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")

SUPPLEMENTARY WRITTEN SUBMISSION OF THE EUROPEAN UNION

10 February 2025

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I. Introduction

1. Rule 32 of Annex 48 TCA, Point 9.6 of Procedural Order No 1 and Point 9.1 of Procedural Order No 2 provide that each Party "may deliver a supplementary written submission concerning any matter that arises during the hearing".

2. This supplementary written submission is submitted by the EU in accordance with those provisions.

3. Given its narrow focus, the fact that the EU's supplementary written submission does not address all points raised by the UK in its Written Submission, during the hearing or in its written responses to the Tribunal's questions should not be construed as a concession or waiving of its position. The EU maintains its positive case as set down in its own submissions save where it has expressly identified that it agrees with the UK.[1]

II. The legal characterisation of the rights granted under Annex 38 TCA

4. The EU notes that, during the hearing, the UK expressed the following position as regards the legal characterisation of the rights granted to the EU under Annex 38 TCA:

> "As explained already, fundamentally the socioeconomic benefits that arise under the TCA are pursuant to an administrative arrangement, and they are subject, importantly, to fisheries management measures" **[Transcript Day 2, page 190, lines 18 to 22]**.

[1] See **Transcript Day 3, page 125, line 25 to page 126, line 12**: "The European Union maintains its written submissions and its submissions from earlier this week. We endeavoured to assist the Tribunal by identifying point where we can agree with the United Kingdom throughout these proceedings. But given that our rebuttal was comparatively short, the fact that we may not have addressed all points raised by the United Kingdom should certainly not be construed as a concession or waiving of those points. That being said, given that there are further rounds of questions and submissions, the European Union will continue in its endeavour to really focus on matters where there is a disagreement between the parties".

5. Whereas the term 'administrative arrangement' is not defined in the TCA, to the extent that the UK thereby intended to suggest that the provisions of Annex 38 to the TCA are not legally binding, this is manifestly incorrect.

6. Article 2(1)(a) of Annex 38 TCA sets out a binding right of full access to waters to fish each and every stock for which a TAC is agreed. That right cannot be characterised as either non-binding or as being so precarious that it can be unilaterally varied without constraint. This is precisely why the requirements set down in Article 494 TCA, Article 496 TCA and Annex 38 TCA are important limits to the exercise of regulatory autonomy to adopt fisheries management measures.

III. Claim 1: the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and 496(2) TCA, read together with Article 494(3)(c) TCA

III.1. Legal standard

7. The EU focuses its supplementary written submission on two issues that crystallised in the hearing as points of disagreement between the Parties, and which the EU considers will be central to the Tribunal's determination of Claim 1:

(i) the interpretation of the notion of "best available scientific advice"; and

(ii) the extent to which a Party challenging a fisheries management measure before an arbitration tribunal under the TCA is required to adduce its own scientific advice.

III.1.1. Interpretation of the notion of "best available scientific advice"

8. During the hearing, the UK challenged the EU's interpretation of the term "best available scientific advice" in Article 494(3)(c) TCA and in Article 496(2) TCA.

9. The EU recalls that this is the first dispute in which the TCA falls to be interpreted. The principles governing that interpretative exercise are those defined in Article 4 TCA. The EU, in its submissions, followed the interpretative principles under customary international law as codified in the Vienna Convention on the Law of Treaties and which find expression in that provision. It advanced an interpretation of the term "best available scientific advice" in the light of that exercise.

10. In contrast, the UK's approach is essentially to express disagreement with the interpretation proposed by the EU, without offering any alternative elements to assist the Tribunal to interpret the term "best available scientific advice".

11. For instance, during the hearing, the UK described the EU's interpretation of the term "scientific" as an "artificial definition" **[Transcript Day 2, page 68, lines 24 to 25]** and stated:

"'scientific' just means what it says, and there is no basis for the EU's attempt to impose a more restricted and elaborate meaning on it" **[Transcript Day 2, page 68, lines 20 to 23]**.

12. In its Written Submission, the UK challenges other elements of the interpretation proposed by the EU, without offering any alternative interpretation. For example:

- "The EU asserts, for example, that 'best available scientific advice' requires "exclusion of advice that is incomplete or which is not based on the most recent available scientific data." That is wrong" [UK Written Submission, paragraph 203];

- "The proposition that only the most recent available scientific data is to be used to the exclusion of advice based on any other data is also wrong." [UK Written Submission, paragraph 203.3];

- "In the Whaling Case, the ICJ rejected Australia's contention that in order to constitute "scientific research" under the International Convention for the Regulation of Whaling, the research had to meet specific characteristics (…)

That approach is also appropriate in the present fisheries context" [UK Written Submission, paragraph 211.1]; and

- "The EU is also wrong to suggest that 'scientific' advice should be interpreted according to the "usual practice" of science in the context of fisheries, which the EU posits involves "large amounts of data and the ability to create and apply models so as to arrive at objectively verifiable and valid conclusions" [UK Written Submission, paragraph 211.3].

13. In other respects, the UK does not appear to take a position at all. For instance, at the hearing, the UK stated that it:

"doesn't have any particular objection to methodological rigour being required" **[Transcript Day 2, page 72, lines 16 to 17]**.

14. The UK relies, therefore, on a primarily negative interpretation that denies the relevance of elements proposed by the EU and which is based on an assertion that the term "best available scientific advice" pursuant to Article 494(3)(c) and Article 496(2) TCA means "something else". The contours of that "something else", are, however, largely undefined.

15. The EU considers this to be problematic. First, it does not assist the Tribunal in the process of identifying how this term should be understood. Second, it reflects more generally that the UK seeks to have a broad and uncharacterised definition of a term which is one of the core constraints on the exercise of regulatory autonomy when deciding on fisheries management measures under Heading Five of Part Two TCA. Given the role of this requirement in the overall structure of the provisions at the core of this dispute, the EU insists that some precision is required.

16. One point on which there is a clear disagreement between the Parties concerns the meaning to be attributed to the term "available" and the extent to which it imposes a burden on a Party to obtain other scientific evidence or information that would, if used, lead to a higher quality of "scientific advice".

17. According to the UK, its "principal point is that "available" means already existing" **[Transcript Day 2, page 80, lines 24 to 25]**. Whilst the UK then accepts (following a question from the Tribunal) that "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," it does not concur with the EU's position that within the notion of "available" is evidence that is "reasonably obtainable".[2]

18. It appears therefore, that the UK's position is that scientific advice on which a measure is based can be dissociated from existing scientific evidence.[3] This interpretation significantly weakens the relevance of science-based decision-making to which Heading Five of Part Two TCA reverts on three occasions, namely in Article 494(3)(c) TCA, Article 496(2) TCA and Article 498(2)(a) TCA. For that reason, this narrow interpretation should be rejected. Parties must make reasonable efforts to obtain the best available scientific advice in light of existing scientific evidence.

III.1.2. Is there a requirement for a Party challenging a fisheries management measure to adduce its own scientific advice?

19. The second point concerns the UK's argument that, in order to challenge a fisheries management measure, a Party must adduce its own scientific advice. The UK described the fact that the EU had not adduced its own model as "dispositive" of Claim 1.[4]

20. In a similar vein, during the hearing, the UK stated:

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[2] For the EU position, see **Transcript Day 1, page 46, lines 1 to 17**.

[3] EU's written response to advance question 8(a), paragraph 34.

[4] See **Transcript Day 2, page 2, lines 1 to 5**: "The EU puts forward no other available scientific advice, let alone any better scientific advice, concerning the same issue. That, members of the Tribunal, is dispositive of the claim under Article 496(2) of the TCA."

- "The difficulty for the EU in this case is that they are not saying there's some other body of science with which the science that the UK relied on is competing, and that other body of science is better. That's the essential problem with the EU's case" **[Transcript Day 2, page 74, lines 1 to 4]**; and

- "But once something is over that threshold, what the EU is asking the Tribunal to do is, as non-scientists, to look at a body of scientific work and say: this is so lacking in methodological rigour that it doesn't constitute "science", and therefore can't be "best available science", without providing the Tribunal with a competing body of evidence or an expert scientific witness or other scientific documents on which it relies" **[Transcript Day 2, page 75, lines 11 to 20]**.

21. As to the evidential burden, the UK also stated that:

"the EU's argument fails at an anterior point, and that is because, first, the EU has not identified any superior ecosystem model of the North Sea which was available to the United Kingdom at the time that the English scientific report was produced" **[Transcript Day 2, page 107, line 22 to page 108, line 2].**

22. As the EU explained in the hearing, it disagrees with the proposition that this is an "anterior" point which is "dispositive":

- "It cannot be right that under the TCA a party is precluded from challenging the consistency of a measure on the basis of Article 496(2) unless it adduces another model or alternative piece of scientific advice which it positively asserts is better scientific advice" **[Transcript Day 3, page 8, lines 14 to 23]**; and

- "On this logic, even if there were evident flaws in the scientific advice a measure is purportedly based upon, a party would be required to produce its own scientific advice on the same issue simply to be able to claim a breach" **[Transcript Day 3, page 9, lines 4 to 8]**.

23. The EU makes the following two further submissions in this regard.

24. First, Article 496(2) TCA obliges Parties to base fisheries management measures on the "best available scientific advice", but this obligation applies to

the Party deciding on a measure rather than to the Party challenging that measure.

25. Second, 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 **[Transcript Day 3, page 9, line 20 to page 10, line 21]**.

26. The UK's position does not reflect the distinction between a burden of proof in terms of which Party must prove a claim and the evidential burden for meeting the standard of proof.

27. The EU may bring a claim challenging the consistency of a measure with the obligations under Article 496(2) TCA, read together with Article 494(3)(c) TCA, by identifying evident methodological flaws in the scientific advice relied upon and explaining why other, better, scientific advice could reasonably have been obtained based on existing scientific evidence. This is one permissible means through which the EU may discharge its burden of proof.

III.2. Application of the legal standard

28. The various points that will require factual determination by this Tribunal in relation to Claim 1 were discussed in detail during the hearing and in the Tribunal's questions.

29. The EU will, therefore, simply recall two overarching points that the exchanges in the hearing confirmed as points of disagreement.

30. First, the UK sought to justify a number of the flaws and caveats identified by the EU in the model used in the English Scientific Report by the fact that they were "openly identified" **[Transcript Day 2, page 79, line 5]**, "described transparently" **[Transcript Day 2, page 120, line 9]** and "transparently identified" **[Transcript Day 2, page 131, line 9]** by the authors of the English Scientific Report.

31. However, what the authors of the English Scientific Report did not "openly" and "transparently" describe and identify is that they could reasonably have corrected those flaws and caveats in light of existing scientific evidence. In particular, as the EU explained during the hearing and in its written response to the Tribunal's questions, the authors of the English Scientific Report could reasonably have parameterised the model to take into account both sandeel size-structure i.e. the age of sandeel consumed by predators **[Transcript Day 3, page 13, line 4 to page 16, line 6]** and predator spatial distribution i.e. the location of sandeel predators **[Transcript Day 3, page 16, line 7 to page 18, line 16]**.

32. The failure of the authors of the English Scientific Report to parameterise correctly the model, coupled with the other flaws and caveats identified by the EU, are material for three reasons.

33. In the first place, the model used in the English Scientific Report sought to simulate average biomass responses in all UK waters of the North Sea and not only English waters of the North Sea **[Transcript Day 1, page 34, lines 14 to 19]**.

34. In the second place, a correctly parameterised model would have likely simulated decreased average biomass responses in all UK waters of the North Sea for the 12 identified "commercial stocks and guilds" in Table 7 of the English Scientific Report **[Transcript Day 1, page 97, lines 3 to 7]**.

35. In the third place, the flaws and caveats that the EU has identified in the model used in the English Scientific Report are relevant to both the English and the Scottish parts of the measure**.** This is because:

    - the decision-maker relied on the simulated biomass responses generated based on the model used in the English Scientific Report [Exhibit R-0077, paragraphs 13-14]; and

    - the decreased average simulated biomass responses from the sandeel fishing prohibition would need to be read in light of the remainder of the scientific

advice that the UK has identified as the base for the measure (the ICES Technical Service Response, the literature review in the English Scientific Report and the Scottish Scientific Report). The remainder of that advice essentially indicates 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 142, line 7 to page 153, line 5; Transcript Day 3, page 29, line 25 to page 30, line 25]**.

36. Second, the UK has argued that the Tribunal should consider "holistically" **[Transcript Day 2, page 34, lines 5 to 11; page 77, line 16; and page 142, lines 23 to 24]** the scientific advice that the UK has identified as the base for the measure. The EU agrees and considers that the need for a holistic assessment is particularly necessary, given that the flaws and caveats that the EU has identified in the model used in the English Scientific Report are relevant to both the English and the Scottish parts of the measure **[see EU response to additional question 4].**

III.3. Conclusion

37. The EU maintains its position that the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(c) TCA.

IV. Claim 2: the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and 496(2) TCA, read together with Article 494(3)(f) TCA

IV.1. Legal standard

38. The EU addresses two points that were raised in relation to the legal standard as applicable to claim 2.

IV.1.1. The standard of review when considering whether a party decided on a measure having regard to the principle of applying proportionate measures

39. During the hearing, one issue that was raised was the standard against which the Tribunal should consider what would constitute a "proportionate" measure. This is closely related to the question as to the intensity of the Tribunal's review when considering claim 2.

40. As to the standard, the Parties agree that there should be a weighing and balancing exercise in the framework of a proportionality assessment.

41. As to the intensity of the Tribunal's review, it is common ground between the Parties that the task of the Tribunal as defined under Article 742 TCA is to objectively assess the matter before it.[5] The UK also indicated that:

> "if one is considering the United Kingdom's test of "have regard", that clearly requires the Tribunal to consider the information on the record, including the weighing that was done by the United Kingdom; and we don't shy away from such scrutiny, we invite it" **[Transcript Day 3, page 96, line 23 to page 97, line 3]**.

[5] This language mirrors language in the WTO Dispute Settlement Understanding, Article 11. In that context, it has been considered that this is a general framework which neither establishes *de novo* review nor total deference so far as fact finding is concerned.

42. This does not, however, fully answer the question of how the Tribunal is to determine whether the sandeel fishing prohibition is consistent with the principle of applying a 'proportionate' measure.

43. Moreover, the requirement in Article 742 TCA that a Tribunal objectively assess the matter before it does not articulate the intensity of that review and does not identify the margin of deference to be accorded to the Party deciding on a fisheries management measure. In this supplementary written submission, the EU addresses both of these aspects.

44. As to how this Tribunal is to assess whether or not the sandeel fishing prohibition is "proportionate", in response to questions from the Tribunal during the hearing, the EU stated:

> "So what we tried to address is to say that we are not arguing that you have to have equality between the costs and the benefit; it's really a question of examining the delta between the two. Is there such a large distinction that one cannot reasonably conclude that the measure is commensurate, proportionate, that there is an imbalance that is so great -- it's about the magnitude of the imbalance between the rights and the benefits" **[Transcript Day 1, page 188, lines 8 to 16]**.

45. The UK stated:

- "Effectively, the UK would say the question is: are the costs out of all proportion to the benefits?" **[Transcript Day 2, page 189, lines 9 to 10; see also page 190, line 14: "It's not out of all proportion"]**; and

- "First of all, they did not address that if the question for the Tribunal is adherence to a standard of proportionality, that the standard of review for assessing that is a standard -- I think as we put it -- out of all proportion, or clearly disproportionate" **[Transcript Day 3, page 75, lines 21 to 25]**.

46. The EU also notes that, in its Written Submission, the UK refers to a standard of whether a measure is "clearly disproportionate" by reference to Air Service

Agreement of 27 March 1946 between the United States of America and France, (1978) XVIII RIAA 417, paragraph 83 and to judgments handed down by the Supreme Court of the United Kingdom [UK Written Submission, paragraphs 354.4, 385-386 and 390]. The UK also refers to the standard that has been applied in the context of EU law, namely that a measure should be "manifestly inappropriate" [UK Written Submission, paragraphs 355.5 and 385-386]. Another formulation of the standard that appears in the UK's Written Submission is that the adverse impacts of the measure should not "clearly outweigh" the benefits [UK Written Submission, paragraph 396].

47. These formulations reflect that there is consensus between the Parties that:

- the Tribunal is not tasked to assess whether the 'costs' of the sandeel fishing prohibition are equal to the 'benefits'; and

- a measure is disproportionate when the imbalance between costs and benefits is 'clear'.

48. This is encapsulated in the EU's position that the notion of 'proportionate', which has also been associated with 'commensurability', recognises that costs and benefits will be on a scale and what is to be assessed is the delta between the two. As the EU acknowledged during the hearing, the costs and benefits may not lend themselves to being quantified in the same manner [**Transcript Day 1, page 135, lines 5 to 9**]. This is not an issue that is unique to the present dispute but is one which has confronted other courts and tribunals applying a proportionality standard. Hence, this in itself cannot preclude the Tribunal from carrying out the weighing and balancing exercise.

49. As to the intensity of review, during the hearing, the UK stated that:

"the context in which [proportionality] appears in EU law and elsewhere -- and really, with proportionality, one finds proportionality either in EU law or in the human rights context, are the primary ones -- are principally vertical relationships between states and individuals, i.e. public law, human rights. These are situations where the state is obliged to uphold rights unless the

restriction is strictly necessary. The same kind of considerations simply do not apply in an inter-state context, where two states or parties are sovereign equals in a horizontal relationship. So that reason makes it additionally inappropriate to take domestic law concepts applicable to individuals or fundamental rights and to try to import them into inter-state relations" **[Transcript Day 3, page 93, lines 2 to 17]**.

50. In the first place, the EU does not disagree with the UK (as a general proposition) that 'proportionality' as a principle has been used in different contexts, including in the context of claims brought by individuals invoking their fundamental rights[6] and, in EU law, in the context of actions related to what the UK has described as the "vertical relationship" with Member States.[7]

51. Proportionality has also, however, been used in EU law as an analytical framework to resolve other claims requiring a 'weighing and balancing' of 'competing' rights. Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*, EU:C:1990:391 [Exhibit CLA-0066] is an example of this. In those proceedings, one of the grounds on which it was queried whether an EU Directive prohibiting the use of certain hormones violated the principle of proportionality was that "the prohibition in question entails excessive disadvantages, in particular considerable financial losses on the part of the traders concerned, in relation to the alleged benefits accruing to the general interest.[8]. In addressing this aspect of the prohibition, the Court of Justice of the European Union held that:

[6] UK Written Submission, paragraph 349: "For example, proportionality features in domestic human rights and other public law as a means to judge the lawfulness of restrictions the State can place on individuals' rights, which rights the State has committed to ensuring except where, and only insofar as, restrictions are necessary."

[7] UK Written Submission, paragraph 349: "the function that proportionality serves in the vertical relationships between State and individual, and the EU and its Member States, in light of the rights and obligations of those actors."

[8] Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*, EU:C:1990:391 [Exhibit CLA-0066], paragraph 12.

"By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."[9]

52. Therefore, the EU disagrees that these applications of proportionality can be disregarded because the TCA is an Agreement between the EU and the UK.

53. It is precisely because there are different contexts in which a principle of proportionality is applicable that both the Court of Justice of the European Union and the Supreme Court of the United Kingdom have concluded that the intensity of review is context-specific.[10] Within other judicial fora, including WTO dispute settlement, the intensity of review has also been considered to be variable depending on the Agreement and the provisions at issue in a given dispute. In other words, the intensity of review is a function of the substantive provisions of the specific Agreement at issue in a dispute as well as the specific claim(s) put forth by a complainant.

54. In general terms, factors which have been considered to inform the intensity of review include: (a) the technical or expert nature of a decision (in which case a wider margin of deference is accorded to a decision-maker); (b) the extent to which a decision-maker is required to follow a defined process to reach factual findings (e.g. a prior investigation); and (c) the nature of the rights at issue (where claims founded on violations of human rights have typically attracted more intense review).

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[9] Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*, EU:C:1990:391 [Exhibit CLA-0066], paragraph 13.

[10] The EU observes that although the UK objects to the Tribunal considering the domestic law of the parties when interpreting the TCA [UK Written Submission, paragraph 342], the UK has referred to the approach that has been applied by the Supreme Court of the United Kingdom in its own Written Submission – see UK Written Submission, footnote 657.

55. There is no reason to conclude, however, that because the term 'proportionate' is used in an Agreement between two sovereign parties and because of regulatory autonomy, that the degree of deference to the decision-maker should preclude the Tribunal from closely scrutinising how the weighing and balancing was carried out in this instance.[11]

56. The EU recalls that the role of the Tribunal is to contribute to the "correct interpretation and application" of the TCA.[12] This role is attributed to the Tribunal to the exclusion of the national courts of either Party.

57. Article 734 TCA provides:

> "The objective of this Title is to establish an effective and efficient mechanism for avoiding and settling disputes between the Parties concerning the interpretation and application of this Agreement and supplementing agreements with a view to reaching, where possible, a mutually agreed solution."

58. The dispute settlement mechanism in Part Six TCA was therefore, established precisely to ensure compliance with obligations under the Agreement and as an alternative to dispute settlement within the judicial system of either Party.[13] This function should inform the Tribunal's overall approach.

59. Moreover, in the specific context of this dispute, it should be noted that Heading Five of Part Two TCA does not set down detailed provisions stipulating

[11] Indeed, the reasoning of the Court of Justice of the European Union in Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*, EU:C:1990:391 [Exhibit CLA-0066] has also been considered by the Supreme Court of the United Kingdom. See Secretary of State for Work and Pensions (Appellant) v Gubeladze (Respondent) 2019] UKSC 31, paragraph 58 to 59 citing R (on the application of Lumsdon and others) (Appellants) v Legal Services Board (Respondent). [2015] UKSC 41, [Exhibit CLA-0067 and EU Written Submission, paragraph 629].

[12] Recital 5 TCA states: "CONSIDERING that in order to guarantee the efficient management and correct interpretation and application of this Agreement and any supplementing agreement, as well as compliance with the obligations under those agreements, it is essential to establish provisions ensuring overall governance, in particular dispute settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom, as well as the United Kingdom's status as a country outside the European Union." See Exhibit CLA-0001.

[13] See also Article 754(5) TCA. The EU recalls that, prior to its withdrawal from the EU as regards disputes concerning fisheries, the UK was subject to the jurisdiction of the Court of Justice of the European Union.

minimum procedural guarantees that a Party deciding on a fisheries management measure must follow. This is a factor which militates in favour of greater intensity of review by this Tribunal.[14] Moreover, the requirement to make an "objective assessment" cannot be understood to preclude the Tribunal from assessing whether the reasoning of a Party deciding on a fisheries management measure is coherent and internally consistent, or from carrying out an in-depth examination of the explanations provided.

IV.1.2. The role of an 'alternative proportionate measure' as an analytical tool

60. The Parties disagree on the role of an 'alternative proportionate measure' as an analytical tool that may be advanced by a complaining Party asserting that a measure is not 'proportionate'.

61. During the hearing, the EU set out its position in the following terms:

> "as to the existence or otherwise of another measure, the European Union has advanced one. The UK must rebut the European Union's argument that this would be a proportionate alternative. In response to a question, the European Union acknowledged that it has been recognised by the Appellate Body, in the context of a WTO dispute looking at necessity, that there could be circumstances in which a tribunal might not have to consider an alternative measure. This was considered, for instance, to be the case where there is no restriction on trade. But this does not mean that in this claim it is heuristic for the Tribunal, or indeed the United Kingdom, to consider the EU's claim that an alternative proportionate measure was reasonably available" **[Transcript Day 3, page 28, lines 3 to 17]**.

[14] This is consistent with the approach that has been followed in the context of the WTO where greater deference is accorded to national authorities under the Anti-Dumping Agreement than under the GATT 1994, in part because the Anti-Dumping Agreement includes provisions that govern the conduct of an investigation. The EU recalls that Article 742 TCA mirrors the language used in Article 11 of the DSU.

62. The UK expressed its position as follows:

> "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. One can see the difficulty with that particularly clearly on the facts of this case. The EU just says that it could have tolerated one or more partial closures based on the foraging range of chick-rearing seabirds. As I emphasised yesterday, it doesn't say how many closures, of what size, or based on the foraging range of which kinds of seabirds. The EU can't just lob something of that generality over the net and expect the UK to disprove that it would have been enough to satisfy the UK's objective" **[Transcript Day 3, page 41, line 13 to page 42, line 1]**.

63. The UK, therefore, takes issue both with the concept that if a party "lobs [an alternative measure] over the net", the burden of proof shifts, and with the degree of precision with which an alternative proportionate measure is to be described.

64. As to the conceptual role of an alternative measure, the EU recalls its response to questions from the Tribunal during the hearing: this is a useful device that has been used extensively in the framework of necessity tests precisely because it is a mechanism through which to assess this question of whether there is a less restrictive measure available. That same logic applies to proportionality: is there another measure available that would be proportionate?[15]

65. It is not a question of pointing to an alternative that would be "more proportionate". This is an analytical device that allows a Party to show that there is another measure which would still contribute to the legitimate regulatory objective but where the imbalance between the costs and the benefits would not be so extreme. This provides a framework to demonstrate that the measure at issue (i.e. the sandeel fishing prohibition) is disproportionate.

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[15] See, for instance, **Transcript Day 1, page 136, lines 11 to 21**.

66. This further reflects that 'applying proportionate and non-discriminatory' measures is formulated as a principle. A principle may be complied with to a greater or lesser extent. However, a decision-maker must justify decisions as regards the application of a principle by reference to legal reasoning. In the framework of Heading Five of Part Two TCA, the reference to proportionate measures reflects that, prior to exercising its discretionary power to adopt a fisheries management measure, a Party must balance all relevant interests and only use its regulatory autonomy (and hence its discretionary power) in the light of this balancing exercise. A Tribunal must also provide reasons for its rulings on review.

67. As to the degree of precision with which an alternative measure should be articulated, the EU recalls that its position is that the conceptual difference between a necessity standard and a proportionality standard is precisely that the question is not whether the alternative measure meets the objective to the same degree. Proportionality may require both the degree of contribution to the objective and the adverse impacts to shift down the scale.[16] It is sufficient for a Party to identify, as the EU has done, a measure which if properly designed and applied could be a proportionate means to pursue the regulatory objective.

IV.2. Application of the legal standard

68. The EU maintains its position that the sandeel fishing prohibition is inconsistent with the requirement to have regard to the principle of applying proportionate measures. This is because of the magnitude of the delta between the costs and benefits of the measure. Even were the Tribunal to adopt the formulation espoused by the UK, the sandeel fishing prohibition would in any event be "clearly disproportionate".

[16] See **Transcript Day 3, page 27, lines 16 to 20**: "There is no textual or contextual basis for construing the term "proportionate" to be even less demanding than the term "necessary" has [been] interpreted to be under the GATT 1994."

69. First, the UK clearly overestimated the ecosystem benefits of the sandeel fishing prohibition. This clear overestimation is confirmed by the following:

    a. the flaws and caveats in the model used in the English Scientific Report deprive the model and the simulated biomass increases generated based on the model of the necessary scientific and methodological rigour in order to be considered the "best available scientific advice" **[Transcript Day 1, page 154, line 2 to page 155, line 2**; **Transcript Day 3, page 29, lines 17 to 24]**. To the extent that a measure is not based on the "best available scientific advice", this is a factor that is also relevant to the assessment of whether the measure is "proportionate" [EU Written Submission, paragraph 705]; and

    b. the fact that the remainder of the scientific advice that the UK has identified as the base for the measure (the ICES Technical Service Report, the literature review in the English Scientific Report and the Scottish Scientific Report) essentially indicates that: (i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent 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 142, line 7 to page 153, line 5; Transcript Day 3, page 29, line 25 to page 30, line 25]**; and

    c. the lack of any real or pressing need to act, which can be contrasted with the relevant context in which the measure was adopted, namely the adjustment period established by Annex 38 TCA **[Transcript Day 1, page 155, line 8 to page 162, line 8; Transcript Day 3, page 31, lines 1 to 24]**.

70. Second, the UK clearly underestimated the economic and social impacts of the sandeel fishing prohibition on EU vessels and EU industry. This clear underestimation is confirmed by the fact that the UK impermissibly (both as a matter of law and of evidence) considered that 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 were mitigated by the ability of EU vessels to access UK waters of the North Sea to fish stocks other than sandeel and to access EU waters of the North Sea to fish sandeel **[Transcript Day 1, page 164, line 7 to page 171, line 25; Transcript Day 3, page 32, line 3 to page 34, line 3]**.

71. Third, the UK clearly failed to weigh properly the benefits and the costs of the sandeel fishing prohibition. This clear failure is confirmed by:

    a. the UK's failure to estimate properly what was to be weighed (see above); and

    b. the lack of any proper weighing of the overestimated ecosystem benefits and of the underestimated economic and social impacts on EU vessels and EU industry **[Transcript Day 1, page 172, line 14 to page 180, line 4; Transcript Day 3, page 34, line 4 to page 34, line 3]**.

72. Had the UK properly estimated the costs and benefits to be weighed and had the UK properly weighed those costs and benefits, the only conclusion could have been that the magnitude of the benefits was clearly disproportionate to the costs.

73. Fourth, the conclusion that the magnitude of the benefits was clearly disproportionate to the costs is confirmed by the availability of an alternative proportionate measure **[Transcript Day 1, page 180, line 9 to page 182, line 9]**.

74. Such a measure would have contributed significantly towards the legitimate regulatory objectives pursued by the UK while impairing to a significantly lesser degree the EU's right of full access to UK waters of the North Sea to fish sandeel [EU Written Submission, paragraphs 746-747]. Therefore, had the costs

and benefits of that alternative measure been properly weighed and balanced, the delta between the two would have been significantly lower than that which applies to the sandeel fishing prohibition. This demonstrates that the measure decided on was clearly disproportionate.

75. During the hearing, the UK argued that the EU has neither "defined" **[Transcript Day 2, page 180, line 11]** the spatial scope of its alternative measure nor explained why it would result in something "meaningfully smaller than a full prohibition" **[Transcript Day 2, page 180, line 15]**. The UK seeks to invoke an alleged lack of clarity as a ground to simply ignore the relevance of this alternative as a device that demonstrates the disproportionate character of the measure that the UK decided on and then applied.

76. The alternative measure consists of one or more spatially limited prohibitions on fishing within the foraging ranges of chick-rearing black-legged kittiwakes. This would still contribute significantly to the objective given that, as the EU has explained, they are the only predators for which sandeels comprise a substantial proportion of their diet and that cannot forage outside of any locally depleted area during their breeding season **[Transcript Day 1, page 142, line 7 to page 153, line 5; Transcript Day 3, page 29, line 25 to page 30, line 25]**.

77. The scope of a measure coinciding with the foraging range of chick-rearing black-legged kittiwakes would result in something "meaningfully smaller than a full prohibition". This is because, contrary to what the UK argues, the foraging ranges of chick-rearing black-legged kittiwakes do not cover most of the UK waters of the North Sea **[Transcript Day 1, page 100, line 23 to page 101, line 6**; footnote 14 of the EU's written response to the Tribunal's questions].

78. The UK was therefore required to rebut the EU's argument that its alternative would be a proportionate measure, in particular given the recognition by the authors of the English Scientific Report [Exhibit R-0076, pages 6-7] that "[b]enefits of the fishery closure may therefore be disproportionately greater in areas with greater predator dependence or forage overlap" **[Transcript Day 1, page 181**, **line 8 to page 182, line 4]**. The UK has however failed to do so.

IV.3. Conclusion

79. The EU maintains its position that the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(f) TCA.

V. Claim 3: the UK has acted inconsistently with its obligations under Article 2(1)(a) of Annex 38 TCA

V.1. Legal standard

80. The EU focuses on the following two points that arose during the hearing to assist the Tribunal in determining Claim 3.

81. The first point relates to the legal nature of Annex 38 TCA. As the EU noted during the hearing, Annex 38 is a Protocol of the TCA which forms an integral part of the Agreement (Article 778(1) TCA) and of Heading Five of Part Two TCA, in particular (Article 778(2)(m) TCA) **[Transcript Day 1, page 191, lines 23 to 25**; EU's written response to the Tribunal's questions, paragraph 13].

82. It must hence be accorded the required weight by the Parties, as a 'Protocol on access to waters', with legally binding provisions through which each Party grants the vessels of the other Party full access to waters to fish for each and every stock listed in Annex 35 and for which a TAC has been agreed.

83. The rights and social and economic benefits that arise under Annex 38 TCA are not the result of an 'administrative arrangement' as argued by the UK[17]. The EU assumes that the UK did not intend to use the term to give Annex 38 TCA a similar status to the various 'administrative arrangements' mentioned in other

[17] See **Transcript Day 2, page 190, lines 15 to 25:** "Second point, on impacts: the impairment of the right of full access under Annex 38, which was very heavily emphasised by the EU, it's there, but it doesn't add significantly here. As explained already, fundamentally the socioeconomic benefits that arise under the TCA are pursuant to an administrative arrangement, and they are subject, importantly, to fisheries management measures. They are subject to those measures. So if the UK's analysis is right on that, that point doesn't materially add, despite the EU's continuing returning to it**".**

provisions of the TCA and which refer to arrangements of an administrative nature between relevant, sector specific, competent authorities of the Parties.[18]

84. The second point relates to the nature of the rights of the Parties under Annex 38 TCA. Those rights are specific to the adjustment period, provide for full reciprocal access to waters of the other Party to fish, and are focused on the social and economic benefits that vessels derive from the certainty of "a further period of stability" during which fishers continue to access waters of the other Party as before the entry into force of the Agreement.

85. While the right to full access to fish under Article 2(1)(a) of Annex 38 TCA does not systematically prevail over the right of a Party to adopt fisheries management measures, the nature of the rights of the other Party under Annex 38 TCA must be considered when assessing whether a measure decided on and applied during the adjustment period is justifiable.

V.2. Application of the legal standard

86. The UK's position that it "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" [UK written response to the Tribunal's advance question 4, page 4] and that "fundamentally the socioeconomic benefits that arise under the TCA

[18] See, for example:

(i) Article 318(1) TCA: "The Parties shall ensure that the Agency for the Cooperation of Energy Regulators and the regulatory authority in the United Kingdom designated in accordance with Article 310 develop contacts and enter into administrative arrangements as soon as possible in order to facilitate meeting the objectives of this Agreement. The contacts and administrative arrangements shall cover at least the following areas (...)".

(ii) Article 435(6) TCA: "The Parties agree to cooperate on security inspections undertaken by them in the territory of either Party through the establishment of mechanisms, including administrative arrangements, for the reciprocal exchange of information on results of such security inspections. The Parties agree to consider positively requests to participate, as observers, in security inspections undertaken by the other Party".

(iii) Article 577(1) TCA: "The details of cooperation between the United Kingdom and Europol, as appropriate to complement and implement the provisions of this Title, shall be the subject of working arrangements in accordance with Article 23(4) of the Europol Regulation and administrative arrangements in accordance with Article 25(1) of the Europol Regulation concluded between Europol and the competent authorities of the United Kingdom".

are pursuant to an administrative arrangement" **[Transcript Day 2, page 190, lines 19 to 21]** is a clear indication that the UK did not give the rights of the EU resulting from Annex 38 TCA the appropriate – or even any – weight when determining whether the sandeel fishing prohibition was a justifiable nullification of those rights.

87. In doing so, the UK undermines the specific nature of the EU's rights in Annex 38 TCA. This is further indication that the weighing and balancing exercise by the UK when deciding on and applying the sandeel fishing prohibition does not consider the nature and the full spectrum of the EU's rights under the Agreement.

V.3. Conclusion

88. The EU maintains its position that, consequent to the inconsistency of the sandeel fishing prohibition with Articles 496(1) and (2) TCA, read together with Articles 494(3)(c) and 494(3)(f) TCA, the UK is in breach of its obligation to grant "full access to fish" sandeel in its waters as set down in Article 2(1)(a) of Annex 38 TCA.

VI. Ruling sought

89. The EU maintains its request that the Arbitration Tribunal issue a ruling in accordance with Article 745 TCA, finding that:

— the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(c) TCA;

— the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(f) TCA; and

— the UK is in breach of its obligation to grant full access to its waters to fish in accordance with Article 2(1)(a) of Annex 38 TCA.

All of which is respectfully submitted on behalf of the European Union by:

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