK is essentially making the same argument as in the passage from Transcript Day 2, page 42, line 22 to page 44, line 1, namely that a partial closure may lead to displacement into one or more open areas. The EU therefore again refers to its comment in paragraph 28 above.

Scottish Scientific Report [**C-0050**], page 36[16] (…) and see also Figures 11 and 12 on pages 18-19

38. The identified passage from the Scottish Scientific Report indicates that there was no "analysis devoted to possible displacement under a future partial closure as an alternative to the complete closure of UK waters", given that "without a robust model of fleet dynamics (which does not yet exist for these fisheries) or

[14] "The ALB science report also acknowledges the risk that partial closures may lead to displacement of sandeel fishing within UK waters, and therefore negate any sought-after wider ecosystem benefits. For example, closure of the UK part of the Dogger Bank SAC still leaves areas open to fishing effort, particularly those closer to the Yorkshire seabird colonies."

[15] "Moreover, a full closure reduces the risk of displacement of sandeel fishing within UK waters."

[16] "One common response of a fishery to an area closure is displacement, in which the vessels concerned move to a different area to fish (spatial displacement) or change their fishing gear and methods to focus on different species (species switching). The fishery distribution plots in Figure 11 show that there remains significant sandeel fishing activity in Scottish waters. The current ICES advice for sandeel indicates that the assessment model doesn't take account of the current Scottish closure, meaning that the available TAC must be taken from a smaller area than intended. This situation would be exacerbated if the closure was extended. However, without a robust model of fleet dynamics (which does not yet exist for these fisheries) or an extensive consultation with the international fishing industry, it is impossible to determine what the response of the fleet would be to an area fisheries closure in Scottish waters."

an extensive consultation with the international fishing industry, it is impossible to determine what the response of the fleet would be to an area fisheries closure in Scottish waters".

Scottish consultation document [**C-0049**], pages 22-23[17]

39. The EU has three comments on the identified passage from the Scottish consultation document:

    a. the first paragraph of the identified passage is identical to the identified passage from page 36 of the Scottish Scientific Report. The EU therefore refers to its comment in paragraph 38 above;

    b. the second paragraph of the identified passage refers to the Scottish Strategic Environmental Assessment. The EU therefore refers to its comments in paragraph 40 below; and

    c. the third paragraph of the identified passage essentially makes the same argument as in the passage from Transcript Day 2, page 42, line 22 to page 44, line 1, namely that a partial closure may lead to displacement into one

[17] "One common response of a fishery to an area closure is fisheries displacement, in which the vessels concerned move to a different area to fish (spatial displacement) or change their fishing gear and methods to focus on different species (species switching). Sandeel in area 4 is managed as a single stock and catching levels are set in line with the agreed TAC level following the annual UK-EU bilateral agreement. The current ICES advice for sandeel indicates that the assessment model does not take account of the current area closure for sandeel (refer to section 3.2), meaning that the available TAC must be taken from a smaller area than intended. This situation would be exacerbated if the fishery closure was extended subject to the outcome of this consultation. However, without a robust model of fleet dynamics (which does not yet exist for these fisheries) or an extensive consultation with the international fishing industry, it is impossible to determine what the response of the fleet would be to an area fisheries closure in Scottish waters.

To inform the consultation, the environmental impacts of fisheries displacement as a result of any extension to the closed area is considered in the SEA Environmental Report. This report can be found along other supporting documents to this consultation. Furthermore, the UK government consulted on potential spatial management measures for sandeel in English waters in spring 2023.

If the UK Government proceed with such measures, then this would mitigate the risk of displacement of activity into English waters. On the other hand, spatial management measures for sandeel in English waters may risk displacement of fishing activity wholly into Scottish waters if the option presented in this consultation for Scottish waters is not pursued. It is also expected that fisheries effort might be displaced into non-UK waters should the sandeel fishery closure in Scottish waters presented in this consultation be pursued."

or more open areas. The EU therefore again refers to its comment in paragraph 28 above.

Scottish Strategic Environmental Assessment [**C-0052**], page 4[18], pages 21-22 (paragraphs 2.3.4-2.3.5[19]), pages 24-26[20], page 83 (paragraph 5.2.33[21]), pages 85[22], 87 (paragraphs 5.3.2 and 5.3.5[23]), pages 93-97[24]

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[18] "Extension of the existing closure to sandeel area 4 only risks displacement of fishing effort into novel sandeel fishing grounds in Scottish waters with potential for detrimental environmental effects".

[19] "2.3.4 Sandeel in area 4 is a single stock. The TAC for sandeel area 4 covers the whole area, without taking into account the existing closure within the area, therefore some fishing effort is currently displaced without regard to the potential effects on local depletion.

2.3.5 Consideration was given to possible further displacement of fishing effort as a result of an extension to the closed area. It is possible that closure of the sandeel fishery in all Scottish waters would mean that some activity is displaced into the portion of sandeel area 4 that extends into English waters. However, it is difficult to quantify to what extent fishing patterns in the area will change as a result of displacement, or if fishing will simply decrease. Displacement can be assessed using VMS data which is already available for all vessels in the fishery. Furthermore, the UK government launched a consultation on the management of sandeel in English waters on 7 March 2023. This proposes a closure of sandeel fishing in English waters within the North Sea. If this proceeds, then this would mitigate the risk of displacement of activity into English waters. On the other hand, closure of the sandeel fishery in English waters may risk displacement of fishing activity into Scottish waters if the option to close the sandeel fishery in Scottish waters is not pursued. Catching levels are set in line with the agreed TAC level flowing from the UK-EU Bilateral Agreement, meaning that there will be no increased fishing pressure in the area as a whole."

[20] "3.3.1 The scope of any potentially significant environmental effects is largely limited to the beneficial effects for species that fall within the proposed closure area or regularly use this area; spill-over benefits beyond area boundaries; and potential adverse effects outside the proposed closure area as a result of the displacement of fishing activity and the intensification of activity in areas where sandeel fishing already occurs.

(…)

"The proposal would be unlikely to result in emissions to air, other than those from vessel use. It is unlikely that the extension would make a significant difference to existing vessel emissions. This fishery currently takes place in offshore waters and therefore doesn't impact Scottish air quality. Any displacement of vessels caused by closing all Scottish waters would move vessels further from Scotland therefore the proposed extension will have no positive or negative impact on Scottish air quality."

(…)

"Although there may be an impact on emissions from Danish vessels as a result of displacement to other grounds, this is a trans-boundary issue that is disproportionate to a SEA"

(…)

"Any impacts to cultural heritage will remain as before. Depending on future spatial measures, there may be less impact in some areas (due to closures) and more in others (due to displacement) but for the purposes of the extension of existing closure in sandeel area 4 to all Scottish waters assessment this can be scoped out."

40. The EU has three comments on the identified passages from the Scottish Strategic Environmental Assessment:

    a. while the Scottish Strategic Environmental Assessment repeatedly refers to the risk of displacement into "novel fishing grounds", those grounds are never identified. Moreover, as paragraph 28 above explains, any displacement can be addressed by fisheries management measures other than a prohibition of all sandeel fishing in UK waters of the North Sea;

    b. section 2.3.5 of the Scottish Strategic Environmental Assessment indicates that displacement may not actually occur ("it is difficult to quantify to what extent fishing patterns in the area will change as a result of displacement, or if fishing will simply decrease"); and

    c. section 2.3.5 of the Scottish Strategic Environmental Assessment further notes that "[d]isplacement can be assessed using VMS data which is

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[21] "5.2.33 The implementation of this management measure may also result in the potential displacement of sandeel fishing activity and its associated pressures outside the boundary of Scottish waters. The closest sandeel fishing waters are in Northeast English waters. The UK government is currently leading their own consultation on the closure of the sandeel fishery in all English waters. If the results of the consultation support closure this would mitigate any displacement effects to English waters. Effects of displacement to the wider North Sea are harder to predict due to the transboundary nature of any displacement.

[22] "Extension to all of Scottish waters prevents the risk of adverse effects being realised via displacement of fishing effort to novel fishing grounds outside of Sandeel Area 4" [repeated twice on page 85]

[23] "5.3.2 In addition to the potential environmental benefits that will result from the extension of the existing sandeel fishery closure to all Scottish waters (see Section 5.2), Option 2 (extension of existing closure to all of Area 4; see Table 10) will provide no further positive impact to the area of the proposed closure when compared to the proposed closure of all Scottish waters and may have detrimental effects on the areas outside Sandeel Area 4a due to the potential for displaced fishing activity to these areas."

(…)

"5.3.5 Option 0 (do nothing; see Table 13) does not provide any additional benefits and therefore does not meet the objectives of the proposed closure. Alternative 4 may also result in detrimental effects due to displacement of fishing effort into Scottish waters if the UK Government decides to close their waters to sandeel fishing following the outcome of their consultation which took place earlier this year."

[24] Page 93: "[i]f [sandeel assessment] area were to be closed to fishing, fishing effort may be displaced to novel fishing grounds outside of SA4 (…) Displacement of fishing effort into novel regions therefore poses a risk to currently unexploited sandeel populations and their predators". Pages 94-97 use essentially the same language.

already available for all vessels in the fishery". This supports the EU's position that, to the extent that displacement occurs, it can be addressed by fisheries management measures other than a prohibition of all sandeel fishing in UK waters of the North Sea.

Advance question 7

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

41. The EU notes that the UK has responded in writing to this question with reference to its oral submissions **[Transcript Day 3, page 36, line 9 to page 42, line 16]**. The EU has the following comments on those submissions.

42. First, in so far as the UK states that, "without discernible reference to authority (…) the EU, as the Complainant party, has a prima facie burden to establish its claims of breach of the TCA" **[Transcript Day 3, page 36, lines 12 to 15]**, the EU recalls that, in its oral submissions, when responding to the Tribunal's advance question 7, it identified the findings of the Appellate Body in DSDS33 Wool Shirts and Blouses and cited those findings **[Transcript Day 1, page 31]**.

43. The EU further explained that although this is authority developed by the Appellate Body under the WTO dispute settlement system, those findings themselves drew on general principles of international law. Therefore, the EU maintains its position that the formulation of general principles guiding the burden of proof in that dispute is informative of how this Tribunal should understand the burden of proof in the present proceedings.[25]

[25] See also Article 516 TCA.

44. In paragraph 29 of its written response to the Tribunal's questions, the EU has elaborated upon how the expression *'prima facie* burden' should be understood in this context.

45. Second, as to the UK's position that the "starting point is that in international law, states are presumed to act in good faith; states are not presumed to have breached their international obligations" **[Transcript Day 3, page 37, lines 9 to 12]**, the EU agrees.

46. Third, as to the argument that it is not appropriate to "export approaches taken within some World Trade Organization jurisprudence to this different context" **[Transcript Day 3, page 39, lines 17 to 19]**, it is apparent from the UK's submissions that the basis on which it relies for this proposition is that "there is no equivalent in the TCA to Article 20 of the GATT, providing general exceptions to treaty obligations, on the basis of which the UK is somehow seeking affirmatively to justify its measures" **[Transcript Day 2, page 30]**.

47. It is incorrect that the burden of proof has only been understood to entail an obligation to establish a *prima facie* case that the claim is established in the framework of Article XX of the GATT 1994. That application of the burden of proof has also been held to be appropriate under the TBT Agreement as well as under other WTO Agreements. This is relevant in that it is not limited to a situation in which a party relies on a justification for its measures in the context of a regulatory framework that mirrors the exact structure of Article XX of the GATT 1994. Moreover, as the EU has already explained, the approach developed in WTO law drew on public international law and the UK has not explained why this should be considered irrelevant.

48. In the second place, the structure of Heading Five of Part Two TCA supports this interpretation:

    a. the TCA establishes a positive right of full access to UK waters to fish sandeel (Article 2(1) of Annex 38 TCA);

b. the TCA establishes that the Parties may decide on fisheries management measures (Article 496(1) TCA) However, the right to decide on such measures to the extent that they derogate from the right of full access to waters to fish, must be exercised in conformity with the requirements in Heading Five of Part Two TCA, of which Article 496(2) TCA and Article 494(3) TCA; and

c. although the structure of Heading Five of Part Two TCA, read together with Annex 38 TCA, does not replicate Article XX of the GATT 1994, it does require a Party deciding on a fisheries management measure to show that this right has been exercised in conformity with the limitations that circumscribe that right. It is appropriate in those circumstances that, once a complainant has established a *prima facie* case that: (i) the right of full access to waters to fish has been impaired (which the European Union does not understand the UK to actually contest concerning sandeel); and (ii) the fisheries management measure is not consistent with the obligations under Article 496 TCA and Article 494(3) TCA, notably those pertaining to the best available scientific advice, proportionality and non-discrimination, the UK does have a burden of proving its defence that the impairment of the EU's rights is justifiable.

49. As to the existence of an alternative, proportionate, measure, the UK has mischaracterised the EU's position. The EU takes note that, in its oral submissions (on which it relies in its written response to this question), the UK states that:

"What the EU says is that once it raises the possibility of an alternative measure, it is somehow for the UK to show why that measure would not have been appropriate to meet the UK's objective" **[Transcript Day 3, page 41, lines 13 to 16]**.

50. The EU submits that, when raising a claim that the UK has not acted consistently with its obligation to decide on fisheries management measures having regard to the principle of applying proportionate measures, it may

identify an alternative measure which, on its case, would have been proportionate and hence which demonstrates why the UK's measure (i.e. the sandeel fishing prohibition) cannot be regarded as such.

51. Where an alternative measure is advanced and the EU identifies by reference to that measure that the delta between the costs on the one hand and the benefits on the other hand is significantly greater as regards the sandeel fishing prohibition, it is for the UK to explain why its measure meets the requirements under the TCA. This is not purely abstract given that, in the present dispute, the UK considered one or more partial closures.

52. In the third place, the UK has neither explained nor cited any authority for its alternative purportedly "orthodox approach" **[Transcript Day 3, page 40, line 5]**. Instead, the UK states that "there is no justification in the TCA for the burden-shifting exercise proposed by the EU" **[Transcript Day 3, page 41, lines 11 and 12]**.

53. The Parties agree that there is no provision in the TCA that stipulates how the burden of proof should be understood in a dispute. However, the EU recalls that the TCA is a Trade and Cooperation Agreement and hence, its reference to well-established principles applicable under WTO law that are themselves explicitly derived from public international law should be considered to inform the standard in these proceedings. This is expressly contemplated by the TCA itself – see Article 516 TCA.

Advance question 8

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

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

54. In its written response to advance question 8(a), the UK has referred to a passage of its oral submissions **[Transcript Day 2, page 80, line 14 to page 81, line 15]**. That passage contains the following statements:

    a. "The UK's principal point is that "available" means already existing"; and

    b. "theoretically there may be a situation in which something could be added easily and quickly to provide a fuller picture, and that could, in principle, form part of what should properly be considered to be "available", even if, strictly speaking, it did not already exist."

55. The EU makes two comments on these statements.

56. First, for the reasons explained in the EU's written response to advance question 8(a), "available advice" means not only existing advice but also advice that could reasonably have been obtained at the time the measure was under consideration.

57. Second, the UK recognises that there may be situations where "available" extends to advice that "strictly speaking" did not exist at the time the measure is under consideration. The UK therefore accepts that "available" does not exclude that Parties have to make a degree of effort to obtain advice that does not exist at the time the measure is under consideration, based on existing scientific evidence.

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

58. The UK's written response to advance question 8(b) consists of references to three passages from its oral submissions The EU has three comments on those passages.

59. First, the EU agrees with the UK that "best" connotes a comparative assessment of "available advice" **[Transcript Day 2, page 73, lines 21 to 25]**.

60. Second, the EU disagrees that "best" is limited to advice that exists at the time the measure is under consideration **[Transcript Day 2, page 80, lines 24 to 25]**. As the EU explained in its written response to advance question 8(a), "available advice" is not limited to advice that exists at the time the measure is under consideration but also extends to advice that could reasonably have been obtained at that time based on existing scientific evidence.

61. Third, the EU also disagrees that there would be an "absence of comparison (...) in the EU's case" **[Transcript Day 2, page 75, lines 2-25]**. The EU has demonstrated that there was existing scientific evidence that the authors of the English Scientific Report could have used to address the flaws and caveats in the model used. The EU has thus made a comparison between the advice available to the UK at the time the measure was under consideration and the advice that the UK could reasonably have been obtained at that time **[Transcript Day 1, pages 62 and 84]**.

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?

62. In its written response to advance question 8(c), the UK has stated that:

    a. even if advice is clear and unequivocal, it does not necessarily determine the content of the measure; and

    b. "based on" does not mean "conform to".

63. The EU agrees with both of these statements.

Advance question 9

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

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

64. In its written response to advance question 9(a), the UK refers to its oral submissions **[Transcript Day 3, page 90, lines 1 to 12]** where it was stated that:

> "In the UK's submission, the word "principles" confirms there's no requirement that the measures must conform to the principles. The language is not of obligations, but principles applying in the decision-making context. So no special meaning. In my submission, they are factors to which regard should be had in coming to a practical result."

65. The UK further indicates in its written response to advance question 9 that:

> "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)."

66. In its written response, the UK further characterises these principles as "outcome oriented".

67. The EU makes the following comments in relation to the above.

68. First, the EU does not agree that the term "principle" can be understood to mean that there is no "mandatory rule of international law against which compliance can be measured".

69. Article 38(1)(c) of the Statute of the International Court of Justice provides that one of the sources of law which may be relied upon when adjudicating international disputes is "general principles of international law".

70. A "principle" may, therefore, have binding normative force.

71. A "principle" may also provide a framework against which compliance may be measured. For instance, one general "principle" of international law is good faith. Courts and tribunals may assess whether a party has acted in "good faith".

This Tribunal may also assess whether a fisheries management measure has been decided on with regard to the "principle" of "applying proportionate and non-discriminatory measures".

72. Second, as the EU identified in its own submissions, it concurs that the "principles" enumerated under Article 494(3) TCA may not all be applicable to all factual circumstances. However, certain of the principles enumerated will always be applicable when a Party decides on a fisheries management measure pursuant to Article 496(1) TCA. In particular, Article 494(3)(c) TCA and Article 494(3)(f) TCA are principles to which regard must always be had when deciding on any fisheries management measure.

73. Third, the EU disagrees that the term "principle" denotes a "goal" or "standard" "that it would be desirable to strive for". For the reasons it has explained in its response to the Tribunal's questions, it considers that this interpretation leaves too much latitude to the decision-maker to ignore "principles" that are of systemic importance to the relations between the Parties. According to the UK, it is perfectly permissible for a Party to decide on a manifestly disproportionate and discriminatory measure since the application of the principle is purely aspirational and lacks any binding force.

74. Fourth, the UK relies on the travaux préparatoires of the TCA **[R-0120]** to support its interpretation that "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".

75. As a preliminary point, the EU remarks that travaux préparatoires are a supplementary means of interpretation to which the Tribunal may have regard in order to confirm the meaning resulting from the application of Article 31 VCLT, or to determine the meaning when the interpretation according to Article 31 VCLT: (i) leaves the meaning ambiguous or obscure; or (ii) leads to a result which is manifestly absurd or unreasonable.

76. The EU does not consider that the meaning of Article 494(3) TCA could be considered ambiguous or obscure or that the result of applying Article 31 VCLT would be "manifestly absurd or unreasonable". Therefore, the travaux préparatoires are of limited assistance and are certainly not, contrary to the position of the UK as expressed in the hearing, "the start and the end of the point" **[Transcript Day 3, page 87, lines 20 to 21]**.

77. Further, the travaux préparatoires do not comfort the UK's position in the manner that is alleged.

78. The UK points to Article FISH.5 of the draft TCA, which provided that new technical measures or changes to 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.FISH1.[Objectives]".

79. Article FISH.6. of the draft TCA, to which the UK refers in paragraph 336 of its Written Submission, stated that "emergency measures" "shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1 [Objectives]".

80. There is no disagreement that this is the language which the EU tabled during the negotiations. Indeed, it is also clear from the lengthy list of objectives tabled by the EU under Article FISH.1 that the EU also sought commitments to "cooperate on the development of measures for the conservation, management and regulation of fisheries in a non-discriminatory manner", to "promote the protection of marine biological resources and their environments and coastal areas" and to apply "the ecosystem-based approach to fisheries management".

81. The EU concurs that following the negotiations with the UK, the TCA as adopted does not include all of these objectives. There is no provision on emergency measures.

82. The EU disagrees, however, that the fact that Article 494(3) TCA uses the expression "have regard to" should be interpreted to mean that the principle of applying proportionate and non-discriminatory measures or the principle of

basing conservation and management decisions for fisheries on the best available scientific advice have been downgraded to purely facultative and aspirational "goals".

83. In paragraph 338 of its Written Submission, the UK further cites from its draft negotiating text which was published in May 2020. This provided:

"Each Party shall manage its own fisheries independently and may take such measures in its relevant waters as it considers appropriate to ensure rational and sustainable management of fisheries."

84. It is clear, therefore, that the UK sought to have an agreement that would have entailed no constraints on the exercise of its autonomy to adopt fisheries management measures. That was rejected.

85. The interpretation of Article 494(3) TCA for which the UK now advocates would amount to essentially this outcome since, according to the UK:

"if a party takes it upon themselves to consider and apply the principle, that's sufficient but not necessary to discharge the obligation" **[Transcript Day 3, page 88, lines 2 to 5].**

86. The EU considers therefore, that to the extent that the travaux préparatoires are considered relevant as a supplementary means of interpretation, the negotiating texts of each of the Parties, when compared, show precisely that Article 494(3) TCA is intended to ensure that meaningful limits are placed on the exercise of regulatory autonomy when deciding on fisheries management measures. Moreover, the fact that the list of "objectives" was reduced from that initially proposed by the EU reflects the importance of those "principles" which were retained.

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

87. The EU notes that the UK has responded in writing to this question by reference to its oral submissions **[Transcript Day 3, page 90, line 13 to page 91, line 23]**.

88. In those submissions, the UK stated that:

"I think it's common ground with the EU that there's no hierarchical order and there's no need for a party to favour one principle over the other. Subject to one point I'm going to come to, that may not be entirely common ground, but that's entirely the UK's position. The weight to give to each in the balance is a matter essentially, in the UK's submission, for the parties' discretion. And it may be in some cases that not all of the principles are relevant" **[Transcript Day 3, page 90, lines 14 to 23]**.

89. As reflected in the EU's written response to advance question 9(b), it is "common ground" that:

a. there is no hierarchy between the various principles;

b. certain principles may interact with one another; and

c. some may not be applicable to a specific measure that has been 'decided on'.

90. The EU recalls however, that its position is that to the extent that more than one of the principles is applicable, the Party deciding on a fisheries management measure should have regard to all of them.

91. The UK then continued in its oral submissions to re-characterise the EU's position as articulated in the EU's Written Submission and to suggest that the EU had argued that:

"Article 494(3)(e) -- and the Tribunal will recall that that's the one that refers to "minimising harmful impacts of fishing on the marine ecosystem", et cetera --

that that ecosystem consideration needs to be subordinated or reconciled with Article 494(3)(f)" **[Transcript Day 3, page 91, lines 4 to 5]**.

92. At paragraphs 564 to 566 of its Written Submission, the EU stated:

"564. Article 494(3)(e) TCA refers to "taking due account of and minimising harmful impacts of fishing on the marine ecosystem and of the need to preserve marine biological diversity". Whereas "taking due account" is not a defined term under the TCA and only appears in Article 494(3)(e) TCA and one other provision of the TCA, it should be understood to be an expression of the recognition in the TCA of "the importance of conserving and sustainably managing marine biological resources and ecosystems" (Article 404(1) TCA).

565. Article 404(4) TCA clarifies that Article 404 TCA (and thus the recognition in Article 404(1) TCA of the importance of conserving and sustainably managing marine biological resources and ecosystems) "is without prejudice to the provisions of Heading Five".

566. Therefore, the TCA is structured to reflect that this legitimate objective must be reconciled with all other relevant principles, of which the need to have regard to ensuring that fisheries management measures taken in pursuit of that aim are "proportionate and non-discriminatory" as provided for in Article 494(3)(f) TCA."

93. The EU did not therefore argue that Article 494(3)(e) TCA is "subordinated" to all other principles enumerated in Article 494(3) TCA. The EU does consider that, to the extent that more than one of the principles is applicable to the decision being taken, regard must be had to all relevant principles and this may entail an exercise of reconciliation between them. In other words, there is no primacy accorded to the principle reflected in Article 494(3)(e) TCA in the sense that this legitimate objective can displace the requirement to have regard to the principle of applying proportionate and non-discriminatory measures.

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)?

94. The EU disagrees with the UK's statement that the "precautionary approach" would act as a fallback if the Tribunal were to conclude that the sandeel fishing prohibition is not based on the best available scientific advice **[Transcript Day 2, page 102, lines 4 to 11]**. As the EU explained in its oral submissions **[Transcript Day 3, page 11]**, the "precautionary approach" is not a fallback in a case where a Party omits to base its measure on advice that it could reasonably have obtained.

95. The UK accepts that "one could not, in good faith, apply the precautionary principle" if "the situation is one in which the absence [of adequate scientific information] is caused by an affirmative decision not to seek readily available information" **[Transcript Day 2, page 106]**.

96. The EU recalls that the UK has chosen not to address the caveats and flaws in the model used in the English Scientific Report that could and should have been addressed on the basis of existing scientific evidence **[Transcript Day 1, page 102]**.

97. The EU moreover refers to its comments on the UK's response to additional question 20.

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

98. The EU agrees with the UK that, where scientific information is adequate, the precautionary approach to fisheries management cannot be engaged (UK written response to advance question 9(d)).

99. However, for the reasons given in the EU's written response to advance question 9(d), the precautionary approach cannot apply where a Party omits to

base its measure on advice that it could reasonably have been obtained at the time the measure was under consideration.

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

100. The EU agrees with the UK that Article 495(1)(b) TCA defines the notion of "precautionary approach to fisheries management" (UK written response to advance question 9(e)).

101. The EU disagrees with the UK that this would give the "precautionary approach to fisheries management" in Article 495(1)(b) TCA a more specific meaning than the "precautionary approach" or "precautionary principle" "in general terms" (UK's response to additional question 20). For the reasons given in the EU's written response to advance question 9(e), the precautionary approach is a manifestation of the precautionary principle. This is further corroborated by Article 6 UNFSA [Exhibit CLA-0028] the title of which reads "Application of the precautionary approach".

102. The EU moreover notes that the UK has failed to explain how the purport of the precautionary approach to fisheries management would differ from the precautionary approach of the precautionary principle "in general terms" (UK response to advance question 9(e)). This supports the EU's position that there is no such difference.

Advance question 10

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

103. The EU notes that the UK has responded to this question by reference to its oral submissions **[Transcript Day 3, page 94, line 18 to page 95, line 13]**. In particular, the UK stated:

> "in principle, yes; but in doing so, the decision-maker is constrained by Articles 496 and 494. So the UK can select a single measure, such as prohibition, as a means of meeting its level of protection where that measure is based on best available science, and regard in good faith has been had to the relevant principles. There is no requirement for the UK to pursue that level of protection in any specific way, other than consistently with the terms of the TCA."

104. The EU agrees that, when deciding on a fisheries management measure in pursuit of a level of protection, a Party is constrained by the requirements in the TCA, notably those set down in Article 496 TCA and Article 494 TCA. Therefore, the EU essentially agrees with the statement cited above. It would comment however, that the nature of the 'singular measure' is relevant. Where that measure is by design the most restrictive of other rights under the TCA (e.g. a ban), when deciding on that measure and having regard to the principles under Article 494(3)(f) TCA, in most circumstances, a Party would need to show that it had considered less restrictive alternatives. In fact, this is what occurred in this case and therefore, the question is hypothetical.

Advance question 11

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

105. In its written response to advance question 11, the UK has referred to two passages from its oral submissions, the first of which extends to more than 11 pages of the transcript **[Transcript Day 2, page 64, line 17 to page 76, line 3]** and in which the UK criticises the EU's interpretation of the notion of "best available scientific advice". However, neither this passage nor the other passage of its oral submissions to which the UK refers in its written response **[Transcript Day 2, page 84, lines 3 to 16]** contains a response to the Tribunal's question about the essential attributes of "scientific advice".

106. In its written response to advance question 11, the EU referred to "scientific and methodological rigour" as the essential attributes that make advice "scientific". In its written response, the UK explains that it "of course accepts that something needs to be systematic or methodical in order to qualify as science" **[Transcript Day 2, page 65, lines 14 to 16]** and that it "doesn't have any particular objection to methodological rigour being required" **[Transcript Day 2, page 72, lines 16 to 17]**. The EU and the UK therefore agree that "scientific advice" requires methodological rigour.

Advance question 12

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

107. The EU agrees with the UK that "advice" may consist of different, individual items of scientific evidence which, collectively are relied upon as the basis for a measure **[Transcript Day 2, page 34, lines 2 to 5]**.

108. Moreover, the EU agrees with the UK that "scientific advice would not be the best available if it is not founded on the best available evidence" **[Transcript Day 2, page 34, lines 14 to 16]**. This is the case where advice fails to have regard to key observations in the existing scientific evidence.

Advance question 13

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

109. The EU notes that the UK has responded in writing to this question with reference to its oral submissions **[Transcript Day 2, page 159, line 15 to page 163, line 23]**.

110. The EU has three comments on those submissions.

111. First, the EU notes that the UK has responded to this question in the negative. In particular, the UK states:

> "The UK's position on question 13 would be in the negative: no requirement to look at less impactful alternatives" **[Transcript Day 2, page 159]**.

112. The EU understands the UK to therefore, reject the proposition that there is any need to consider the proportionality of the measure by reference to the "least restrictive measure".

113. As the EU indicated in paragraphs 53 to 55 of its written response to this question, the EU concurs that the least restrictive measure is not the relevant reference point in a proportionality assessment (i.e. a necessity test).

114. Second, the UK submitted that:

> "alternative measures may be a relevant tool to consider whether or not a measure is proportionate. So they may be a relevant tool, but it's not a

requirement that one has regard to them. One can look at the overall decision-making process, and if that tool arose and was done, then that's part of that exercise, but it's not that parties invariably must employ that tool" **[Transcript Day 2, page 160, lines 11 to 18]**.

115. The EU observes that the question of whether a Party must look at alternative measures during the decision-making process is conceptually distinct to the question of whether the proportionality of a measure can be assessed by reference to an alternative measure advanced by a Party in the framework of a dispute. In this instance, alternative measures were considered during the decision-making process and the EU has advanced the position in this dispute that an alternative proportionate measure was reasonably available to the UK. It maintains its position that, having made that submission in these proceedings, the UK should grapple with that assertion.

116. Third, in the passages of its oral submissions to which the UK refers in its written response to this question, the UK addresses 'necessity' and its relationship with the term "proportionality". The UK submits:

"within the context of the TCA, the two seem to have a clear different meaning. And had it been intended to include a necessity test, that would have been done" **[Transcript Day 2, page 161, lines 13 to 16]**.

117. The EU confirms that it fully concurs with these statements. As reflected in paragraphs 612 and 613 of its Written Submission, the EU position is:

"had the Parties intended to impose a standard of "necessity" as the benchmark against which measures adopted for marine conservation and fisheries management should be assessed, this term could have been used expressly.

Therefore, the choice of the term "proportionate (…) measure" as opposed to the term "necessary measure" should be understood as a deliberate choice by the Parties which differentiates the legal standard from that applicable under WTO law when applying either Article XX(b) of the GATT 1994 or Article 2.2 of the TBT Agreement."

118. Where the Parties disagree is what the implications of this distinction entail. In sum, the UK appears to contend that proportionality is a less onerous standard than necessity. The EU on the other hand considers that the term "proportionality" does not denote a lower degree of scrutiny since it is a broader standard.[26] Hence, the EU's position is that a measure could meet the necessity test on the basis that it is the least restrictive measure and yet still fail a proportionality test.

119. The EU remarks that the UK has not clearly stated whether or not it considers that a measure that is more restrictive than necessary to meet a regulatory objective could still be proportionate. That is however, the logical inference from its rejection of the EU's position. On that, the Parties are in clear disagreement. If a measure restricts rights beyond that which is required to achieve a regulatory objective, then, by definition, those costs are not commensurate with the benefits of securing that objective.

Advance question 14

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

120. The EU makes three comments on the UK's written response to advance question 14.

121. First, it is not permissible for the UK to refer "in particular" to certain documents. Given that this is a situation in which the evidential burden falls primarily on the UK in the sense that the evidence demonstrating the alleged 'taking into account' is in the UK's possession, it is for the UK to identify precisely and exhaustively all the relevant evidence on the Tribunal's record that the UK considers demonstrates such "taking into account".

[26] EU Written Submission, paragraph 614.

122. Second, while in their written responses to advance question 14, the EU and the UK have identified many of the same documents on the Tribunal's record,[27] as the EU explained in its written response, while those documents may refer to the economic and social implications of the sandeel fishing prohibition, they do not either properly consider or weigh those impacts.

123. Third, the same is true of the three additional documents on the Tribunal's record that the UK has identified in its written response to advance question 14:

    a. regarding the UK Government response to Defra's consultation [Exhibit R-0087], that document merely "acknowledge[s] the responses from some stakeholders who will be directly affected by a prohibition and recognise[s] the impact it could have on their businesses", without disclosing any actual weighing;

    b. regarding the letter of 27 February 2024 [Exhibit R-0085], that document merely "acknowledge[s] the impact on the Danish fishing sector" and concludes that "I am satisfied that this decision is neither discriminatory nor disproportionate having regard to the important aim the ban seeks to achieve", without disclosing any actual weighing; and

    c. regarding the final Business and Regulatory Impact Assessment [Exhibit C-0066]:

        i. section 2.1.2 merely describes the EU sandeel fishery;

        ii. section 4.4 merely describes the sectors affected and (erroneously) argues that "EU vessels may choose to move their fishing of sandeel to other waters and therefore offset the loss of a Scottish

[27] (i) Ministerial submission of 16 January 2023 [Exhibit R-0074]; (ii) English consultation document, March 2023 [Exhibit R-0061]; (iii) De Minimis Assessment (DMA) for Defra's Consultation on Spatial Management Measures for Industrial Sandeel Fishing, March 2023 [Exhibit C-0044]; (iv) Ministerial submission of 14 September 2023 [Exhibit R-0077]; (v) Ministerial submission of 6 February 2023 [Exhibit R-0091]; (vi) Ministerial submission of 27 April 2023 [Exhibit R-0092]; (vii) Partial Business and Regulatory Impact Assessment, July 2023 [Exhibit C-0051]; and (viii) Ministerial submission of 26 January 2024 [Exhibit R-0098].

waters closure" (on which see further the EU's comments on the UK's response to additional question 16 below);

iii. section 6.1 and table 1 merely describe the estimated "[d]irect cost to Non-Scottish vessels catching sandeel in Scottish waters" of the measure; and

iv. section 6.1.2 merely describes the "[e]xpected cost to non-Scottish vessels catching sandeel in Scottish waters".

Advance question 15

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

124. In its written response to advance question 15, the UK refers back to its oral submissions **[Transcript Day 2, page 191, lines 1 to 17]**, in which the UK stated the following:

"And one point that's connected with that -- it's the third point -- is the advance question 15 from the Tribunal. By that question, you asked about the catch, the TAC, for SA4 being set to zero in 2024, and the implications of that for the economic considerations. That in itself the UK wouldn't say affects the economic analysis, because the economic analysis is over a period of time, and there have been catches in sandeel area 4. So we don't say there's zero impact because they wouldn't have been fishing there anyway; there could be an impact, and we had regard to that. But it is relevant in that it demonstrates the precarious nature of the social and economic benefits that the EU relies upon, involved here in fishing for marine living resources such as sandeel. And it is a reason, if the Tribunal is appraised of this, to give less weight to the economic impacts, such as they are".

125. Contrary to what the UK argues, the fact that the Parties agreed to set the TAC for sandeel in stock assessment area 4 to zero in 2024 is not a reason to give "less weight to the (…) social and economic benefits that the EU relies upon".

Any impairment of the right of full access to waters to fish in UK waters must still be decided on and applied in a manner that is consistent with the Article 496 TCA, read together with Article 494 TCA, and taking into consideration the terms and rationale of Annex 38 TCA. The possibility under Article 496(1) TCA for a Party to decide on any measures applicable in its waters must be exercised in compliance with the framework established by the TCA.

Advance question 16

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

a. What distinguishes permissible differential treatment from discrimination?

126. The EU notes that the UK's position in its written response to advance question 16 is that:

"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."

127. The UK further argues in its response to additional question 16 that this is a specific definition of non-discrimination applicable to the fisheries context and hence, which cannot be interpreted by reference to WTO law. Hence, the UK relies on a generalised rejection of references to WTO law and to the findings of the Appellate Body in Clove Cigarettes in particular. This is clear from the passages of its oral submissions to which the UK refers as part of its written response to this question. In particular, the UK states:

"The simple point is that the derivation of this term, or the adverb "exclusively", is from the trade context; in particular, the Clove Cigarettes case (CLA-53) and the Appellate Body there, where the words are about regulatory distinctions, and the context is free trade rules and exceptions" **[Transcript Day 2, page 185, line 8 to page 187, line 13]**.

128. The EU makes the following three comments.

129. First, the term "non-discrimination" must plainly be accorded a meaning in Article 494 and Article 496 TCA. It has not been accorded a specific definition for the purpose of applying Heading Five of Part Two TCA and is not a defined term in the TCA. The UK has not explained why this term should be understood differently in the context of Heading Five of Part Two TCA.

130. Second, it cannot be correct that once the regulatory objective is characterised as legitimate (which is undisputed in this dispute), all and any form of differential treatment automatically passes the discrimination standard.

131. Certainly, differential treatment is not enough to establish *de facto* discrimination, but the analysis should not stop there. This would accord significant latitude to a decision maker. In other words, there must be a nexus between the objective and any differentiation.

132. In its Written Submission (to which the UK cross-refers in the oral submissions cited as its written response to this question), the UK stated that it "agrees with the EU's general position that whether there is *de facto* discrimination requires consideration of whether the differential impacts stem from a measure that pursues a legitimate regulatory objective".[28]

133. The EU understands this to reflect that the UK acknowledges that a nexus is required. It appears that the issue that divides the Parties is related to the EU's position that differential treatment will be permissible to the extent that it stems "exclusively" from that objective as opposed to being attributable to other considerations. This distinction is not, however, without significance.

134. It is unclear to the EU why the UK seeks to avoid this articulation of the legal standard. The EU notes that this could suggest that the UK wishes to retain the right to apply norms that *de facto* differentiate between EU and UK vessels

[28] UK Written Submission, paragraph 356.3.

without having to show that any such differentiation is only attributable to the regulatory objective that has been accepted to be legitimate. The EU considers that the term "founded" (which the UK proposes) lacks precision in this context and given the potential implications of the UK's position. Moreover, the UK has provided no explanation as to why this articulation of the standard is relevant to or justified by the fact that these provisions govern fisheries management measures.

135. Third, the EU observes that it is incorrect that this formulation of the relationship between a principle of non-discrimination and a regulatory objective is found only in the findings of the Appellate Body in Clove Cigarettes.

136. In many WTO disputes it has been necessary for Panels and the Appellate Body to consider a non-discrimination claim in a context in which the other Member relies on its right to regulate.

137. It has consistently been considered – whether through the prism of the chapeau of Article XX of the GATT 1994 or in the framework of applying Article 2.1 of the TBT Agreement – that even where a legitimate regulatory objective is pursued, a measure may still be inconsistent with the non-discrimination norms if differential treatment (or a detrimental impact on the conditions of competition) is attributable to factors other than the pursuit of that objective.

138. Hence, under the chapeau of Article XX, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between WTO Members where the same conditions prevail. This measure must also not be applied in a manner that would constitute "a disguised restriction on international trade".

139. The Appellate Body identified that, through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.

140. Under Article 2.1 of the TBT Agreement, the test has been formulated differently to allow differential treatment only to the extent that it "stems exclusively from legitimate regulatory distinctions". This formulation is not purely linked to the facts of a given dispute (US Clove Cigarettes) – it reflects the objectives of the WTO Agreements that seek to balance non-discrimination norms with the right of WTO Members to regulate in pursuit of legitimate objectives by requiring a nexus to that objective.[29]

141. Therefore, whilst it is not clear to the EU what the UK seeks to achieve through the distinction it now seeks to draw, given that the UK has advanced no rationale to explain why, in the context of fisheries, it should be sufficient to point to a legitimate regulatory objective as opposed to demonstrating that this is the only basis for any *de facto* differential treatment, the EU invites the Tribunal to reject the UK's alternative formulation of the legal standard.

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

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

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?

142. The EU takes note that, in its written response, the UK has responded together to advance questions 16(b), 16(c) and 16(d).

143. The EU does not disagree that the quota shares under Annex 35 TCA may imply that a fisheries management measure would have a greater impact on the vessels of one Party rather than on the other. When deciding on which stocks should be subject to fisheries management measures or which measures would

[29] See also Appellate Body, US COOL, paragraph 5.15.

be consistent with the requirements of Heading Five of Part Two TCA, this should be taken into account.

Advance question 17

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

144. In its written response to advance question 17, the UK refers back to two points that it made during the hearing, which the EU already addressed in its written response to advance question 17.

145. The UK's first reference is to **Transcript Day 2, page 151, lines 10 to 22**:

> "The last point on this, about the adjustment period, is question 17, and it's just a short answer to that. The Tribunal asked about urgency involved, given the 2026 end of the adjustment period. I don't think the UK would say that the measure or measures were justified as an emergency. They're not emergency measures. But I'll just give you a reference: core bundle, page 152 -- this is the call for evidence [of October 2021 (Exhibit C-0043, page 4)] -- does note the need for "urgent action to protect stocks" from "increasing pressures" in the changing world, and urgent action was supported by advocacy from environmental NGOs such as BirdLife International."

146. However, as the EU explained in paragraph 73(a) of its written response to advance question 17, there is no similar language in the English or Scottish consultation documents.

147. The UK's second reference is to **Transcript Day 3, page 98, line 8 to page 99, line 13**:

> "There was one other point on benefits that was raised by the EU this morning relating to urgency of measures. I'll take this very briefly. The comment was made by the EU Agent that there is only one reference to the word "urgent" in the documents. I don't know where this goes; it's a slightly forensic point, and not strictly true. First of all, it's plain when one looks at the record, and the process that was followed, and the evidence that was inputted into that process, that there was temporal importance to introducing the management measures that were needed to protect sandeel. It speaks for itself, given the importance of sandeels to the marine food web and ecosystem. In addition, if one wants to look for references to the word "urgent" specifically, one can see it additionally in the 14 September ministerial submission -- so tab 17 (R-77), page 269, paragraph 17 -- pointing out that BirdLife International emphasised the "urgent need to build resilience", and then going on to agree with that comment and the need "to take ... action", not least because of avian flu. The simple point is: there was a need for these measures. And really this goes to something the EU doesn't purport to challenge anyway, which is the regulatory objective. If we are talking about balance, this goes to benefits rather than costs in any event. And it's a matter where, at the very least, the United Kingdom was entitled to take the view that it was important that action was taken, with a level of urgency, on sandeels."

148. However, as the EU explained in paragraph 73(b) of its written response to advance question 17, there is no indication in the Ministerial Submission of 14 September 2023 that urgency was a factor taken into account by the UK when deciding on the measure.

149. Finally, the EU notes that the UK has failed to reply to the Tribunal's question regarding how (the lack of) urgency interacts with the amount of time remaining in the adjustment period.

II. The EU's comments on the UK's written response to the Tribunal's question during the hearing

150. In its written response to the Tribunal's question during the hearing, the UK argues that "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" (page 14). Other "problems" identified in the UK's written response include "a risk of sandeel depletion in certain locations" (page 13) or a risk if "the abundance of sandeels in the remaining open areas falls below levels critical for successful predator foraging" (ibid). The UK's written response also refers to the sandeel fishing prohibition as better "reflecting the high interannual variation in offshore foraging dispersion" (page 13) compared to partial closures.

151. The EU has four comments on the UK's written response.

152. First, one or more potential partial closures could have been "effective at delivering the UK or Scottish Government's objectives" [UK written response to the Tribunal's question during the hearing, page 14]. This is because, as the EU explained in its response to additional question 19, one or more prohibitions on sandeel fishing in the foraging area of chick-rearing seabirds would have been sufficient to meet the UK's objective of improving the resilience of sandeel stocks and the wider marine ecosystem in the North Sea area (see also paragraphs 177 and 207-208 below).

153. Second, to the extent that potential partial closures could give "rise to (…) displacement" (UK written response to the Tribunal's question during the hearing, page 14), the EU has already explained in paragraph 28 above: (i) why this cannot, in and of itself, justify a prohibition of all sandeel fishing in UK waters of the North Sea; and (ii) any displacement could be addressed by fisheries management measures other than a prohibition of all sandeel fishing in UK waters of the North Sea.

154. Third, to the extent that "potential partial closures" could lead to other "problems" such as "a risk of sandeel depletion in certain locations" (page 13) or "the abundance of sandeels in the remaining open areas falls below levels critical for successful predator foraging" (ibid), such problems could be addressed by adjusting the spatial scope of the partial closures. Again, however, such "problems" cannot, in and of themselves, justify a prohibition of all sandeel fishing in UK waters of the North Sea.

155. Fourth, there is no evidence on the Tribunal's record to support the alleged "high interannual variation in offshore foraging dispersion" i.e. that the foraging ranges of seabirds differ widely on an interannual basis.[30] Such a "problem" is therefore incapable of supporting the UK's argument that a full prohibition on sandeel fishing prohibition "better reflects the high interannual variation in offshore foraging dispersion".

III. The EU's comments on the UK's written responses to the Tribunal's additional questions of 30 January 2025

Additional question 1

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

156. The UK has responded to this question essentially by referring to its oral submissions **[Transcript Day 3, page 92, line 2 to page 93, line 23]**.

[30] While the UK had already referred to the alleged "high interannual variation in offshore foraging dispersion" at paragraph 403.2 of its Written Submission, it had provided no evidence to support that statement. Rather, it merely cross-referred to paragraphs 297-298 of its Written Submission and to Exhibit R-0077, which also did not provide any evidence to support that statement.

157. The EU makes the following four comments on those submissions.

158. First, the EU recalls that its position is that the manner in which the Parties have interpreted the term in their domestic legal orders may be relied upon by the Tribunal as relevant context when interpreting that term in the TCA. This reflects that:

a. the term is not defined in the TCA and must be accorded a meaning;

b. the term applied under the legal framework governing fisheries which the TCA replaces; and

c. the apex courts of both Parties have interpreted that term and those interpretations are largely aligned.

159. Second, it is incorrect that proportionality has only been used in the domestic legal orders of the Parties to address the fundamental rights of individuals. It has also been used as a framework against which to review a measure which required a decision-maker to balance different interests. Indeed, in its Written Submission, the EU referred the Tribunal to a judgment of the UK Supreme Court in which that court held that:

"Proportionality is a test for assessing the lawfulness of a decision-maker's choice between some legal norm and a competing public interest. Baldly stated, the principle is that where the act of a public authority derogates from some legal standard in pursuit of a recognised but inconsistent public interest, the question arises whether the derogation is worth it."[31]

160. Moreover, in Kennedy (Appellant) v The Charity Commission (Respondent) [2014] UKSC 20 [Exhibit CLA-0062], the UK Supreme Court considered the different contexts in which proportionality is used and concluded that:

[31] EU Written Submission, paragraph 624, citing R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6, paragraph 47 [Exhibit CLA-0063] and Bank Mellat, paragraph 74 per Lord Sumption. [Exhibit CLA-0064].

"The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context."

161. The EU reiterates therefore, that it is not inviting the Tribunal to consider exclusively the EU interpretation of proportionality but rather, when considering what the constituent elements of a proportionality analysis entail, to have regard to the close correlation in approach as between that followed by the European Court of Justice and the UK Supreme Court, the latter of which explicitly acknowledged that it was not applying that standard exclusively due to its relevance under EU law or under the European Convention on Human Rights.

162. Third, the EU concurs with the UK that Article 4(2) TCA provides that there is no obligation to interpret the TCA by reference to domestic law. The EU has not suggested that there is any such "obligation". It has simply indicated that this is a term which has been accorded a similar meaning in the domestic legal orders of the Parties and since it is a term which they chose to apply widely across the TCA, this may be instructive to this Tribunal when seeking to accord it meaning in Heading Five of Part Two TCA.

163. Fourth, the EU observes that, in its oral submissions, the UK invited the Tribunal to consider requirements under the 'SEA Directive' which should be understood as a reference to Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ L 197, 21.7.2001, p. 30–37 **[Transcript Day 3, page 85, line 10 et seq;** Exhibit RLA-0027**]**.

164. The EU is unclear as to why the UK considers that EU law, of which the SEA Directive forms part, can assist the Tribunal in one context but neither EU law nor UK law may permissibly inform the interpretation of the term "proportionate".

Additional question 2

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

165. In its response to additional question 2, the UK states that "the adjustment period in Annex 38 has no impact on the interpretation of Article 496, read with Article 494, of the TCA" and that "[i]t 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".

166. The EU has already explained in its response to additional question 2 why the UK's interpretation is incorrect. Article 496 TCA cannot be read in isolation from the other provisions of the TCA. During the adjustment period, this means that Annex 38 TCA and the context of the adjustment period must be taken into consideration when interpretating and applying the legal framework of Article 494 TCA and Article 496 of the TCA. That context includes the social and economic impacts which result particularly during the adjustment period – a period which the recitals of Annex 38 TCA note to be 'a further period of stability' for fishers to continue to access the waters of the other Party as before the entry into force of the Agreement.

Additional question 3

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

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

167. The EU agrees with the following statements in the UK's response to additional question 3a:

    a. the EwE model that was granted key run status by ICES in 2015 "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 (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)" (page 18); and

    b. the EwE model that was granted key run status by ICES in 2015 "does not have an 'Ecospace' component" (page 18).

168. By contrast, the EU disagrees with the following statements in the UK's response to additional question 3a.

169. First, the fact that a flaw or a caveat in the model used in the English Scientific Report was "transparently acknowledged" (page 17) does not alter the fact that the flaws and caveats identified by the EU in that model and the reasonable availability of other means to have applied a more scientifically rigorous model means that the advice that the UK identifies as the basis for the measure cannot be considered the "best available scientific advice" [EU's Written Submission, paragraph 480].

170. Second, the UK now seeks to downplay the purpose of the model used in the English Scientific Report and of the simulated biomass responses generated based on that model: "[t]he 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" (page 18). This can be contrasted with:

    a. the terms of the English Scientific Report itself: "the evidence presented within this advice presents the current state of understanding of the role of sandeels and the potential impacts of a prohibition of industrial fishing for them in UK waters" [Exhibit C-0045, page 5]; and

    b. the manner in which the decision-maker relied on the simulated biomass responses generated based on the model used in the English Scientific Report: "[f]ollowing the call for evidence Defra commissioned advice from scientific experts in the Defra group on the ecosystem risks and benefits of a reduction in sandeel fishing in the UK waters of the North Sea (ALB report). This report predicted that a full prohibition of sandeel fishing in the UK waters of the North Sea could lead to an increase in seabird biomass of 7% in around 10 years as well as delivering benefits to other fish species and marine mammals (…) In light of the potential ecosystem benefits (such as an increase in seabird biomass over 10 years), we are recommending a prohibition on fishing for sandeel in English waters of the North Sea by all vessels" [Ministerial submission of 14 September 2023, Exhibit R-0077, paragraphs 13-14].

171. Third, the UK seeks to justify the failure of the model used in the English Scientific Report to consider the spatial distribution of predators (via an Ecospace component) by the fact that "the model would no longer have been aligned with the ICES Key Run" (page 18). However, as the EU explained in its response to additional question 5, a model does not need to enjoy ICES key run status in order to be considered as "best available scientific evidence". By contrast, what a model must do in order to be considered as "best available scientific evidence" is to be parameterised based on the key observations from

the scientific literature. As the EU explained in paragraphs 85-86 of its written response to the Tribunal's questions, this is not the case of the model used in the English Scientific Report.

172. Fourth, the UK asks a number of irrelevant questions in an attempt to distract from the fact that "a spatially distributed model of the North Sea" was "reasonably capable of being obtained" (page 18, point 3):

a. the UK confuses the "stock assessment models" (point 3a) that ICES uses when advising on the level of fishing opportunities, on the one hand, and models like the North Sea EwE model that decision-makers can use to evaluate spatial management measures such as a prohibition on fishing in certain areas, on the other hand. The ICES Technical Service Response refers only to the first type of "models"; and

b. it was not for the EU to "develop the North Sea EwE model (…) to include the spatial distribution of sandeel and their predators and put the resulting simulations into evidence" (point 3b). As the EU explained in its oral submissions **[Transcript Day 3, page 9, line 20 to page 10, line 21**[32]**]**, a Party is not required to adduce an alternative piece of scientific advice that it positively asserts is better scientific advice in order to challenge the consistency of a measure on the basis of Article 496(2) TCA. Rather, the correct position is that it is sufficient for a Party to identify that other advice could reasonably have been obtained based on existing scientific evidence.

[32] "The European Union does not accept that it is dispositive of its claim that the European Union did not identify or produce another superior model. It has pointed to flaws in the scientific advice relied upon, and this Tribunal may assess the consistency of the sandeel fishing prohibition with the obligation to base measures on the best available scientific advice on the basis of those, we say, valid criticisms. The European Union accepts that it has a prima facie burden, but the TCA does not dictate how this is to be met. Moreover, insofar as the concession made by the United Kingdom was confined to circumstances where there are errors which, in their view, undermine the quality of advice as "science", the European Union also disagrees. And this leads me to respond briefly to the UK's position on the meaning of the term "available". The UK appeared in its submissions to assimilate this to mean "at the disposal of the state" (Day 2/80:16-17). They also linked this term to refer to already-existing advice. The European Union takes issue with this interpretation. Where there is an existing model, the question is whether there was data that could reasonably have been obtained and used to parametrise the model, or if other existing components could have been used to extend that model."

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?

173. The EU makes two comments on the UK's response to additional question 3(b).

174. First, the EU does not dispute that the English and Scottish Reports "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" (page 24). The EU also accepts that it "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" (ibid).

175. However, neither of these undisputed points is capable of altering the fact that:

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

    b. to the extent that a correctly parameterised model would have simulated that a prohibition of sandeel fishing in all UK waters of the North Sea does not lead to an increase in the biomass of a given predator, this would cast further doubt on the existence of a rational or objective relationship between the "scientific advice" invoked by the UK as the base for the sandeel fishing prohibition and the full spatial scope of the measure, which covers all UK waters of the North Sea (EU's Written Submission, paragraph 490).

176. In other words, the flaws and caveats in the model used in the English Scientific Report and the simulated biomass responses generated based on that model are

relevant both to the English and the Scottish parts of the measure. Indeed, the UK implicitly accepts this in its Written Submission when it argues that:

a. "the English Scientific Report contains scientific advice which supports both the English and the Scottish measure (since it evaluated the effects of a prohibition in sandeel fishing in all UK waters in the North Sea)";[33] and

b. "the modelling and the evidence in the literature review support and reinforce one another. The conclusions drawn from the modelling are strengthened when viewed in the context of the literature review (and vice versa) because the two are aligned".[34]

177. Second, the UK is wrong to argue the English and Scottish Reports did not "indicate that a prohibition on sandeel fishing would not be expected to produce any benefits for seabirds, marine mammals, predatory fish, and the broader marine environment" (page 24). As the EU explained in its response to the Tribunal's additional question 4, a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits for seabirds, marine mammals, predatory fish, and the broader marine environment. This is because that the literature review in the English Scientific Report and the Scottish Scientific Report both essentially indicate that: (i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent that there is a localised depletion of sandeel and that the relevant predators for which sandeels comprise a substantial proportion of their diet cannot forage outside of any such locally depleted area; and (ii) the only predators for which sandeels comprise a substantial proportion of their diet and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.

[33] UK Written Submission, paragraph 258.

[34] UK Written Submission, paragraph 276.

Additional question 4

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

178. Additional question 4 was addressed only to the EU.

Additional question 5

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

179. The EU agrees with the UK's statement that "modelling is not a necessary component of 'best available scientific advice'" (page 25). However, this does not alter the fact that, where such modelling is undertaken, it must be done on the basis of scientific and methodological rigour (see paragraph 88 of the EU's written response to the Tribunal's questions).

180. The EU also agrees that "[t]he 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" (page 25). However, this does not alter the fact that, when the purpose of a model is to simulate and quantify predator biomass responses to a prohibition on sandeel fishing in certain waters, that model must be parameterised based on the key observations from the

scientific literature. As the EU explained in paragraphs 85-86 of its written response to the Tribunal's questions, this is not the case of the model used in the English Scientific Report.

Additional question 6

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

181. The EU makes four comments on the UK's response to additional question 6 and the erroneous assumption by the authors of the English Scientific Report that a prohibition of sandeel fishing in all UK waters of the North Sea would reduce by an average of 58% the amount of sandeel catches in the North Sea.

182. First, the UK misleadingly argues that "[t]he EU in its Written Submission made no criticism of the English Scientific Report for using data from STECF" (page 27) when calculating the 58% average. As the EU explained in its oral submissions **[Transcript Day 1, pages 72, lines 21-25**[35]**]**, until the UK's Written Submission, the EU could not know which STECF data source the authors of the English Scientific Report had used, given that this was not specified in the English Scientific Report.[36]

[35] "Now, before the UK's submission, the EU had no idea of how the UK reached this average of 58% reduction in catches, and therefore reduction in fishing mortality. The UK's submission presented in table 2 how they reached that level".

[36] Compare: (i) Exhibit C-0045, page 9: "To assess the proportion of sandeel landings taken from UK waters, the weight of sandeels landed within and outside the UK EEZ were taken from data published by the European Commission's Scientific, Technical and Economic Committee for Fisheries (STECF) and split between those caught within the UK Exclusive Economic Zone (EEZ) and those caught outside of the UK EEZ"; and (ii) UK Written Submission, paragraph 282.1: "The method by which the proportion of North Sea sandeel landings taken from UK waters was calculated is set out in the English Scientific Report at pages 9-10. The data that was used to calculate this figure was the real (yearly)

183. Second, the UK now concedes that the authors of the English Scientific Report estimated the average amount of sandeel caught in UK waters compared only to sandeel catches in EU and UK waters of the North Sea and not also compared to sandeel catches in Norwegian waters of the North Sea (page 27[37]).

184. Third, the UK seeks to justify the failure of the authors of the English Scientific Report to take into account any sandeel catches in Norwegian waters of the North Sea by the fact that, "[w]ithout 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" (page 28). However, this is not a valid justification because:

    a. the English Scientific Report itself recognises that the "the majority of Norwegian operations take place in Norwegian waters" [Exhibit C-0045, page 7];

    b. other evidence on the Tribunal's record notes that that the Norwegian sandeel fishery takes place "in the current SA3r" [Exhibit R-0238, page 540] and sandeel catches in Norwegian waters of the North Sea varied between approximately 30 400 tonnes in 2013 and 244 000 tonnes (in 2020) [Exhibit R-0238, pages 549-550]; and

    c. Area 3r mostly falls within the EEZ of Norway, bordering the south of that country (EU Written Submission, paragraph 50).

185. Fourth, in its response to additional question 7, the EU has already addressed the UK's claim that "the 39% reference point (…) is within the lower confidence interval range used in the English Scientific Report" (page 19).

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sandeel landing data published by the European Commission's Scientific, Technical and Economic Committee for Fisheries (STECF) from 2003-2020".

[37] "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".

Additional question 7

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

186. Additional question 7 was addressed only to the EU.

Additional question 8

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

187. Additional question 8 was addressed only to the EU.

Additional question 9

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

188. In its response to additional question 9, the UK "refers to and repeats its answer to [additional] 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" (page 29).

189. However, nothing in the UK's response to additional question 5 explains "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".

Additional question 10

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

190. The EU agrees with the UK's statement in its response to additional question 10 that the flaws and caveats identified by the EU in the model used in the English Scientific Report are subject to a "requirement of materiality" (page 29).

191. By contrast, the EU disagrees with the UK's statement in its response to additional question 10 that the flaws and caveats identified by the EU in the model used in the English Scientific Report do not meet that "requirement of materiality" (page 29). In support of that statement, the UK refers to a number of passages from its oral submissions, which the EU will address in turn.

192. Regarding **Transcript Day 3, page 55, line 10 to page 56, line 21**, the EU makes two comments.

193. First, the EU does not "just parrot the caveats that the authors of the English scientific reports had already identified and say, on that accepted basis, that more should have been done" **[Transcript Day 3, page 55, lines 12 to 16]**. Rather, the EU has gone further and explained why it is material that the model used in the English Scientific Report was not parameterised based on the key observations from the scientific literature as summarised in the English and Scottish Scientific Reports. It is material because:

    a. the simulated biomass responses to a prohibition of sandeel fishing in UK waters of the North Sea are likely to be overestimated. Correction of these likely overestimations would accordingly decrease the average simulated biomass responses from the sandeel fishing prohibition in Table 7 of the

English Scientific Report for the 12 identified "commercial stocks and guilds"; and

b. those decreased average simulated biomass responses from the sandeel fishing prohibition would need to be read in light of the ICES Technical Service Response, the literature review in the English Scientific Report and the Scottish Scientific Report, which essentially indicate that a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits because: (i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent that there is a localised depletion of sandeel and that the relevant predators for which sandeels comprise a substantial proportion of their diet cannot forage outside of any such locally depleted area; and (ii) the only predators for which sandeels comprise a substantial proportion of their diet and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.

194. Second, in its response to additional question 7, the EU has already addressed the UK's claim that "even at the maximum possible assumption in favour of the EU's case, which is that there's no Norwegian fishing of sandeel in UK waters, even on that maximum possible assumption, the number on which they focused, based on that assumption, was within the confidence interval identified in the English scientific report on which the English measure was based" **[Transcript Day 3, page 55, lines 18 to 25]**.

195. Regarding **Transcript Day 3, page 55, line 10 to page 56, line 21; and Transcript Day 3, page 65, line 19 to page 66, line 10**, and "the three examples of the scientific literature relied on by the EU"[38], the EU's position is that none of those examples is capable of altering the fact that the flaws and caveats identified by the EU in the model used in the English Scientific Report

[38] The "three examples of the scientific literature relied on by the EU" are: (i) the 2023 Searle et al paper [Exhibit C-0040]; (ii) the 2023 OSPAR "Quality Status Report for the North-East Atlantic" [Exhibit C-0041]; and (iii) the 2014 Engelhard paper [Exhibit C-0019].

meet the requirement of materiality. The EU will address in turn each of those three examples.

196. Concerning the first example, namely the 2023 Searle et al study [Exhibit C-0040]:

a. the UK notes two uncontroversial points made by the study, namely that: (i) "seabirds as important not just for their inherent value but as an indicator of the broader health of the ecosystem, because of their position at the top of it" **[Transcript Day 2, page 58, lines 4 to 8]**; and (ii) "[t]he blue line is breeding success for kittiwakes that forage inside the closed area. As the Tribunal will appreciate, that shows an improvement in breeding success after the closure of the fishery when compared to the period during the fishery" **[Transcript Day 2, page 58, lines 20 to 24]**; and

b. however, those two uncontroversial points[39] are incapable of altering the fact that, as the Scottish Scientific Report noted: (i) the study "did not detect any increase in breeding success following the Wee Bankie sandeel closure for any species other than kittiwake" [Exhibit C-0050, page 53]; and (ii) "this was because some species feed close inshore in unfished areas (terns, shag) or can dive in the water column (guillemot, razorbill and puffin) and so are less affected by a decrease in absolute abundance of sandeel than surface feeders" (ibid).[40]

[39] By contrast, the UK is wrong to repeat its incorrect argument that "we know from figure 19 that the Tribunal has seen from the Scottish scientific report, and too the data with the standard deviation added used by NatureScot for wind power projects, that the foraging range of kittiwakes actually extends well beyond the closed area" [**Transcript Day 3, page 59, lines 20 to 25**]. The EU refers the Tribunal to its oral submissions [**Transcript Day 1, pages 100-101**] and to footnote 14 of its written response to the Tribunal's questions in which the EU has already explained why the UK's argument is incorrect.

[40] In its oral submissions **[Transcript Day, page 60, lines 21-24]**, the UK also referred the Tribunal to Exhibit R-0076, page 2, in which the authors of the English Scientific Report noted that the 2023 Searle et al study "aligns with the core advice of the ALB science report which highlighted that adverse environmental conditions could dampen potential ecosystem benefits". However, what the UK omitted to mention is that, on the same page of Exhibit R-0076, the authors of the English Scientific Report also noted that: (i) "the bulk of the available evidence suggests that kittiwakes are the key species for which there is substantial concern regarding sandeel fishing effort"; and (ii) the Searle et al 2023 study

197. Concerning the second example, namely the 2023 OSPAR "Quality Status Report for the North-East Atlantic" [Exhibit C-0041]:

a. the UK notes three uncontroversial points made by the report: (i) "the low abundance of seabirds overall"; (ii) the fact that three species of surface-feeding, chick-rearing, seabirds (black-legged kittiwakes, Arctic skua and northern fulmar) are currently not meeting the OSPAR threshold for breeding success; and (iii) the availability of forage fish (including but not limited to sandeel) "is probably limiting the breeding success or the annual survival of some surface-feeding species" (but without the report making any link with the three species of surface-feeding, chick-rearing seabirds that are currently not meeting the OSPAR threshold for breeding success); and

b. however, those three uncontroversial points are incapable of altering the fact that, as the EU explained during the hearing, while terns and kittiwakes (but not skua and northern fulmar) are the most sensitive surface-feeding, chick-rearing seabirds to changes in sandeel abundance [Exhibit C-0022, page 8], the scientific literature "did not detect any increase in breeding success following the Wee Bankie sandeel closure for any species other than kittiwake (…) because some species feed close inshore in unfished areas (terns, shag)" **[Transcript Day 1, page 145, line 22 to page 147, line 2]**.

198. This also answers the UK's point about why the failure of the English Scientific Report to present separately simulated biomass increases from surface-feeding and diving (or water column-feeding) chick-rearing seabirds "would help the EU's case" **[Transcript Day 3, page 63, line 6 to page 64, line 2**[41]**]** and why,

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"found no evidence to suggest the fishery closure has, to date, been effective in safeguarding the breeding success of guillemot, razorbill or puffin".

[41] "The EU is correct that the model does disaggregate water- and column-feeders, and that the English scientific report doesn't; and Ms Boileau addressed you on that yesterday. My point now is simply to say: if the English scientific report did do so, it seems pretty likely, based on what the Tribunal has seen in evidence before it, that it would show greater impact for surface-feeders than for column-feeders. It's very hard to see how the result would be otherwise. What is much less obvious is quite

contrary to what the UK claims, that failure would have an impact "in terms of the decision-making or in terms of the overall scientific that would have any impact at all, in terms of the decision-making or in terms of the overall scientific advice."

199. Put simply, had the English Scientific Report presented separately simulated biomass increases for various species of surface-feeding and diving (or water column-feeding) seabirds, this would likely have shown that the only (seabird) predators for which sandeels comprise a substantial proportion of their diet and cannot forage outside of any locally depleted area are surface-feeding, chick-rearing, black-legged kittiwakes and not other surface-feeding and diving (or water column-feeding) chick-rearing seabirds such as tern, skua and northern fulmar.

200. Concerning the third example, namely the 2014 Engelhard study [Exhibit C-0019]:

    a. the UK notes the uncontroversial point made by the study that "decreasing fishing mortality for forage fish increases their biomass" **[Transcript Day 3, page 65, lines 17-18]**; and

    b. however, that uncontroversial point is again incapable of altering the fact that a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits.

201. Finally, the UK wrongly argues that the three examples from the scientific literature "matter for four reasons" **[Transcript Day 3, page 65, line 20]**.

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how that would help the EU's case. Kittiwakes, and a number of other birds the UK was seeking to protect, are surface-feeders. So the numbers in the report, had it done what the EU now says it should have done in a hypothetical world, would have very likely shown greater benefit for surface-feeders than the numbers in the report now show. It's hard to see how that would have any impact at all, in terms of the decision-making or in terms of the overall scientific advice. But if it did, it would have even more strongly justified the measures on the basis of higher predicted effects for surface-feeding birds."

202. First the UK wrongly argues those examples matter because "they explain why no competing science is being proffered **[Transcript Day 3, page 65, lines 21 to 22]**. As the EU explained in its oral submissions **[Transcript Day 3, page 9, line 20 to page 10, line 21**[42]**]**, the EU is not required to adduce competing scientific advice that it positively asserts is better scientific advice in order to challenge the consistency of a measure on the basis of Article 496(2) TCA. Rather, the EU is required, and has discharged its burden, to identify flaws and caveats in the scientific advice relied upon and explain why other advice could reasonably have been obtained based on existing scientific evidence.

203. Second, the UK wrongly argues those examples matter because "they demonstrate why the EU is not able to show that any of its criticisms of the model in the English scientific report would make any difference to whether the English scientific report was best available scientific advice" **[Transcript Day 3, page 65, line 23 to page 66, line 2]**. The EU has explained (see paragraph 193 above) why it is material that the model used in the English Scientific Report was not parameterised based on the key observations from the scientific literature as summarised in the English and Scottish Scientific Reports.

204. Third, the UK misleadingly refers to the fact that "the EU has not been able to make any criticism of the Scottish scientific report" **[Transcript Day 3, page 66, lines 5 to 6]**. The EU did not make any criticism of the Scottish Scientific Report because that report (like the ICES Technical Service and the literature review in the English Scientific Report) essentially indicates that a prohibition

[42] "The European Union does not accept that it is dispositive of its claim that the European Union did not identify or produce another superior model. It has pointed to flaws in the scientific advice relied upon, and this Tribunal may assess the consistency of the sandeel fishing prohibition with the obligation to base measures on the best available scientific advice on the basis of those, we say, valid criticisms. The European Union accepts that it has a prima facie burden, but the TCA does not dictate how this is to be met. Moreover, insofar as the concession made by the United Kingdom was confined to circumstances where there are errors which, in their view, undermine the quality of advice as "science", the European Union also disagrees. And this leads me to respond briefly to the UK's position on the meaning of the term "available". The UK appeared in its submissions to assimilate this to mean "at the disposal of the state" (Day 2/80:16-17). They also linked this term to refer to already-existing advice. The European Union takes issue with this interpretation. Where there is an existing model, the question is whether there was data that could reasonably have been obtained and used to parametrise the model, or if other existing components could have been used to extend that model."

of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits because: (i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent that there is a localised depletion of sandeel and that the relevant predators for which sandeels comprise a substantial proportion of their diet cannot forage outside of any such locally depleted area; and (ii) the only predators for which sandeels comprise a substantial proportion of their diet and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.

205. Fourth, and for the same reason, the UK misleadingly refers to the fact that "so far as the analysis of the scientific literature is concerned, the English scientific report and the Scottish scientific report are equivalent" **[Transcript Day 3, page 66, lines 7 to 10]**.

Additional question 11

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

"For nesting seabirds in particular, the local abundance of forage fish (especially sandeel) at specific times of the year is likely to matter more than the abundance in the North Sea as a whole (or even in a single management area). It is never going to be feasible for ICES to provide catch advice at a sufficiently fine scale to account for this local food requirement, and therefore the responsibility to ensure the provision of these local ecosystem services relies on national regulations (for example using permanent or timed closures or setting restricted quotas in given areas)."

And again at p. 7):

"ICES advice on fishing opportunities is given at stock level and cannot function at the level of individual feeding grounds, which goes beyond the detail level of

the stock assessment models. Therefore, a large part of the question of whether management is supporting ecosystem functions should occur at the level of national regulations, which is outside the scope of this technical service. There are several closed sandeel areas, and this is one possible example of measures to provide ecosystem services that sits alongside the overall quota. However, it would make sense to evaluate the degree to which such closures could be targeted to maximize the benefits while minimizing the costs."

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

206. The EU makes four comments on the UK's response to additional question 11 and its interpretation of certain passages from the ICES Technical Service Response [Exhibit C-0022].

207. First, the UK argues that:

    a. "more mobile predators such as marine mammals and predatory fish (…) 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" (page 30); and

    b. "marine mammals and predatory fish are often migratory and capable of foraging over wider areas" (page 31).

208. The EU agrees and observes that this supports the EU's position that a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits because: (i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent that there is a localised depletion of sandeel and that the relevant predators for which sandeels comprise a substantial proportion of their diet cannot forage outside of any such locally depleted area; and (ii) the

only predators for which sandeels comprise a substantial proportion of their diet and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes **[Transcript Day 1, page 10, line 14 to page 12, line 5; page 145, line 12 to page 153, line 15; EU's response to additional question 4, paragraphs 98-101]**.

209. Second, regarding the foraging range of chick-rearing seabirds, the UK again refers to the evidence[43] that was not part of the advice that the UK identified as the basis for the measure. The EU therefore refers the Tribunal to its oral submissions **[Transcript Day 1, pages 100 and 101]** and to footnote 14 of its written response to the Tribunal's questions in which the EU has already explained why the UK's argument that the foraging ranges of chick-rearing black-legged kittiwakes cover most of the UK's EEZ is contradicted by the advice that the UK identifies as the basis for the measure[44] and which shows more limited foraging ranges.

210. Third, the UK argues that "the reference to local food requirements mattering "more" than forage fish (especially sandeel) 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" (pages 30-31).

211. However, as the EU already explained during the hearing,[45] outside of their breeding season, black-legged kittiwakes can forage outside of any locally

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[43] "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)."

[44] See Scottish Scientific Report [Exhibit C-0050, page 51]: "[k]ittiwake have a mean foraging range of 55km and a mean maximum foraging range of 156km (Woodward et al. 2019). For many seabird colonies along the east coast of Scotland, this means that a typical foraging range would not regularly include foraging outside of the existing closed area".

[45] (i) **Transcript Day 1, page 147, line 20 to page 148, line 9**: "Before moving on to the marine mammals, the EU would take this opportunity to react to a point made by the United Kingdom in its Written Submission regarding the protection of seabirds outside of the breeding season, and even for kittiwakes. There, if the Tribunal could just turn back to page 409 of the document in which you are,

depleted area because they are not constrained by the need to return to their nests and feed their young.

212. Fourth, the UK argues (page 31) that, when page 7 of the ICES Technical Service Response refers to "closed sandeel areas" as "one possible example of measures to provide ecosystem services", this is a reference to "the seven sandeel areas into which ICES divides the Greater North Sea" and that "[t]his 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" (ibid).

213. However, contrary to what the UK argues, when page 7 of the ICES Technical Service Response refers to "closed sandeel areas", this is not a reference to "the seven sandeel areas into which ICES divides the Greater North Sea." Rather, as the wording of page 4 of the ICES Technical Service Response confirms,[46] this

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and it's the paragraph that begins "While". So page 409 of the core bundle. It says: "... seabirds are not constrained to feeding around their colonies or provisioning offspring during the non-breeding period ..." So essentially that means they are able to travel further because they do not need to travel back as often to their nests"; and

(ii) **Transcript Day 1, page 152, line 2 to page 153, line 14**: "JUSTICE UNTERHALTER: Can I just ask: among the references you gave us was the dependence that seabirds have; well, their ability to feed outside depleted areas. There seemed to be some qualification around the breeding season, where there was a greater dependency on localisation. Does that make a difference to your analysis or not? MR DAWES: I think the EU's position is: one of the constraints on the foraging range of these nesting seabirds is the fact that during their breeding season, because of where the seabird colonies are, the adults must, when they feed, not only go out and eat sandeel for themselves, but they must also bring back sandeel or other fish to their young, who are in the nests on the coast. So to that extent, yes, there is a difference during the breeding season because -- and that was shown also by some of the slides you were shown this morning -- the foraging ranges are smaller during the breeding season than maybe they are when the adults are not required to bring back the sandeel in order to feed their young. JUSTICE UNTERHALTER: Does that make a difference to the dependence of various species on localised depleted areas? Because I assume that the breeding season is rather critical to the perpetuation and flourishing of the species. So the fact that outside the breeding season they have less dependence would still seem to require careful consideration as to what dependency exists during the breeding season. MR DAWES: But I think to that point, the position would be that to the extent there is a localised depletion, then those seabirds are even more able to travel longer distances; if sandeel is an important part of their diet, they are able to travel even further. And therefore any dependency in the localised area is reduced because the seabirds are able to go even further than during the breeding season, and to obtain sandeel in a wider range of areas, geographically."

[46] "In addition to an overall quota, there are technical regulations on permitted bycatch of non-target species (with gear regulations to reduce the bycatch), and a closed season for Danish vessels (which take approximately ¾ of the catch). There are also several closed areas, giving high levels of protection for specific areas (one on the Dogger Bank and one east of Scotland)" (emphasis added).

is a reference to the existing closed areas within "the seven sandeel areas into which ICES divides the Greater North Sea".

Additional question 12

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?)

214. The EU notes that, in its response to additional question 12, the UK identifies the standard of review by reference to Article 742 TCA which 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."

215. As to the intensity of the review, that must necessarily form part of the Tribunal's objective assessment, the EU understands the UK to insist that this should reflect a high level of deference to the decision-maker.

216. The UK further argues in its response to additional question 12 that:

"[t[he Tribunal should objectively assess 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."

217. The UK places emphasis on the idea that the question is one of "engagement" by the decision maker with "factors relevant to proportionality". This is borne out by the oral submissions of the UK in which it stated that:

> "[i]t would suffice, in my submission, for a party to have regard to the constituent factors that go to proportionality, and think about them in its process, without necessarily applying them" **[Transcript Day 3, page 89, lines 11 to 15]**.

218. As the EU outlined in its response to additional question 12, it considers that the requirement to have regard to the principle of "applying proportionate and non-discriminatory" measures extends beyond the decision-making process. Moreover, even within that process, it is not sufficient for a decision-maker to demonstrate "engagement" by simply referring to relevant factors. There should be evidence that those different factors have both been correctly identified and then weighed and balanced.

Additional question 13

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

219. The EU has three comments on the UK's response to additional question 13.

220. First, the EU takes note that in essence, the UK's primary position is that the terms of Article 494(3) TCA should be understood to reflect a deliberate negotiated outcome to ensure that it would be permissible for a Party to adopt, if it so wished, a fisheries management measure that is disproportionate and discriminatory or both of the above.

221. The EU disagrees. The EU refers to its comments on the UK's written response to advance question 9(a) as regards the relevance of the travaux préparatoires.

222. Second, the UK states that the Tribunal should consider the terms of the draft TCA tabled by the EU. The UK argues that:

> "[t]he 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."

223. As the EU has explained, the travaux préparatoires are a supplementary means of interpretation. However, if such comparisons are considered useful to the Tribunal, the UK's proposal to have total discretion to apply any kind of fisheries management measure in its waters was rejected.

224. Instead, the terms of Article 494(3) TCA, read together with Article 496 TCA, reflect that there should be a weighing and balancing of costs and benefits during the decision-making process taking into account that the output – e.g. the measure decided on which would by design, then be applied - should reflect the principle of "applying proportionate and non-discriminatory" measures.

225. Third, the UK's suggestion that this interpretation has broader ramifications for all other principles does not attach sufficient weight to the choice of the term "applying" which is different to "promoting".

Additional question 14

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

226. The EU makes four comments on the UK's response to additional question 14.

227. First, the UK argues that "this case is very far from arbitrary or peremptory decision-making without due process or without taking into account relevant considerations. Careful and iterative consideration was given over time to the benefits and impacts" (pages 34-35). The EU observes that this is a false dichotomy: it is not because "this case is very far from arbitrary or peremptory decision-making without due process" that this means that "[c]areful and iterative consideration was given over time to the benefits and impacts".

228. Second, regarding the benefits of the sandeel fishing prohibition the UK argues that, since "[t]he 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 (…) 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" (page 35).

229. Again, the EU observes that this is a false dichotomy: it is not because the sandeel fishing prohibition was decided for the purposes of meeting the UK's chosen objective and is "apt" to contribute towards such an objective that the UK was entitled to: (i) overestimate the benefits arising from the measure; (ii) underestimate the costs arising from the measure; and (iii) fail to properly weigh those benefits and costs.

230. Third, regarding the costs of the sandeel fishing prohibition as given effect to in English waters of the North Sea, the UK argues that:

    a. the English consultation documents explained "the anticipated adverse impacts" (page 35) on EU vessels and EU industry;

    b. "[t]he 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" (ibid); and

    c. "as far as reasoning is concerned" (ibid) regarding the adverse impacts on EU vessels and EU industry, this was provided in the De Minimis Assessment [Exhibit C-0044], the ministerial submission of 14 September

2023 [Exhibit R-0077] and the UK Government's response to the consultation [R-0087].

231. Similarly, regarding the costs of the sandeel fishing prohibition as given effect to in Scottish waters, the UK argues that:

a. the partial Business and Regulatory Impact Assessment [Exhibit C-0051] "directly recognised the significance of the EU sandeel fishery (…) and set out benefits and costs against the different management options assessed (…) including the impacts on non-UK vessels" (page 37);

b. those "impacts were also specifically raised" (ibid) in the Ministerial submissions of 6 February 2023 [Exhibit R-0091] and of 27 April 2023 [R-0092]; and

c. "as far as reasoning is concerned" (ibid) regarding the adverse impacts on EU vessels and EU industry, this was provided in the partial Business and Regulatory Impact Assessment [Exhibit C-0051], the final Business and Regulatory Impact Assessment [Exhibit C-0066], the ministerial submission of 14 September 2023 [Exhibit R-0077] and the ministerial submission of 26 January 2024 [R-0098].

232. However, the EU observes that, in all those documents, the UK's position was that the magnitude of the adverse impacts on EU vessels and EU industry could be reduced from what would ordinarily follow from the loss of the right of full access to UK waters of the North Sea to fish sandeel by reference to the proposition that EU vessels prohibited from fishing for sandeel in UK waters of the North Sea, may fish sandeel in EU waters of the North Sea or may fish other stocks in UK waters.

233. As the EU explained in its response to additional question 16, the UK's position is both legally misconceived and factually unsubstantiated:

a. the UK's position is legally misconceived because it was only the economic and social impacts associated with the nullification of the EU's right of full access to UK waters of the North Sea to fish sandeel that the

UK should have identified and weighed against the benefits of the measure; and

b. the UK's position is factually unsubstantiated because there is no evidence on the record allowing the Tribunal to accept the proposition that the adverse impacts on EU vessels and EU industry could be reduced.

234. The UK is therefore wrong to conclude the relevant "impacts were considered" (page 38) and that "the financial impacts are relatively limited" (page 39).

235. Fourth, regarding the weighing of the benefits and costs of the sandeel fishing prohibition, the UK argues that:

a. "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" (page 34);

b. "[o]n the final decision-making" (page 36), "evidence is (…) 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"" (page 38); and

c. while "[t]here is in this case express evidence of such weighing in the submissions to the Minister and Cabinet Secretary" (page 38), "[t]here is no need for the UK to demonstrate precisely 'how' the weighing was done";

236. Taking each of these three points in turn:

a. the English and Scottish consultation exercises carried out in 2023 did not "ensure that a proper weighing and balancing was carried out before the

measure was decided upon", given that, as the EU has already explained,[47] the English and Scottish consultation documents also: (i) overestimated the benefits arising from the measure; (ii) underestimated the costs arising from the measure; and (iii) failed to properly weigh those benefits and costs;

b. not only did the UK fail properly to have "regard to the costs and benefits" (by underestimating the costs and overestimating the benefits of the measure), as the EU has already explained,[48] the UK also failed to undertake correctly the weighing exercise; and

c. not only is there a "need for the UK to demonstrate 'how' the weighing was done"[49], there is no "express evidence of such weighing in the submissions to the Minister and Cabinet Secretary".[50]

Additional question 15

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

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[47] (i) EU Written Submission, paragraphs 707-711; (ii) EU oral submissions **[Transcript Day 1, page 142, line 6 to page 164, line 2];** and (iii) EU written response to the Tribunal's questions, paragraphs 98-101.

[48] (i) EU Written Submission, paragraphs 712-742; (ii) EU oral submissions, Transcript Day 1, page 172, line 13 to page 180, line 4; and (iii) EU written response to the Tribunal's questions, paragraphs 56-60 and 142-155.

[49] (i) EU oral submissions **[Transcript Day 3, page 146, line 4 to page 148, line 1]**; and (ii) EU written response to the Tribunal's questions, paragraphs 143-148.

[50] (i) EU oral submissions **[Transcript Day 1, page 173, line 23 to page 180, line 2]**; and (ii) EU written response to the Tribunal's questions, paragraph 60.

237. Additional question 15 was addressed only to the EU.

Additional question 16

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

238. Additional question 16 was addressed only to the EU.

Additional question 17

For both Parties: What is the relevance of the phenomenon of fisheries displacement, recognised by both Parties, to an assessment of the social and economic costs and benefits of a measure addressing sandeel? For example, the United Kingdom has pointed to the fact that the TACs of sandeel in various sandeel management areas have varied widely over the last 5 years, with the TAC in some years being zero or only a small, monitoring, TAC. In these circumstances, do the Parties acknowledge that fisheries displacement takes place and that this may have economic and social consequences on the relevant fishing and processing industries which may vary from year to year

239. The EU makes two comments on the UK's response to additional question 17.

240. First, the UK argues that fisheries displacement "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" (page 40).

241. However, as the EU has explained in paragraphs 232-233 above, the UK's position that the magnitude of the adverse impacts on EU vessels and EU industry could be reduced from what would ordinarily follow from the loss of the right of full access to UK waters of the North Sea to fish sandeel by reference to the proposition that EU vessels prohibited from fishing for sandeel in UK waters of the North Sea, may fish sandeel in EU waters of the North Sea or may fish other stocks in UK waters is both legally misconceived and factually unsubstantiated.

242. Second, the UK argues that "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" (page 40). The EU has already addressed this argument in paragraph 125 above.

Additional question 18

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

243. The EU notes that the UK's position is that it need not have any regard to the "necessity" of a measure and hence there is "no requirement for the UK to meet any particular standard as regards possible alternative measures."

244. The EU therefore understands the UK's position to be that it has no obligation to engage with the EU's argument that it could have adopted one or more partial closures and that this would have been a alternative proportionate measure. On the UK's logic, the Tribunal need not consider that argument either and therefore, there is no standard of review to apply.

245. The EU disagrees. It refers the Tribunal to its response to additional question 18.

246. The EU acknowledges that "alternative measures" are a device that has been used by WTO Panels and the Appellate Body when assessing the "necessity" of a measure by reference to the standard of whether it is the "least restrictive measure". For the reasons that the EU has outlined, its position is that 'proportionality' is broader than necessity in the sense that a measure might meet the necessity test and fail an assessment of its proportionality. In that sense, it does not imply lesser scrutiny by the Tribunal than would have been the case if the term 'necessity' were deployed. Moreover, it is a feature of the manner in which other Courts have addressed proportionality that they have used alternative measures as a device to consider the proportionality of the measure at issue in the proceedings. Therefore, it is incorrect that the UK can simply ignore the EU's argument in this respect.

Additional question 19

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

247. The EU makes two comments on the UK's response to additional question 19.

248. First, the UK argues that a "prohibition on sandeel fishing in the foraging area of chick-rearing seabirds" (page 42) would not necessarily "be lesser in scale than a prohibition in all UK waters" (ibid) because the UK has "demonstrated

that even if the prohibition was tailored to the foraging range of nesting kittiwakes, that would alone justify a prohibition in all UK waters in the North Sea (see e.g. Day 2, Slide 42)."

249. However, as the EU has already explained in paragraph 209 above, the UK's argument that the foraging ranges of chick-rearing black-legged kittiwakes cover most of the UK's EEZ is contradicted by the advice that the UK identifies as the basis for the measure[51] and which shows more limited foraging ranges.

250. Second, the UK argues that the EU "relies upon an alternative measure that does not pursue the same objective" (page 43).

251. However, as the EU explained in its response to additional question 19, one or more prohibitions on sandeel fishing in the foraging area of chick-rearing seabirds would be sufficient to meet the UK's objective of improving the resilience of sandeel stocks and the wider marine ecosystem in the North Sea area.

Additional question 20

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

252. The EU makes two comments on the UK's response to additional question 20.

[51] See Scottish Scientific Report [Exhibit C-0050, page 51]: "[k]ittiwake have a mean foraging range of 55km and a mean maximum foraging range of 156km (Woodward et al. 2019). For many seabird colonies along the east coast of Scotland, this means that a typical foraging range would not regularly include foraging outside of the existing closed area".

253. First, the EU disagrees with the UK's position that the "precautionary approach to fisheries management" in Article 495(1)(b) TCA has a more specific meaning than the "precautionary approach" or "precautionary principle" (see the EU's comments on the UK's response to advance question 9(e) above).

254. Second, regarding the UK's argument that there are no procedural requirements in relation to the precautionary approach to fisheries management under Heading Five of Part Two TCA, as the EU explained in its response to additional question 20, this is a hypothetical issue in this dispute because the UK failed to base its measure on advice that it could reasonably have been obtained.

Additional question 21

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

255. The EU makes three comments on the UK's response to additional question 21.

256. First, the UK argues that UNCLOS and UNFSA have no bearing to this dispute. In response, the EU refers to Article 493 TCA, and notes that UNCLOS and UNFSA are among the rules of international law applicable to relations between the Parties and which hence provide context for interpreting Article 496 TCA.

257. Second, the EU agrees with the UK that the term 'shared stock' is defined in Article 495(1)(c) TCA and that sandeel is a shared stock for the purpose of the TCA.

258. Third, while the EU agrees with the UK that a Party to the TCA may decide on fisheries management measures for shared stocks such as sandeel, and that those measures must be consistent with Article 496 TCA, read together with Article

494 TCA, the EU adds that a Party must also take into consideration the terms and rationale of Annex 38 TCA that provides for full access to waters to fish each and every shared stock for which a TAC has been agreed, including sandeel.

Additional question 22

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

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

259. In its written response to the Tribunal's additional question 22, the UK makes two alternative points:

a. it does not understand the EU to have argued that there is a separate breach of Article 2(1)(a) of Annex 38 TCA which is not consequential on its Claims 1 and 2; or

b. in the event that the EU has sought to raise a separate non-consequential breach of Article 2(1)(a) of Annex 38 TCA, the EU is wrong to do so.

260. The UK is correct in its understanding. The EU does not argue that there is a separate breach of Article 2(1)(a) of Annex 38 TCA which is not consequential on Claims 1 and 2.

261. The UK's explanation why the Tribunal would have no jurisdiction to consider a separate non-consequential breach of Article 2(1)(a) of Annex 38 TCA, and why reliance on Annex 38 TCA to establish a separate breach would add nothing to the analysis, is therefore irrelevant to the present dispute.

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

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