

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

PCA Case No. 2024-45

Permanent Court of Arbitration  
Peace Palace  
The Hague  
The Netherlands

Day 1

Tuesday, 28 January 2025

Before:

DR PENELOPE JANE RIDINGS MNZM  
PROFESSOR HÉLÈNE RUIZ FABRI  
HON JUSTICE MR DAVID UNTERHALTER

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THE EUROPEAN UNION

Complainant

-v-

THE UNITED KINGDOM  
OF GREAT BRITAIN AND NORTHERN IRELAND

Respondent

UK-SANDEEL ARBITRATION

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09:27 1 Tuesday, 28 January 2025  
2 (10.01 am)  
3 THE CHAIRPERSON: Good morning, ladies and gentlemen.  
4 I have the pleasure of opening this hearing of PCA  
5 Case 2024-45 in the case UK-Sandeel, European Union  
6 v The United Kingdom of Great Britain and Northern  
7 Ireland, instituted by the European Union against the  
8 United Kingdom under Article 739 of the Trade and  
9 Cooperation Agreement between the European Union and the  
10 European Atomic Energy Community on the one part, and  
11 the United Kingdom of Great Britain and Northern Ireland  
12 on the other part. I'll refer to this as the "TCA".  
13 I'm joined today by my colleagues and fellow members  
14 of the Arbitration Tribunal: to my left is Professor  
15 H el ene Ruiz Fabri, and to my right is the Honourable  
16 Justice Mr David Unterhalter. My name is Penelope  
17 Ridings.  
18 On behalf of the Arbitration Tribunal, I welcome the  
19 Agents, counsel and delegations of the European Union  
20 and the United Kingdom, and express our gratitude to the  
21 parties for their cooperation in the conduct of these  
22 proceedings.  
23 In accordance with Rule 23 of the Rules of Procedure  
24 for Dispute Settlement under the TCA and Procedural  
25 Orders Nos. 1 and 2, the Arbitration Tribunal shall sit

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10:04 1 that the parties do not envisage a requirement to  
2 protect confidential information.  
3 May I now ask the Agent for each party to introduce  
4 their delegations. First, let me give the floor to the  
5 European Union.  
6 MR DAWES: Thank you, Madam Chair.  
7 Before I introduce the delegation of the European  
8 Union, the European Union would like to first express  
9 its gratitude to the Tribunal for taking up this task in  
10 this first dispute under the Trade and Cooperation  
11 Agreement, or TCA, and the EU would also like to express  
12 its gratitude to the PCA for all its assistance,  
13 including in the organisation of this hearing.  
14 My name is Anthony Dawes. And I will let the other  
15 agents of the European Union who will address the  
16 Tribunal introduce themselves.  
17 MS NORRIS: Good morning. My name is Josephine Norris,  
18 Agent for the European Union.  
19 DR HOFST OTTER: Good morning. My name is  
20 Bernhard Hofst otter, Agent for the European Union.  
21 DR PUCCIO: Good morning. I am Laura Puccio, Agent for the  
22 European Union.  
23 MS GAUCI: Good morning. I am Daniela Gauci, Agent for the  
24 European Union.  
25 THE CHAIRPERSON: Thank you very much.

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10:03 1 from today, 28 January 2025, until 30 January 2025.  
2 Pursuant to Rule 29 of the Rules of Procedure, the  
3 Arbitration Tribunal, in consultation with the parties,  
4 has fixed a schedule for this hearing. At today's  
5 sitting, the European Union will deliver its argument;  
6 tomorrow, the United Kingdom will present its argument;  
7 and on Thursday, we will hear the parties' rebuttal  
8 arguments. In the morning the European Union will  
9 present its reply, and in the afternoon the  
10 United Kingdom will deliver its counter-reply.  
11 Paragraph 8.3 of Procedural Order 2 states that:  
12 "In principle, the entire hearing will be open to  
13 the public."  
14 Accordingly, I note the presence of the members of  
15 the diplomatic corps and the general public who are  
16 observing the hearing in this room, and the  
17 representatives of the press who are following via  
18 livestream in a separate viewing room in the  
19 Peace Palace.  
20 I also note that the procedural order provides that:  
21 "... upon a request from either Party, the  
22 Arbitration Tribunal may hold selected portions of the  
23 hearing in closed session when necessary to protect  
24 Confidential Information."  
25 It is the understanding of the Arbitration Tribunal

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10:05 1 So now can I give the floor to the United Kingdom to  
2 introduce your delegation.  
3 MR JURATOWITCH: Thank you very much, members of  
4 the Tribunal.  
5 My name is Ben Juratowitch. The Agents for the  
6 United Kingdom are Mr Alex Cooke and Mr Steven Fuller.  
7 I am counsel for the United Kingdom, together with  
8 Mr Ned Westaway, Ms Catherine Drummond and  
9 Ms Camille Boileau, also with Mr Pablo Bentes,  
10 Dr Weiwei Zhang and Mr Claude Chase.  
11 The United Kingdom delegation also consists of  
12 a number of representatives of the Government of the  
13 United Kingdom, and they are listed on the sheet that  
14 the Tribunal has.  
15 Thank you very much.  
16 THE CHAIRPERSON: So now I would like to give the floor to  
17 the European Union to proceed with its arguments.  
18 Mr Dawes, you have the floor.  
19 (10.07 am)  
20 Opening statement on behalf of the European Union  
21 MR DAWES: Madam Chair, honourable members of the Tribunal,  
22 after recalling why we are here today, the EU will  
23 identify what it understands, on the basis of the  
24 Written Submissions of the parties, can be considered  
25 agreed facts. The EU will then highlight horizontal

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10:07 1 issues concerning the legal standard, and then the EU  
 2 will address the Tribunal on each of its three claims.  
 3 The EU has set out its arguments in its Written  
 4 Submission. It will therefore use this hearing to focus  
 5 on the core points of disagreement between the parties,  
 6 while maintaining its broader position as set out in its  
 7 Written Submission.  
 8 So why are we all here today? We are here today  
 9 because the UK's prohibition of all sandeel fishing in  
 10 its waters of the North Sea nullifies rights conferred  
 11 on the European Union -- which I will henceforth refer  
 12 to as "the EU" -- pursuant to the "Fisheries" heading of  
 13 the TCA.  
 14 The TCA sets out the terms of the relations between  
 15 the EU and the UK following the UK's withdrawal from the  
 16 EU on 31 January 2020. The "Fisheries" heading of the  
 17 TCA is not the starting point of the fisheries relations  
 18 between the EU and the UK, which have a much longer  
 19 history. The TCA comes after more than four decades of  
 20 the EU and the UK regulating those fisheries relations  
 21 through a Common Fisheries Policy.  
 22 The "Fisheries" heading of the TCA establishes a new  
 23 legal framework regulating those fisheries relations.  
 24 As part of that framework, the TCA provides for  
 25 arrangements, among others, on access to waters to fish.

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10:11 1 nullifies the EU's right of full access to UK waters to  
 2 fish sandeel, and that nullification is inconsistent  
 3 with the UK's obligations under the TCA.  
 4 Although the UK argues in its Written Submission --  
 5 and we will come back to that during the course of the  
 6 hearing -- that EU vessels can continue to access UK  
 7 waters of the North Sea to fish other fish stocks, this  
 8 is not relevant, since the rights at issue in this  
 9 dispute relate specifically to access to UK waters to  
 10 fish sandeel.  
 11 This is not to say that the EU has no broader  
 12 systemic concerns relating to the UK's decision to  
 13 prohibit all sandeel fishing in UK waters of the  
 14 North Sea. As I mentioned, the TCA grants EU vessels  
 15 the right to access waters to fish the EU share of each  
 16 and every stock for which the EU and the UK have agreed  
 17 a quota. And the UK's interpretation of the TCA, if  
 18 accepted by this Tribunal, could allow the UK to nullify  
 19 the EU's rights under the "Fisheries" heading of the TCA  
 20 by prohibiting fishing in UK waters one stock after the  
 21 other.  
 22 The UK has also sought in its Written Submission to  
 23 emphasise the role of regulatory autonomy under the TCA.  
 24 However, this autonomy is not without limits. As the EU  
 25 will elaborate on during this hearing, the TCA requires

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10:09 1 These arrangements grant rights to the parties, and were  
 2 part of the negotiations that led to the conclusion of  
 3 the TCA as a whole.  
 4 For the purpose of this dispute, the rights granted  
 5 by the TCA are essentially twofold.  
 6 The first right is set down in Article 498,  
 7 paragraph 3, read together with Annex 35 to the TCA.  
 8 Those articles grant the right to a fixed share of any  
 9 quota agreed by the parties for a particular fish stock,  
 10 and sandeel in the North Sea is such a particular fish  
 11 stock.  
 12 When parties agree on a quota, it is known as  
 13 a "total allowable catch", or "TAC". As I said, one of  
 14 the fish stocks for which parties may agree TACs is  
 15 sandeel in the North Sea; and since 2021, the parties  
 16 have agreed on TACs for that stock.  
 17 So that was the first right set down in the TCA.  
 18 The second right, for the purpose of this dispute,  
 19 is set down in Article 2(1)(a) of Annex 38 to the TCA.  
 20 That article grants the right of full access of vessels  
 21 of one party to the waters of the other party to fish  
 22 each and every stock for which the parties have agreed  
 23 on a quota.  
 24 The EU's position is that the UK's prohibition of  
 25 all sandeel fishing in UK waters of the North Sea

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10:13 1 the parties to exercise their autonomy in a manner  
 2 consistent with their commitment under the TCA.  
 3 Before the EU turns to horizontal legal issues,  
 4 it already takes the opportunity to clarify two  
 5 misconceptions as regards its position that feature  
 6 prominently in the UK's Written Submission.  
 7 The first misconception is that the EU's position is  
 8 a manifestation of the EU remaining acutely focused on  
 9 maximising fishing yields, while the UK more generally  
 10 focuses on preserving marine biological diversity.  
 11 Like the UK, the EU is, and has been for many years,  
 12 committed to the conservation of marine living  
 13 resources. This is one of the essential tenets of the  
 14 EU's Common Fisheries Policy. And it is pursuant to the  
 15 EU's Common Fisheries Policy that, in 2000, the EU  
 16 prohibited the fishing of sandeel in parts of UK waters  
 17 of the North Sea. It did so in order to support the  
 18 requirement of certain seabirds for which sandeel is  
 19 a major component of their diet. This prohibition was  
 20 evidence-based and proportionate, focusing on areas  
 21 where local sandeel depletion was linked to seabird  
 22 breeding success.  
 23 The second misconception that the EU would like to  
 24 correct is that the parties are aligned, and the EU  
 25 accepts it to be a truism, that human activities can

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<p>10:15 1 have impacts, negative impacts, on marine living 2 resources. The EU accepts that rights to access to 3 waters to fish may be impaired by fisheries management 4 measures that pursue the legitimate objective of marine 5 conservation, provided that such measures respect the 6 conditions in the TCA. 7 The TCA strikes a careful balance between the 8 conservation of marine living resources and human 9 activities, including fishing, and at the heart of this 10 dispute is that the sandeel fishing prohibition 11 disregards that balance. 12 This brings me on to the scope of the sandeel 13 fishing prohibition. 14 The EU's position is a simple one. The scope of the 15 prohibition, and its nullification of the EU's rights of 16 full access to UK waters of the North Sea to fish 17 sandeel, is the issue. The issue is not, as such, the 18 imposition or the limitation of those rights in pursuit 19 of a legitimate objective. 20 The EU accepts that it would have been open for the 21 UK to restrict the EU's right of full access to UK 22 waters of the North Sea to fish sandeel, but to the 23 extent that such a restriction or impairment was 24 supported by scientific advice and was proportionate to 25 the needs of specific predators. This is because the</p> <p style="text-align: center;">Page 9</p>	<p>10:18 1 "... kittiwakes are the key species for which there 2 is substantial concern regarding sandeel fishing ..." 3 The Tribunal will find that statement at 4 Exhibit R-76, which is tab 16 of the core bundle, 5 page 266. 6 Regarding the second category of sandeel predators, 7 marine mammals, again, the scientific advice that the UK 8 has identified indicates that: 9 "[While] [s]andeel are also important prey for seals 10 and minke whales ..." 11 So categories of marine mammals: 12 "... these species can forage over a wider area than 13 nesting seabirds." 14 And that the Tribunal will find at tab 4 of its core 15 bundle (C-22), page 89. 16 In other words, this means that in the event of such 17 localised sandeel depletion, marine mammals can prey on 18 sandeel outside of the area of the localised depletion. 19 As for the third category of predators -- so, other 20 fish that prey on sandeel -- again, the scientific 21 advice that the UK has identified: 22 "... altered sandeels fishing pressure may have 23 a limited impact on commercial stocks, such that ... 24 stocks may be equally likely to experience positive or 25 negative effects."</p> <p style="text-align: center;">Page 11</p>
<p>10:17 1 parties agree that there can be instances of localised 2 depletion of sandeel in UK waters of the North Sea. 3 The EU also accepts that scientific advice has 4 identified a link between such localised depletion and 5 the breeding success of one species of sandeel predators 6 known as black-legged kittiwakes. Why? Because these 7 birds have a limited foraging range during their 8 breeding season. And it's precisely because of this 9 link -- and not for precautionary reasons, as the UK has 10 sought to portray in its Written Submission -- that the 11 EU established a prohibition, in 2000, of sandeel 12 fishing within an area of the UK waters of the 13 North Sea. 14 Now, in its Written Submission, the UK argues that 15 the EU has failed to explain why the same logic would 16 not apply to other predators of sandeel. This is simply 17 not the case. The EU has explained, and will explain 18 again today, why the same logic would not hold true, by 19 reference to the scientific advice that the UK itself 20 has identified as the basis for the measure. And the EU 21 would like to summarise briefly its position on this 22 important issue. 23 So regarding the breeding success of other seabirds, 24 the scientific advice that the UK itself has identified 25 as the basis for the measure indicates that:</p> <p style="text-align: center;">Page 10</p>	<p>10:20 1 And that the Tribunal will find at tab 15 of its 2 core bundle (C-45) at page 230. 3 What does this mean? This means that there is 4 essentially no difference for other fish between leaving 5 open or closing the sandeel fishery. 6 This, the EU submits, is one of the factors that 7 demonstrates that the nullification of the EU's rights 8 to access UK waters of the North Sea to fish sandeel 9 does not respect the balance between the obligations 10 under the "Fisheries" heading of the TCA. 11 Unless the Tribunal has any questions at this stage, 12 the EU would propose to move on to indicate what it 13 understands to be agreed facts on the basis of the 14 Written Submissions of the parties. 15 THE CHAIRPERSON: Thank you, Mr Dawes. Please go ahead. 16 MR DAWES: Thank you, Madam Chair. 17 The EU will try to be brief, but it hopes that this 18 will assist the Tribunal in its task. And the EU will 19 identify the agreed facts by reference to relevant 20 sections and paragraphs of the UK's Written Submission. 21 So if the Tribunal has the UK's Written Submission, 22 I will start at paragraph 87, where there is a section 23 on "Terminology", section IV.A. It's one paragraph with 24 a number of subparagraphs. The simple point is that the 25 EU can agree with the definitions set out, the</p> <p style="text-align: center;">Page 12</p>

<p>10:22 1 terminology set out in that section of the UK's Written 2 Submission. 3 That was terminology. 4 Now, regarding sandeel in the Greater North Sea, 5 which are sections IV.B and IV.C of the UK's Written 6 Submission, the EU will list the points on which it is 7 in agreement, and they start as of paragraph 88. So 8 I will go through them in order. 9 Sandeel are small eel-like fish, paragraph 88. 10 Sandeel is an important type of forage fish, 11 paragraphs 88, 97 and 108 to 110. Sandeel feed on 12 plankton, and are preyed on in turn by other fish, 13 marine mammals and seabirds; that's again paragraph 88 14 of the UK's Written Submission. 15 There is also agreement that sandeel is a relatively 16 short-lived species, again paragraph 88; agreement that 17 sandeel spawn in winter, paragraph 89 of the UK's 18 Written Submission; agreement that sandeel are reliant 19 on the availability of sandy sediments, paragraph 90. 20 Paragraphs 91 and 92, sandeels have a life-long 21 attachment to the sand bank in which they initially 22 settle, and that there is a limited exchange between 23 even close fishing grounds. Paragraph 94, that sandeel 24 experience high levels of natural fluctuation. 25 Paragraph 95, sandeel recruitment is highly sensitive to</p> <p style="text-align: center;">Page 13</p>	<p>10:25 1 that's section V.A of the UK's Written Submission. 2 The EU can agree with the following three 3 statements. The first one is paragraph 111: that 4 sandeel are industrially fished in the North Sea to 5 produce fish oil and fishmeal. The next, paragraph 112: 6 that the fishery in the North Sea is seasonal, taking 7 place between 1 April and 31 July. And finally, 8 paragraph 113: that the fishery targets sandeel aged 9 one year or above. 10 So those are the facts with which the EU is in 11 agreement. 12 Given that the EU has a maximum time for its opening 13 submissions, I will now pass the floor to my co-Agent to 14 address the Tribunal on legal questions regarding the 15 interpretative approach and the standard of review that 16 the Tribunal should apply when deciding on these claims. 17 And the EU is available to answer, at the end of its 18 opening arguments, certain of the factual questions that 19 the Tribunal sent the parties yesterday. 20 THE CHAIRPERSON: Thank you very much. 21 Ms Norris you have the floor. 22 MS NORRIS: Madam Chair, members of the Tribunal, as 23 announced, the European Union turns now to the legal 24 framework applicable to this dispute, and the 25 interpretative approach which it considers this Tribunal</p> <p style="text-align: center;">Page 15</p>
<p>10:24 1 environmental variation. Paragraph 96, that sandeel 2 stock sizes can vary significantly from year to year. 3 Then there's a big jump to paragraphs 117 to 119: 4 the fact that since 2011, the International Council on 5 the Exploration of the Sea -- which the EU will refer to 6 from now on by its acronym "ICES" -- divides the Greater 7 North Sea into seven stock assessment areas, and issues 8 separate advice for each of those areas. And 9 paragraph 121: that in preparing its advice, ICES 10 applies what is known -- and we'll come back to it -- as 11 an "escapement strategy". 12 So those are the points regarding sandeel in the 13 Greater North Sea. 14 Now, there will be two more categories. The third 15 one regards predators of sandeel in the North Sea. 16 There are two statements with which the EU can 17 agree. The first one is in paragraph 101 of the UK's 18 Written Submission: that sandeels comprise a substantial 19 portion of the diet of certain seabirds, marine mammals 20 and fish. And then in the next paragraph, 102, that 21 different seabird species have different constraints 22 when it comes to searching for sandeels, in particular 23 in terms of feeding ranges. 24 Briefly, the final category regards the sandeel 25 fishery in the North Sea and the way it is managed, and</p> <p style="text-align: center;">Page 14</p>	<p>10:27 1 should follow. 2 Now, in these introductory remarks, the European 3 Union will highlight horizontal points in order to 4 provide the Tribunal with a roadmap through the 5 remainder of our oral submissions, and we will endeavour 6 to provide preliminary answers to certain of the advance 7 questions the panel sent, and which we received 8 yesterday evening. The EU will, of course, return to 9 some of the more detailed aspects of the legal standard 10 applicable to each of its claims when it makes 11 submissions on those claims. 12 As is clear from the Written Submissions, the 13 parties do not share the same understanding of the 14 content of the legal obligations contained in 15 Heading Five, Part Two and Annex 38 of the TCA. Nor is 16 there a common position as to how certain of these 17 obligations should be understood to interact with one 18 another. 19 To determine this dispute, the Tribunal will 20 therefore need to apply the interpretative approach set 21 down in Article 4 of the TCA, which draws on customary 22 international law principles themselves reflected in the 23 Vienna Convention on the Law of Treaties. And the 24 Tribunal will also need to take a position on the 25 content and meaning of certain of the core provisions in</p> <p style="text-align: center;">Page 16</p>



10:29 1 Heading Five of the TCA.  
 2 Given this, the European Union takes this  
 3 opportunity to highlight certain points of agreement  
 4 between the parties as to the applicable legal standard,  
 5 and then to turn to areas of disagreement. We will also  
 6 address the burden of proof, the standard of review, and  
 7 why the sandeel fishing prohibition is challenged by the  
 8 European Union as a single measure.  
 9 So I turn then to the point of agreement, and  
 10 I'm sure the Tribunal will be delighted to learn that  
 11 there are some.  
 12 The first is that protection of the marine  
 13 environment is recognised under the TCA to be  
 14 a legitimate regulatory objective, as is the  
 15 conservation of the marine environment. Both the  
 16 United Kingdom and the European Union recognise the role  
 17 of conservation measures in protecting the marine  
 18 environment. This is reflected in the TCA, which makes  
 19 provision for conservation and management decisions for  
 20 fisheries.  
 21 Therefore, this dispute does not require the  
 22 Tribunal to rule on the importance of environmental  
 23 protection and marine conservation as such, either under  
 24 international law or under the TCA. The European Union  
 25 would like to emphasise that it itself has a high level

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10:30 1 of environmental ambition. Hence, and as has already  
 2 been explained, the European Union takes issue with the  
 3 UK's characterisation of its objectives in its fisheries  
 4 policies as focusing on maximising fishing yields.  
 5 It disagrees with the United Kingdom's suggestion that  
 6 the root of this dispute concerns a difference in the  
 7 conception of the role of conservation of the ecosystem  
 8 under their respective legal frameworks.  
 9 The second point on which the parties agree is that  
 10 other legally binding instruments provide relevant  
 11 context for the interpretation of the TCA, of which  
 12 UNCLOS, the FAO Code of Conduct and the Convention on  
 13 Biodiversity. The European Union's position, of course,  
 14 is that the WTO agreements also provide relevant  
 15 context. In that sense, the parties are fully aligned  
 16 that other sources of international law may inform the  
 17 Tribunal's approach.  
 18 Both parties have a strong commitment to ensuring  
 19 the application of and adherence to their commitments  
 20 under multilateral environmental treaties and other  
 21 instruments of international law setting obligations  
 22 relating to the marine environment. Both parties  
 23 acknowledge the role of these instruments as  
 24 an interpretative aid.  
 25 I turn now to the precautionary approach to

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10:31 1 fisheries management, which the parties likewise agree  
 2 may inform the nature, content and ambition of fisheries  
 3 management measures that a party adopts in accordance  
 4 with the TCA.  
 5 Importantly, the European Union is not arguing that  
 6 international law does not recognise a role for the  
 7 precautionary approach. This is contemplated by UNCLOS  
 8 and other international environmental treaties. The  
 9 parties also agree that the precautionary approach to  
 10 fisheries management is identified and accorded a role  
 11 in the TCA. The parties further agree that reliance on  
 12 the precautionary approach to fisheries management does  
 13 not obviate the need to base decisions on the best  
 14 available scientific advice.  
 15 The core difference between the parties' positions  
 16 is, therefore, whether the material conditions defined  
 17 in Articles 496 and 494 of the TCA for relying on the  
 18 precautionary approach when deciding on fisheries  
 19 management measures are satisfied in the present  
 20 dispute.  
 21 And by way of response to advance question 9(c),  
 22 the European Union indicates that it considers the  
 23 precautionary approach to be a manifestation of the  
 24 precautionary principle, and refers the Tribunal to  
 25 Article 356 of the TCA, footnote 1.

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10:33 1 The EU will return to these issues in further detail  
 2 under its first claim.  
 3 Having addressed those points of agreement, the  
 4 European Union now turns to highlight some of the  
 5 critical points of divergence which it considers to be  
 6 likely of particular relevance to the Tribunal's  
 7 assessment of its claims. And at this stage, the EU is  
 8 focusing on four fundamental issues that separate the  
 9 parties.  
 10 The first, with reference to the objectives and the  
 11 purpose of the TCA, is the role and relevance of  
 12 regulatory autonomy. The second concerns the  
 13 relationship between the principles of proportionality  
 14 and non-discrimination and the right to decide on  
 15 fisheries management measures. The third is the  
 16 standard of review relating to the best available  
 17 scientific advice. And the fourth concerns the legal  
 18 standard relating to proportionality.  
 19 Turning to the first of these points, members of  
 20 the Tribunal, the TCA is not an ordinary free trade  
 21 agreement. As indicated by its name, it establishes  
 22 a framework for relations between the parties which is  
 23 built on the dual pillars of trade and cooperation.  
 24 That relationship entails close political cooperation  
 25 and economic links between the parties going well beyond

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10:34 1 the mere liberalisation of trade between them.  
 2 Like other international agreements to which the  
 3 Union is party, the TCA establishes rights intended to  
 4 confer economic and social benefits. Under the TCA,  
 5 those rights include access to waters to fish the  
 6 species in Annexes 35 and 36 to the TCA.  
 7 The parties have an obligation not to jeopardise the  
 8 attainment of any objective of the TCA. This implies  
 9 that the nullification or any impairment of the rights  
 10 and benefits flowing from their commitments under the  
 11 TCA must respect the balance of rights and obligations  
 12 under that agreement.  
 13 How then does this relate to regulatory autonomy?  
 14 The United Kingdom places considerable emphasis on the  
 15 references in the TCA to regulatory autonomy and how,  
 16 since its withdrawal from the Union, it has developed  
 17 its own regulatory framework to address marine  
 18 conservation.  
 19 The EU recalls that the withdrawal from the Union  
 20 had the effect of ending the European Union's exclusive  
 21 competence in fisheries policy as pertains to the UK.  
 22 The TCA is the legal framework governing this dispute.  
 23 The EU does not call into question the right of each  
 24 party to the TCA to regulate its own levels of  
 25 protection in the marine environment. This right is

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10:38 1 the environment but also how to pursue those objectives,  
 2 the Union disagrees.  
 3 The Union also disagrees that the recognition of  
 4 regulatory autonomy comforts the UK's position that it  
 5 may ultimately adopt disproportionate and discriminatory  
 6 fisheries management measures without violating  
 7 Article 494(3) TCA, read together with Article 496 TCA.  
 8 The European Union considers that the right to regulate,  
 9 and the exercise of regulatory autonomy to decide on  
 10 fisheries management measures, must be construed in the  
 11 light of the UK's commitment to grant full access to UK  
 12 waters of the North Sea to fish sandeel as reflected,  
 13 inter alia, in Annex 38 TCA.  
 14 Since the Tribunal has addressed a question to the  
 15 parties on this issue, the European Union will elaborate  
 16 on this under its claim 3.  
 17 I turn then to the principles of proportionality and  
 18 non-discrimination. This is clearly a further issue on  
 19 which the parties diverge, and that divergence concerns  
 20 the function that those principles play under the TCA in  
 21 general, and in Heading Five of Part Two in particular.  
 22 The United Kingdom characterises Article 494(3) as  
 23 setting an optional obligation of conduct as regards the  
 24 decision-making process only. Consequently, the UK's  
 25 position is that the term "having regard to" does not

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10:36 1 derived from internationally recognised principles and  
 2 the sovereignty of the United Kingdom as a coastal state  
 3 recognised under international law, of which UNCLOS.  
 4 It is also recognised in the TCA.  
 5 Such recognition cannot, however, be construed as  
 6 conferring an unlimited right on either party to  
 7 derogate from any other provision of the TCA.  
 8 Regulatory autonomy, as has been explained, must be  
 9 exercised in accordance with the requirements of other  
 10 provisions of the TCA that give expression to and  
 11 operationalise that right to regulate, and specifically  
 12 to adopt fisheries management measures that have regard  
 13 to the principles and legal constraints on the exercise  
 14 of that right as agreed between the parties.  
 15 Those constraints, insofar as they are relevant to  
 16 the present dispute, include the obligation to base  
 17 measures on the best available scientific advice, the  
 18 requirement to have regard to the principles of applying  
 19 proportionate and non-discriminatory measures, and the  
 20 obligation to ensure that measures adopted are  
 21 non-discriminatory and proportionate.  
 22 Therefore, insofar as the United Kingdom appears to  
 23 argue that because of regulatory autonomy it has  
 24 unfettered discretion to decide not only which  
 25 legitimate objectives it intends to pursue in respect of

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10:39 1 entail any obligation to ensure that fisheries  
 2 management measures that it decides on are proportionate  
 3 and non-discriminatory.  
 4 The divergence between the parties on this point  
 5 goes beyond the construction of the term "having regard  
 6 to" as it appears in Article 494(3): it goes to the core  
 7 of the balance between the rights and obligations, as  
 8 well as the principle of good faith which informs the  
 9 interpretation of the TCA as a whole.  
 10 By its advance question 9(a), the Tribunal has asked  
 11 the parties to provide their position as to the  
 12 relevance of the term "principles" in the chapeau of  
 13 Article 494(3).  
 14 The European Union considers that the term  
 15 "principle" denotes something that informs and guides  
 16 the interpretation of corresponding obligations; in this  
 17 precise instance, in Article 496 TCA. This does not  
 18 detract from the importance that such principles have  
 19 when interpreting obligations. Those principles are the  
 20 means through which the parties have chosen to  
 21 operationalise and frame how they will exercise  
 22 regulatory autonomy to ensure a balance between the  
 23 rights and obligations under Heading Five.  
 24 In light of this, the European [Union] wishes to  
 25 make very, very clear that the TCA cannot be interpreted

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<p>10:41 1 such as to accord latitude to either party to adopt 2 a disproportionate or discriminatory measure, even when 3 pursuing a legitimate regulatory objective such as 4 environmental protection. 5 The United Kingdom asks this Tribunal effectively to 6 rule that regulatory autonomy, as operationalised in the 7 TCA, offers carte blanche to pay lip-service to these 8 core principles under the agreement. The UK goes so far 9 as to say that for the purposes of Article 496(1) TCA, 10 it would be permissible for the decision-making process 11 not to comply with those principles at all; we refer you 12 to paragraph 330 of their Written Submission. 13 Now, at this juncture, and to again refer back to 14 a question which the panel has asked us in advance, the 15 European Union recalls its position, which it had set 16 out in its Written Submission, that it does not consider 17 there to be any hierarchy between the principles set 18 down in Article 494(3), and hence they must be 19 considered concurrently. And it refers the panel to 20 paragraphs 257 and 258 of its Written Submission. 21 At the same time, the roles that those principles 22 play must be construed in the light of the terms in 23 which they have been formulated. And that is where the 24 European Union makes the point that applying is not the 25 same as taking into account.</p> <p style="text-align: center;">Page 25</p>	<p>10:44 1 Now, in this context, and under the TCA, the 2 measures adopted by a party must be "base[d] ... on the 3 best available scientific advice". And as the 4 European Union has explained in its Written Submission, 5 this does imply consideration of the qualitative merits 6 of a chosen approach to pursuing legitimate objectives. 7 Indeed, the UK appears to agree that this term denotes 8 that there should be form of a comparative assessment. 9 In this respect, to respond to the Tribunal's 10 question 8(b), the European Union has never suggested 11 that the bar is so high that scientific advice must be 12 "the best [in] the universe". The European Union has 13 set out its understanding of the applicable legal 14 standard at some length, identifying that it need not be 15 the only scientific opinion, but it must of course 16 respect the criterion of methodological rigour. 17 Moreover, the term "available scientific advice" extends 18 to advice which could reasonably have been obtained at 19 the point in time when the measure was being decided on. 20 And the EU will return to these points under its 21 claim 1. 22 Now, the European Union also understands the parties 23 to agree that the role of this Tribunal is not to 24 conclusively assess the scientific advice or to give its 25 own scientific opinion. However, contrary to the</p> <p style="text-align: center;">Page 27</p>
<p>10:42 1 I will move on then to the standard of review by 2 the Tribunal. Here there is also some agreement between 3 the parties, notably that it does not extend to ruling 4 on the appropriateness of the level of environmental 5 protection set by either party. 6 On the other hand, the European Union does not agree 7 with the United Kingdom as to the extent to which the 8 Tribunal may review the means chosen to pursue that 9 level of protection. And here the European Union 10 considers that the Tribunal's scope of review is 11 greater. 12 The United Kingdom argues, on the basis of the 13 ruling of the International Court of Justice in Whaling 14 in the Antarctic (Australia v Japan) judgment of 2014 at 15 page 226 -- and it's your Exhibit RLA-0012 -- on the 16 basis of that ruling, they argue that the Tribunal need 17 not decide whether the design and implementation of a -- 18 in this case -- measure are the best possible means of 19 achieving its stated objectives. 20 Now, the European Union underscores that whilst 21 the role of this Tribunal is not to identify the best 22 approach to a fisheries management measure in 23 an absolute sense, it may nonetheless scrutinise the 24 design and implementation of a measure to determine 25 whether it respects the obligations in the TCA.</p> <p style="text-align: center;">Page 26</p>	<p>10:45 1 position articulated by the United Kingdom in 2 paragraph 214 of its Written Submission, the 3 European Union does consider that when determining 4 whether there has been a breach of Articles 496(1) and 5 496(2) TCA, the Tribunal may assess whether a measure is 6 based on such scientific advice as required by that 7 provision. 8 This does therefore imply that the Tribunal should 9 consider the degree to which the scientific advice 10 supports the measure that has been adopted. A measure 11 that is not supported by scientific advice would, put 12 simply, not be based on it. 13 So to use the parameter defined in advance 14 question 8(c), in general terms, the European Union 15 would point out that scientific advice is rarely 16 unequivocal. That is inherent to the nature of 17 scientific evidence in general. However, where a party 18 has scientific advice that meets all the criteria for 19 the best available scientific advice and that supports 20 one conclusion, it could not adopt a different approach 21 while simultaneously maintaining it had based its 22 measure on that best available scientific advice. 23 Now, this is a different question to when a party 24 may rely on the precautionary approach. And as to the 25 relationship between the two, that is something which</p> <p style="text-align: center;">Page 28</p>

<p>10:47 1 will also be addressed under claim 1. 2 So finally in terms of the standard of review, the 3 European Union would simply reflect that evidently the 4 Tribunal may plainly also consider whether the chosen 5 approach to achieving a level of protection meets other 6 requirements under the TCA, namely those pertaining to 7 proportionality and non-discrimination. 8 And that, members of the Tribunal, is an excellent 9 opportunity to segue precisely to that point: the legal 10 standard relating to proportionality. 11 The European Union and the United Kingdom have 12 a different understanding not only of the role of 13 proportionality in delimiting the nature of fisheries 14 management measures that a party may adopt, but 15 they also have differing interpretations of the term 16 "proportionate". 17 The European Union would like to make it very clear 18 that its interpretation of "proportionate" is that which 19 it itself set out in its Written Submission, as opposed 20 to the United Kingdom's description of the EU's 21 position. And we would therefore emphasise that the 22 Tribunal, when following what the European Union's 23 position is, should look at paragraphs 635 to 641 of the 24 European Union's submission. 25 Now, the European Union disagrees with the UK that</p> <p style="text-align: center;">Page 29</p>	<p>10:50 1 with well-established principles, it is for the European 2 Union to present a prima facie case that the measure at 3 issue violates the UK's commitments under the TCA. And 4 that applies for each of its claims. 5 In turn, in accordance with the same 6 well-established principles, it is for the UK to support 7 its assertion that its measures could be justified under 8 other provisions of the TCA. In that sense, the 9 European Union considers that the burden of proof 10 shifts. 11 Now, since I've referred to well-established 12 principles in support of this proposition, to give one 13 example, we could refer the Tribunal to the findings of 14 the Appellate Body in DS33, Wool Shirts and Blouses. 15 Now, although this is authority in the framework of 16 international economic law, in reaching its position, 17 the Appellate Body referred to other sources of law, 18 including the position which has been expressed by 19 the International Court of Justice. 20 In that dispute, the Appellate Body said: 21 "... we find it difficult, indeed, to see how any 22 system of judicial settlement could work if it 23 incorporated the proposition that the mere assertion of 24 a claim might amount to proof. It is, thus, hardly 25 surprising that various international tribunals,</p> <p style="text-align: center;">Page 31</p>
<p>10:48 1 this Tribunal is precluded from considering how that 2 term, which does appear in the legal systems of each of 3 the parties, is interpreted under domestic law as one of 4 the elements that may provide additional relevant 5 context when it is according that term a meaning under 6 the TCA. 7 Turning then to the standard of proportionality, 8 the parties agree that there must be a weighing and 9 balancing of the obligations and commitments in 10 Heading Five. The disagreement concerns the contours of 11 that exercise and the distinction between a standard of 12 necessity and one of proportionality. 13 The European Union maintains that a proportionality 14 standard implies that it is relevant for the Tribunal to 15 consider whether other measures less restrictive of 16 rights, and which still contribute to the regulatory 17 objective, could have been adopted. And given the 18 importance of this point to the claims overall, the 19 European Union will be elaborating on that under 20 its second claim. 21 I move on then to the burden of proof. And since 22 this is a matter on which the Tribunal has also 23 addressed a question to the parties in its advance 24 question 7, we will deal with that now. 25 The European Union's position is that, in accordance</p> <p style="text-align: center;">Page 30</p>	<p>10:51 1 including the International Court of Justice, have 2 generally and consistently accepted and applied the rule 3 that the party who asserts a fact, whether the claimant 4 or the respondent, is responsible for providing proof 5 thereof. Also, it is a generally-accepted canon of 6 evidence in civil law, common law and, in fact, most 7 jurisdictions, that the burden of proof rests upon the 8 party, whether complaining or defending, who asserts the 9 affirmative of a particular claim or defence. If that 10 party adduces evidence sufficient to raise a presumption 11 that what is claimed is true, the burden then shifts to 12 the other party, who will fail unless it produces 13 sufficient evidence to rebut the presumption." 14 Now, on this issue, the European Union would 15 underscore that the mere fact that the measure at issue 16 involves the exercise of regulatory autonomy does not 17 change the burden of proof when relying on provisions 18 which frame the exercise of that autonomy. If the mere 19 invocation of regulatory autonomy were sufficient to 20 reverse the burden of proof when seeking to justify 21 fisheries management measures which otherwise nullify 22 rights of access to UK waters to fish sandeel, this 23 would be contrary to the burden of proof, as referred to 24 just now. 25 Now, the Tribunal has asked the parties to provide</p> <p style="text-align: center;">Page 32</p>

10:53 1 a more granular breakdown of where [they say] the burden  
 2 of proof falls, and we will do that for each claim as  
 3 we come to those claims.  
 4 I turn then to the final point in these introductory  
 5 remarks, and that concerns the measure.  
 6 The United Kingdom takes issue with the  
 7 European Union's choice to challenge the sandeel fishing  
 8 prohibition as a single measure. It repeats and  
 9 emphasises that the management of fishing in Scotland is  
 10 largely a devolved matter.  
 11 The European Union has addressed the reasons why  
 12 it chose to challenge a single measure in its Written  
 13 Submission. Aside from the evident point that the TCA  
 14 is an agreement between the United Kingdom and  
 15 Northern Ireland on the one hand and the European Union  
 16 on the other, the EU has relied on other factors which  
 17 warrant treating the provision as a single measure which  
 18 is given effect through different regulatory frameworks.  
 19 Indeed, as the United Kingdom's own explanations show,  
 20 the regulatory framework in Scotland is partly  
 21 overlapping with that which applies in England and  
 22 Wales.  
 23 Equally, the European Union would observe that,  
 24 whilst the Tribunal is not bound by either party's  
 25 characterisation, the starting point should be the

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10:55 1 It is of course open for a tribunal to frame its  
 2 ruling, and any ultimate findings, on how and why it  
 3 considered a single measure to be inconsistent or not  
 4 inconsistent with obligations under the TCA in the  
 5 manner that it considers appropriate. But this is  
 6 different to severing parts of a measure at the end of  
 7 its analysis.  
 8 Finally, since there is a reference in the panel's  
 9 questions to remedial powers, the European Union would  
 10 refer to Article 746 of the TCA, entitled "Compliance  
 11 measures", and indicates that this reflects that it is  
 12 for a party found to have acted inconsistently with its  
 13 obligations under the TCA to:  
 14 "... take the necessary measures to comply ... with  
 15 the ruling of the ... tribunal ... to bring itself  
 16 in[to] compliance ..."  
 17 Members of the Tribunal, unless I can assist you  
 18 with further questions at this stage, that concludes our  
 19 introductory and framing remarks on the legal standard  
 20 and interpretative approach. And I would therefore pass  
 21 the floor to another Agent of the European Union to  
 22 address you on claim 1. Thank you.  
 23 JUSTICE UNTERHALTER: I wonder if I could just ask you  
 24 one question concerning the question of comparable  
 25 inconsistency; in other words, whether characterised as

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10:54 1 manner in which the European Union, as the complainant,  
 2 has characterised the measure in its Request and its  
 3 Written Submissions.  
 4 The panel has asked a question as to the  
 5 implications of this for the Tribunal's analytical  
 6 exercise. The fact that it is challenged as  
 7 an individual measure means that the Tribunal should  
 8 analyse holistically all of the costs and all of the  
 9 benefits.  
 10 As to the existence of distinguishable parts of the  
 11 measure, the European Union acknowledges that there is  
 12 a different scientific foundation relied upon for the  
 13 application of the prohibition in English waters of the  
 14 North Sea and the application of the prohibition in  
 15 Scottish waters of the North Sea. However, the  
 16 scientific literature review is essentially the same,  
 17 and the Ecosim model -- which will be discussed at some  
 18 length -- considers the closure in all UK waters of the  
 19 North Sea.  
 20 As to advance question 1(c), the European Union  
 21 considers that although the European Union challenges  
 22 this measure as a single measure, it is ultimately for  
 23 this Tribunal to determine at the outset if it accepts  
 24 this proposition, and the analytical exercise that this  
 25 Tribunal conducts must follow from this.

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10:57 1 a single measure or two measures.  
 2 If -- and again, all of this is hypothetical; it's  
 3 purely for the purposes of understanding what outcome  
 4 could arise. If there's partial inconsistency -- let us  
 5 just say, for argument's sake, that the measure which  
 6 concerns Scottish waters was found to be inconsistent --  
 7 the requirement would be to bring a measure that  
 8 restores consistency.  
 9 Would you agree that that doesn't require formal  
 10 severance, but would have to be a measure that sought to  
 11 restore inconsistency? Is that your understanding?  
 12 MS NORRIS: Our understanding is indeed that it wouldn't  
 13 require formal severance. And the manner in which the  
 14 Tribunal framed its ruling and its findings should  
 15 inform the manner in which a party should take the  
 16 necessary measures to bring itself into compliance. And  
 17 so indeed it could restore itself into a situation of  
 18 compliance.  
 19 JUSTICE UNTERHALTER: Yes. So what, in your understanding,  
 20 really rests on the question as to whether there is  
 21 a single measure or two measures, if there is, as it  
 22 were, remedial flexibility concerning how to restore  
 23 consistency, should the Tribunal ever get to that point  
 24 in its analysis?  
 25 MS NORRIS: We would argue that that goes to the core of

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<p>10:58 1 the approach to the analytical exercise itself. So the 2 European Union challenges this measure on various 3 grounds: not just on the question of the scientific 4 basis, but also on the question of its proportionality, 5 for example, that being a clear example. 6 Now, when conducting the weighing and balancing 7 exercise, the European Union would say you must look at 8 the degree of benefits, on the one hand, of this measure 9 as a whole, and then on the costs of the measure as 10 a whole. So we would argue that it informs the 11 analytical approach. 12 If the question goes to, "At the end of the 13 approach, does this in any way delimit the scope of the 14 Tribunal's powers to make more nuanced findings?", 15 we would say: no. 16 JUSTICE UNTERHALTER: And then finally, therefore 17 your holistic consideration would say: well, don't do 18 a cost/benefit analysis in respect of the Scottish 19 waters and the English waters; look at it as a singular 20 cost/benefit analysis. That's where you would say this 21 difference matters most? 22 MS NORRIS: Essentially. And that's the approach that the 23 European Union has taken in its Written Submission: 24 it has sought to present to you the evidence of those 25 costs, on the one hand, and the benefits, [on] the</p> <p style="text-align: center;">Page 37</p>	<p>11:01 1 principles in it. 2 Thank you. 3 MS NORRIS: Perhaps just to start by clarifying one aspect 4 of that, what the European Union absolutely does not 5 disagree with is that individual states -- and here 6 the two parties -- can set their own aspiration of 7 regulatory ambition. I think that is a principle which 8 has been already accepted in many different 9 jurisdictions, including other jurisdictions that 10 balance economic rights with environmental protection, 11 of which the WTO is one example. So, yes, it is of 12 course up to the parties to set that level of regulatory 13 protection. 14 That is a different thing to saying, when deciding 15 on and adopting measures in pursuit of that level of 16 regulatory protection, that they have unfettered 17 discretion, as it were, simply because of the principle 18 of regulatory autonomy. 19 Once again, the European Union is not in any way 20 suggesting that the United Kingdom does not have 21 regulatory autonomy, that there is no recognition of the 22 right to regulate under the TCA. We are talking here 23 about the exercise of that right and how it interfaces 24 with other obligations under this binding international 25 treaty.</p> <p style="text-align: center;">Page 39</p>
<p>11:00 1 other, on a holistic basis. 2 And it says that that is appropriate, for all of the 3 reasons we described as to why this is a single measure: 4 it is one prohibition which has exactly the same impact. 5 The overall impact of the sandeel fishing prohibition is 6 that no EU vessels have access to any waters of the 7 United Kingdom in the North Sea to fish sandeel, and 8 therefore the analytical exercise should focus on that. 9 MR JUSTICE UNTERHALTER: Yes, thank you very much. 10 MS NORRIS: Thank you. 11 THE CHAIRPERSON: Ms Norris, I also have a question for you, 12 and I would like to refer back to an earlier part of 13 your presentation. 14 You said earlier on, first, that there was a right 15 of a party to adopt its own level of protection of the 16 marine environment; and then a little later, you talked 17 about regulatory autonomy and the extent to which the 18 TCA constrains regulatory autonomy in respect of 19 protection of the environment. 20 So I would like to have a better understanding of 21 how you see that interrelationship between the ability 22 or the right to have your own appropriate level of 23 protection of the marine environment, at the same time 24 as having your regulatory autonomy being constrained by 25 the TCA; and in particular, by Article 494(3) and the</p> <p style="text-align: center;">Page 38</p>	<p>11:03 1 And that is where the parties chose -- and, we would 2 argue, carefully chose -- to delimit how precisely those 3 considerations need to interact. So when we look at the 4 provisions on when you may adopt fisheries management 5 measures, and the principles to which you must have 6 regard when deciding on those measures, that informs how 7 exactly your regulatory autonomy should be exercised in 8 a way to ensure respect of the balance of rights and 9 obligations. 10 Because as the European Union has endeavoured to 11 portray, both in its Written Submission and again this 12 morning, it is not arguing that you can never have 13 a fisheries management measure. It is not arguing that 14 economic rights always and systematically take 15 precedence over environmental considerations. If that 16 were the case, we would be having a very different 17 discussion today. That is absolutely not the 18 European Union's position. 19 So here it is precisely about the exercise of your 20 regulatory autonomy and how you agreed that that should 21 be constrained in order to preserve this balance. 22 This is something which, again, we will try to 23 elaborate upon in more concrete form when we come to 24 the claims. 25 THE CHAIRPERSON: Thank you, Ms Norris, that would be very</p> <p style="text-align: center;">Page 40</p>

11:04 1 helpful.  
2 So I invite your next speaker, thank you.  
3 MS NORRIS: Thank you.  
4 DR HOFSTÖTTER: Madam Chair, distinguished members of  
5 the Tribunal, the EU will now start by addressing the  
6 Tribunal on the first claim.  
7 The EU's first claim is that the sandeel fishing  
8 prohibition is inconsistent with the UK's obligation  
9 under Articles 496(1) and 496(2) of the TCA, read  
10 together with Article 494(3)(c) of the TCA, because that  
11 prohibition is not based on the best available  
12 scientific advice. This claim is addressed in the EU's  
13 Written Submission commencing at page 127.  
14 This claim will require the Tribunal to consider  
15 scientific facts and information. But before we come to  
16 these facts, the EU notes that there are differences  
17 between the parties about the interpretation of the  
18 legal standards. The EU will therefore start by  
19 explaining the elements of the legal standards on which  
20 the Tribunal will need to adjudicate.  
21 The parties agree that Heading Five of the TCA  
22 obliges them to base fisheries management measures  
23 applicable to the waters on the best available  
24 scientific advice.  
25 Article 494(3)(c) TCA establishes that the parties

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11:07 1 on the EU's first claim.  
2 The EU will first walk the Tribunal through the  
3 legal standard with regard to the notion of the "best  
4 available scientific advice". It will then apply this  
5 legal standard to the facts of the case.  
6 In a second step, the EU will return to the legal  
7 standard concerning the notion of "based on". This will  
8 be followed by the application of the legal standard  
9 concerning "based on" to the facts of the case.  
10 The EU will now start by addressing the Tribunal on  
11 the legal standard regarding the "best available  
12 scientific advice".  
13 When it comes to the interpretation of the notion of  
14 "best available scientific advice", the parties agree  
15 about the principal role of ICES in the framework of  
16 Article 494(3)(c), which, however, does not preclude  
17 reliance on other scientific advice. I refer you to the  
18 UK's Written Submissions, paragraph 202.  
19 The parties agree further that the term  
20 "principally", as it appears in Article 494(3)(c) TCA,  
21 recognises the weight to be accorded to advice coming or  
22 emanating from ICES, a world-leading marine research  
23 organisation. There is no issue between the parties as  
24 regards any exclusion of national scientific bodies from  
25 providing scientific advice, provided that such advice

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11:05 1 shall have regard to the principle of:  
2 "... basing conservation or management decisions for  
3 fisheries on the best available scientific advice,  
4 principally that provided by [ICES] ..."  
5 This obligation is mirrored in Article 496(1) TCA,  
6 which provides that:  
7 "Each Party shall decide on any measures applicable  
8 to its waters in pursuit of the objectives set out in  
9 Article 494(1) and (2), and having regard to the  
10 principles referred to in Article 494(3)."  
11 This obligation is further mirrored in  
12 Article 496(2) of the TCA, which provides that:  
13 "A Party shall base the measures referred to in  
14 paragraph 1 [of 496] on the best available scientific  
15 advice."  
16 It is not in dispute between the parties that  
17 Article 494(3)(c) and Article 496 TCA provide for  
18 an obligation for parties to base their fisheries  
19 management measures on the best available scientific  
20 advice. The Tribunal will have to determine whether  
21 the sandeel fishing prohibition is based on the best  
22 available scientific advice. This will require that the  
23 Tribunal determines the meaning of the notions of (1)  
24 "best available scientific advice", and (2) "based on",  
25 both of which define the legal standard for adjudicating

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11:08 1 meets the attributes of the "best available scientific  
2 advice", and I will come back to these attributes very  
3 shortly.  
4 Contrary to what the UK seems to imply in  
5 paragraph 213 of its Written Submission, the EU has  
6 never argued that national scientific bodies as such do  
7 not have the authority to provide the best available  
8 scientific advice. Moreover, the EU has never contested  
9 the authority of any body that provided scientific  
10 advice to the UK in the present case. This is therefore  
11 a false debate.  
12 The parties agree that beyond the principal role of  
13 ICES, the TCA does not prescribe from what scientific  
14 body scientific advice must come. Consequently, there  
15 is no need for the Tribunal to address this issue in the  
16 present case, since there is no dispute between the  
17 parties.  
18 In its Written Submission, the EU attempted to give  
19 a complete interpretation of the term "best available  
20 scientific advice". We appreciate that the application  
21 of the legal standard regarding the "best available  
22 scientific advice" will not require the Tribunal to look  
23 into all of the issues covered by the interpretation set  
24 out in the EU's Written Submission. However, there are  
25 certain aspects of the notion of the "best available

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<p>11:10 1 scientific advice" that are material to resolve the                  2 dispute, and which the Tribunal will therefore have to                  3 interpret and apply.                  4 In this regard, the EU notes that the parties                  5 disagree on the following three key questions:                  6 (1) Which meaning is to be accorded to the term                  7 "available" in relation to scientific advice?                  8 (2) What attributes of quality does scientific                  9 advice have to have in order to qualify as the "best                  10 available scientific advice"?                  11 (3) Under what circumstances are the parties allowed                  12 to rely on the precautionary approach?                  13 I will start with the first question, and take the                  14 remainder in turn.                  15 So the first question is: which meaning is to be                  16 accorded to the term "available" in relation to                  17 scientific advice?                  18 I would like to start by recalling that "best" in                  19 "best available scientific advice" is a superlative:                  20 it sets a high threshold. The necessary consequence of                  21 "best" is that the advice relied on by a party to adopt                  22 a fisheries management measure is comprehensive,                  23 in the sense that it relies on all available scientific                  24 information or data objectively available or objectively                  25 obtainable by that party.</p> <p style="text-align: center;">Page 45</p>	<p>11:13 1 The "best available scientific advice" should                  2 integrate available scientific information. To the                  3 extent that it does not, and is in that sense                  4 incomplete, it cannot meet the attributes of the "best                  5 available scientific advice".                  6 The EU does not argue that the UK did not comply                  7 with the first of these obligations, namely to request                  8 scientific advice. It is indisputable that the UK has                  9 requested scientific advice prior to the sandeel fishing                  10 prohibition. What the EU is arguing, however, is that                  11 the Natural England scientific report, Exhibit C-0045,                  12 exhibits various flaws in the context of what the UK is                  13 trying to test, including caveats. These flaws and                  14 caveats could and should have been addressed on the                  15 basis of reasonably available data and science, but                  16 a choice was made not to address those flaws and                  17 caveats.                  18 My colleague will detail these flaws later this                  19 morning, when applying the legal standard to the facts                  20 of the case.                  21 Moving on to the requirement of basing measures on                  22 the most recent available scientific advice, on which                  23 the EU has elaborated in its Written Submission, the EU                  24 argues that where there is relevant data, including more                  25 recent data, that data -- being the more recent data --</p> <p style="text-align: center;">Page 47</p>
<p>11:11 1 In this context, the EU notes the UK's reference to                  2 the Virginia Commentary on Article 119(1)(a) of                  3 UNCLOS -- that is Exhibit R-0136 in this regard --                  4 according to which:                  5 "... 'available' evidence ... indicates that                  6 measures should be based on whatever evidence is at hand                  7 or reasonably obtainable."                  8 This statement from the Virginia Commentary is borne                  9 out by Articles 12(1) and 12(3) of the FAO Code for                  10 Responsible Fisheries, which is relevant context for the                  11 interpretation of the TCA. You will find the FAO Code                  12 in Exhibit CLA-0033, and it's also in the core bundle of                  13 documents.                  14 This is the basis for the EU's submission that the                  15 parties must make reasonable efforts to obtain the best                  16 available scientific advice. And this is also in reply                  17 to your question 8(a) of yesterday afternoon.                  18 The obligation for parties to make reasonable                  19 efforts is twofold. It consists, first, of the                  20 obligation to request scientific advice from                  21 a scientific body, to the extent that that advice is not                  22 already available; and second, the obligation to make                  23 sure that the scientific body requested to provide the                  24 scientific advice bases its report on reasonably                  25 obtainable data.</p> <p style="text-align: center;">Page 46</p>	<p>11:14 1 has to be taken into account.                  2 The EU accepts that "recent" doesn't always mean                  3 "best". But in fisheries management, as a general                  4 proposition, the most comprehensive available data needs                  5 to be taken into account in order to achieve the                  6 objectives of the TCA, including the objective of                  7 exploiting shared stocks at rates intended to maintain                  8 and progressively restore populations of harvested                  9 species. To the extent that there is more recent data,                  10 a party should therefore rely on that more recent data.                  11 As said, the EU's concerns as regards the scientific                  12 advice that the UK has identified as the base for the                  13 sandeel fishing prohibition relates to certain flaws and                  14 unaddressed caveats in the Natural England scientific                  15 report. They do not relate to an assertion that more                  16 recent data could have been taken or should have been                  17 taken into account.                  18 This being said, I will now move to the second                  19 question which I introduced at the start of my                  20 presentation. The second question is: what attributes                  21 of quality does scientific advice have to have in order                  22 to qualify as "the best available scientific advice"?                  23 This question is about whether the scientific advice                  24 that the UK has identified as the base for the sandeel                  25 fishing prohibition has the attribute of quality of</p> <p style="text-align: center;">Page 48</p>



<p>11:16 1 being the "best available scientific advice".  2 The EU argues that the "best available scientific  3 advice" must be derived from rigorous scientific  4 methods. This is essentially for the following reasons.  5 As already discussed earlier, Article 494(3)(c) of  6 the TCA qualifies the term "best available scientific  7 advice" by referring that such advice is  8 "principally" -- "principally" -- that provided by ICES.  9 The parties agree that this does not rule out the best  10 available scientific advice from scientific bodies other  11 than ICES. However, the emphasise on ICES in  12 Article 494(3)(c) implies that such advice from other  13 parties should be based on compelling and authoritative  14 scientific evidence such that it can be considered to  15 have an equivalent authoritative status: equivalent to  16 the advice provided by ICES.  17 The notion that scientific advice should adhere to  18 rigorous scientific methods and standards is therefore  19 a reasonable attribute of the "best available scientific  20 advice" to read into Article 494(3)(c) TCA, given that  21 the parties recognise the principal role of ICES.  22 Conversely, it would be inconsistent with that  23 principal role if the parties were entitled to rely on  24 advice not adhering to rigorous scientific methods and  25 standards. To the extent that a party relies on advice</p> <p style="text-align: center;">Page 49</p>	<p>11:19 1 New Zealand intervening, claimed that Japan was not  2 undertaking scientific research, but rather commercial  3 harvesting, contrary to the moratorium under the 1946  4 International Convention on the Regulation of Whaling.  5 Japan, on the other hand, argued that its whaling  6 programme was undertaken for purposes of scientific  7 research. The ICJ found that Japan's whaling programme  8 is not for the purposes of scientific research.  9 Article VIII, paragraph 1 of the 1946 Whaling  10 Convention that the court was called upon to interpret  11 provides in relevant part that:  12 "... any Contracting Government may grant to any of  13 its nationals a special permit authorizing that national  14 to kill, take and treat whales for purposes of  15 scientific research ..."  16 So the notion which the ICJ interprets in the  17 Whaling case was "for the purposes of scientific  18 research". But the notion to be interpreted by this  19 Tribunal is "best available scientific advice".  20 In the Whaling case, the ICJ held that activities  21 must not satisfy the criteria for "scientific research"  22 put forward by Australia. Among these criteria were  23 appropriate methods and peer review. At the same time,  24 the ICJ did not consider it necessary to devise  25 alternative criteria or a general definition of</p> <p style="text-align: center;">Page 51</p>
<p>11:17 1 other than coming from ICES, it has therefore to show  2 that such advice has certain attributes, to the extent  3 that it is supported by data obtained by using rigorous  4 scientific methods.  5 "Best available scientific advice" therefore does  6 not have to be the best of the universe -- it has  7 already been said -- as long as it uses rigorous  8 scientific methods, and is thus reputable and legitimate  9 science. This is also in reply to your question 8(b).  10 The UK seeks to challenge the EU's interpretation of  11 the "best available scientific advice" by reference to  12 the Whaling case decided by the International Court of  13 Justice. What the UK is asking the Tribunal to find is  14 essentially that there are no qualitative attributes  15 that attach to the notion of the "best available  16 scientific advice". The EU had not anticipated that the  17 requirement of methodological rigour would prove  18 controversial, and therefore takes the opportunity to  19 address the Tribunal further on this point.  20 Let me for a moment take you through the Whaling  21 case, which certain members of the Tribunal may recall  22 very well.  23 The Whaling case arose from a long-standing dispute  24 about whether Japan's whaling programme is legitimately  25 for purposes of scientific research. Australia, with</p> <p style="text-align: center;">Page 50</p>	<p>11:20 1 "scientific research".  2 At the same time, in paragraph 58 of the Whaling  3 judgment, the ICJ found that:  4 "... programmes for purposes of scientific research  5 should foster scientific knowledge ..."  6 It is on the basis of paragraph 86 of the Whaling  7 judgment alone -- this is the paragraph about science  8 not requiring specific methods or peer review -- it is  9 on the basis of this paragraph alone that the UK reads  10 the Whaling case to mean that there are no qualitative  11 requirements to be derived from the notion of "best  12 available scientific advice".  13 Once again, the ICJ's finding related to a 1946  14 treaty providing for an entirely different standard from  15 Article 494(3)(c) TCA. Paragraph 86 of the Whaling case  16 can therefore not serve as an authority for the  17 interpretation of the "best available scientific  18 advice".  19 On the other hand, the UK's proposition overlooks or  20 disregards paragraph 58 of the court's judgment, where  21 the court referred to the "purposes of ... foster[ing]  22 scientific knowledge", a purpose that should be fostered  23 by scientific research.  24 The EU is therefore baffled by the very extreme  25 proposition of UK. It is almost as if the UK suggested</p> <p style="text-align: center;">Page 52</p>

<p>11:22 1 that Article 494(3)(c) TCA should be interpreted as 2 setting a standard for science for a post-factual age, 3 without there being any requirements with regard to the 4 quality of the best available scientific advice. The EU 5 submits that this cannot be the result of 6 an interpretation in good faith of Article 494(3)(c). 7 The EU's position is further corroborated by 8 a reference to the international law of the sea, 9 providing for the same stringent standard as the TCA and 10 WTO law. 11 As far as WTO law is concerned, the UK takes 12 an ambiguous position, and does not seem to entirely 13 exclude the relevance of the WTO jurisprudence on 14 scientific and methodological rigour, identified by the 15 EU as relevant context in further interpretation; and 16 this in the EU's Written Submissions, paragraph 415. 17 In fact, the UK itself seems to apply this standard 18 when it submits, for instance, in paragraph 252 of the 19 UK's Written Submissions, that the Natural England 20 report was "methodical, thorough and objective". 21 At the same time, the UK argues that the standard 22 simply serves to distinguish between reputable and 23 legitimate, and disreputable and thus illegitimate 24 science. But it shouldn't be in dispute that "best 25 available scientific advice" must be reputable and</p> <p style="text-align: center;">Page 53</p>	<p>11:25 1 is the case here, then that model has to be prepared on 2 the basis of methodological rigour. 3 The EU does not dispute that there may be parametric 4 uncertainties in any model. It is also not arguing that 5 the model must be perfect, or free from such 6 uncertainties, in order to qualify as the "best 7 available scientific advice". However, if there are 8 obvious deficiencies in a model which could have been 9 avoided by reasonably available scientific information, 10 any failure to use that information deprives the data 11 derived from applying the model of its quality of the 12 "best available scientific advice". 13 Now, what advice is there that meets this attribute 14 of quality attaching to the "best available scientific 15 advice"? The EU argues that the North Sea Ecopath with 16 Ecosim model -- or short, "Ecosim model" -- as updated 17 by Natural England, Cefas and JNCC, and the simulations 18 based on that model, do not have the necessary 19 scientific and methodological rigour to be considered 20 reputable science. It can therefore not be considered 21 to constitute the "best available scientific advice". 22 On the other hand, the EU does not challenge the 23 scientific and methodological rigour of the remainder of 24 the pieces of scientific advice identified by the UK in 25 support of the sandeel fishing prohibition. These are</p> <p style="text-align: center;">Page 55</p>
<p>11:23 1 legitimate science, and must thus have scientific and 2 methodological rigour. 3 As regards the law of the sea, the UK is incorrect 4 when it seeks to discard the relevance of the fact that, 5 in the context of fisheries, organised methods of 6 science typically rely on large amounts of data, and the 7 ability to create and apply models, so as to arrive at 8 objectively verifiable and valid conclusions. 9 Heading Five of the TCA addresses "Fisheries". 10 It is therefore relevant to consider how the term "best 11 available scientific advice" has been understood in the 12 specific framework of fisheries management and marine 13 conservation. 14 Contrary to what the UK submits, the EU is therefore 15 not relying on any subsequent practice, but on a common 16 understanding in the practice of fisheries management. 17 The pieces of advice prepared by ICES are a case in 18 point. 19 One word on modelling. The "best available 20 scientific advice" does not dictate any form, or the 21 precise form, of the scientific advice. The EU has 22 never argued that Heading Five of the TCA requires 23 modelling for the purposes of the "best available 24 scientific advice". On the other hand, if the 25 scientific advice relied upon integrates modelling, as</p> <p style="text-align: center;">Page 54</p>	<p>11:26 1 notably the ICES Technical Service, the remainder of 2 the Natural England scientific report and the Scottish 3 scientific literature review. 4 I will now move on to the third question. And the 5 third question is: under what circumstances are the 6 parties allowed to rely on the precautionary approach? 7 According to Article 495 -- 8 JUSTICE UNTERHALTER: I'm sorry, I wonder, just before 9 you go on to the next topic: you have placed some 10 emphasis in the interpretation on the requirement that 11 the advice should "principally" be provided by ICES, 12 which seems to be a reliance upon an institutional norm 13 as the principal provider of advice; but that other 14 advice may be sought, but it should, as I understand 15 your submission, match the kind of institutional science 16 that ICES produces. 17 Is that a fair understanding of how you read this 18 provision? 19 DR HOFSTÖTTER: The EU's position is that the science relied 20 on, science different from science emanating from ICES, 21 has to have comparable, equivalent quality as the 22 science emanating from ICES. 23 JUSTICE UNTERHALTER: Yes. 24 DR HOFSTÖTTER: So it is not the institutional component; 25 it is more the substantive component. So it's about the</p> <p style="text-align: center;">Page 56</p>

<p>11:28 1 qualitative, the methodological rigour which science has 2 to have. 3 JUSTICE UNTERHALTER: Yes. But I'm assuming that 4 the agreement to reference principally ICES was because 5 of the confidence that the parties had in ICES as 6 a repository of science and scientific advice. That's 7 why it's specifically identified. Would that be fair? 8 MS NORRIS: To respond to that question specifically, 9 the role of ICES in that provision is indeed reflecting 10 an understanding between the parties that effectively 11 it could be presumed, if science came from that 12 institutional body, that it had the relevant attributes, 13 as it were. That's not to say that other bodies 14 couldn't have the same, but that would be something that 15 had to be demonstrated. 16 So in that sense, yes, there is an institutional 17 recognition built into the TCA. Of course -- 18 JUSTICE UNTERHALTER: Assuming -- I'm so sorry. Please. 19 MS NORRIS: I was simply going to add that of course, in 20 this particular dispute, the European Union is not 21 challenging the institutional attributes of the sources 22 of the other -- 23 JUSTICE UNTERHALTER: Yes, I think that my follow-up 24 question is, though: to the extent that this is 25 a reference to an institutional guarantee of the quality</p> <p style="text-align: center;">Page 57</p>	<p>11:31 1 what are the substantive scientific norms that ICES 2 adheres to in the quality of the work it produces that 3 you, I think, are contending must be sufficiently 4 replicated in another institution that might be used for 5 advice? 6 And you ultimately say that's methodological rigour. 7 But I'm just wondering how one derives methodological 8 rigour from the mere reference to ICES as 9 an institution. How do you go from ICES to 10 methodological rigour? 11 MR DAWES: I think one characteristic is the way in which 12 the ICES advice is peer-reviewed. So the way the advice 13 is produced, the way it is then also reviewed within 14 ICES before it is published. So to go back to the 15 notions you were referring to, so then the manner in 16 which the output of ICES is produced. 17 So I would say there are multiple characteristics, 18 including the ones we've discussed. But I would say 19 when you put those together, they explain the reference 20 to "principally [by ICES]" in the TCA. 21 JUSTICE UNTERHALTER: Then, final question: just taking peer 22 review as an example, does ICES always give advice on 23 the basis of peer review, or does it sometimes do so? 24 Are you saying it's a necessary attribute, or simply one 25 of the factors to be considered?</p> <p style="text-align: center;">Page 59</p>
<p>11:29 1 of advice, how does one then know whether another 2 institution that is used is, as it were, matching what 3 you call the "rigour" that would be of application by 4 ICES? 5 In other words, what is there about ICES that 6 adheres to certain identifiable norms of science that 7 one could say, "Well, another institution must have like 8 attributes", if the institutional reference is of the 9 significance that you contend for? 10 MR DAWES: I think when it comes to ICES, one must look 11 at the history of the body, also its composition -- so 12 it is composed of members from across the world -- also 13 the long-standing nature of the advice it provides. 14 Those are the characteristics that are recognised in the 15 TCA when it uses the notion of "principally": it is 16 the long-standing tradition, the long-standing 17 characteristics of ICES, and the fact that it brings 18 together many other scientific institutes within the 19 ICES framework. 20 JUSTICE UNTERHALTER: Yes, but it doesn't follow, I assume, 21 that because you use another institution that doesn't 22 have quite such a wide-ranging composition, that 23 it isn't eligible for consideration. 24 MR DAWES: That is correct. 25 JUSTICE UNTERHALTER: So I think it's more a question of:</p> <p style="text-align: center;">Page 58</p>	<p>11:32 1 MR DAWES: I don't think we say it's a necessary attribute, 2 in the sense that scientific advice can constitute the 3 best available science if it is not peer-reviewed. But 4 I would say peer review is one of the characteristics 5 that gives the ICES advice the presumption, if one can 6 call it that, that it [is]. 7 JUSTICE UNTERHALTER: Yes, thank you. 8 THE CHAIRPERSON: Thank you very much, Justice Unterhalter, 9 for those questions. 10 I'm looking at the time. Dr Hofstötter, would it be 11 convenient for you to commence your third point 12 regarding the issue of the precautionary approach after 13 a short break? 14 DR HOFSTÖTTER: (Nods head) 15 THE CHAIRPERSON: I also have a question for you, which 16 relates to some of the matters that you've already 17 raised, in particular in relation to the modelling. But 18 I think I will leave that question, if I may, until we 19 return, so it gives you an opportunity to have a bit of 20 a break. 21 Thank you all very much. We will come back after 22 a break. Thank you. 23 (11.34 am) 24 (A short break) 25 (11.50 am)</p> <p style="text-align: center;">Page 60</p>

<p>11:50 1 THE CHAIRPERSON: Thank you very much to the parties. 2 So, Dr Hofstötter, can I ask you first a question, 3 before you proceed with your presentation regarding the 4 precautionary approach. 5 When you discussed the standard of review, you said 6 the Tribunal must determine whether the measure is based 7 on the best available scientific advice, and that's the 8 essence of the standard of review. You then talked 9 about the Natural England/Cefas/JNCC model, and the 10 flaws and caveats in the model. 11 Could you explain in a little bit more detail as to 12 how you think the Tribunal should go about its task in 13 assessing the model, and whether the model is the best 14 available scientific advice? So in light of the caveats 15 and flaws that you mentioned, to what extent does the 16 Tribunal need to assess those caveats and flaws, and 17 take some determination regarding them, in order to meet 18 the standard of review as you set out? 19 DR HOFSTÖTTER: First of all, I would like to answer that 20 of course the precise extent of the flaws and caveats 21 will be still discussed and will be presented by 22 my colleague in more detail. 23 I think if a model is being used, there are certain 24 key elements which this model has to comply with, and 25 a model should contain key features of the system that</p> <p style="text-align: center;">Page 61</p>	<p>11:54 1 the methodological rigour of science. With your 2 permission, I will come back -- 3 THE CHAIRPERSON: Please do. 4 DR HOFSTÖTTER: Thank you very much. 5 The answer is that we have discussed the 6 institutional setup of ICES, but it's not the 7 institutional setup that provides the guarantees -- or 8 it's not only the institutional setup that provides the 9 guarantees that science that is equivalent to ICES 10 advice has the attribute of the best available 11 scientific advice. 12 What is special about ICES? I think this is a fair 13 summary of your question. And I would like to highlight 14 three elements, which you can also find in Annex C-54 on 15 page 1. 16 The three elements of the ICES approach are, 17 first of all, "Scientific objectivity". I think this is 18 not in doubt. As my co-Agent has already explained, 19 ICES is an institution, a scientific organisation with 20 a long-standing history, dating back to 1966. It's 21 an international organisation, in a sense. 22 So the first one is "Scientific objectivity and 23 integrity". This is a key element in order to ensure 24 that there is methodological rigour, in the submission 25 of the European Union, when it comes to scientific</p> <p style="text-align: center;">Page 63</p>
<p>11:52 1 is being simulated. 2 Now, the EU's proposition is that the [Natural] 3 England report used, among other things, a model which 4 had flaws and unaddressed caveats, even though there was 5 available science to address those caveats. 6 How should the Tribunal look at this issue? This is 7 how I understand your question. I think the Tribunal 8 would need to look at the evidence which the 9 European Union has presented; and in particular, 10 it would need to look if credible evidence has [been] 11 presented that there was available science that could 12 have addressed the caveats and the problems identified 13 in full transparency in the Natural England scientific 14 report. 15 The EU will present a list of those elements. 16 It has also drawn attention to those elements, it has 17 elaborated on them in its Written Submission. And the 18 Tribunal's task would be to assess whether indeed there 19 was available science to address these gaps. 20 That would be my answer to your question. 21 Madam Chair, with your indulgence, may I come back 22 to the question which Judge Unterhalter asked before the 23 break concerning the quality and the methodological 24 rigour, and why there is any connection being made 25 between ICES, in the EU's submission, and the quality or</p> <p style="text-align: center;">Page 62</p>	<p>11:55 1 output of a scientific body. 2 The second element is "Quality assurance[s]". So 3 there are quality checks in place which make sure that 4 the science that emanates from ICES has actually been 5 thoroughly assessed, checked, double-checked, and 6 therefore is indeed reputable, reliable science, with 7 all the methodological rigour which such science 8 requires. 9 And the third element, which links back to the 10 second element, is "Transparency": transparency in the 11 sense that the science is open to researchers in a very 12 large area; I could say it is open, yes, to scientists 13 globally. And transparency contributes to the 14 qualitative outcome. 15 Now, of course we are not submitting that a national 16 body would necessarily have to have the same system of 17 transparency involving a full international network at 18 the same level as ICES does. But it is these three 19 quality elements which ensure that science that emanates 20 from national scientific bodies is in line, is in 21 accordance with the requirements of scientific rigour, 22 and can therefore be considered the best available 23 scientific advice. 24 That would be the answer of the European Union. 25 Thank you. Unless there are --</p> <p style="text-align: center;">Page 64</p>

<p>11:57 1 THE CHAIRPERSON: Yes, Dr Hofstötter, can I ask a follow-up 2 question in that regard. 3 So the ICES Technical Service, it's made quite clear 4 in its products that it is not "advice" as such. It is, 5 however, considered in the EU's opening statements to be 6 the best available scientific advice. So to what extent 7 does the ICES Technical Service meet these three 8 qualities that you mentioned that the ICES advice does? 9 Not necessarily now, but something for you to think 10 about, especially when you come later. 11 DR HOFSTÖTTER: I can answer right now your question. 12 First of all, there is agreement between the 13 European Union and the United Kingdom that the 14 ICES Technical Service is part of the best available 15 scientific advice in this case. 16 And the second point is that if you look at 17 Annex C-54 at page 1, you will see that the ICES 18 Technical Service follows the exact same standards as 19 ICES. So therefore we do not see any problem arising 20 from the fact that the Technical Service, and not ICES 21 as such, issues the scientific advice. 22 THE CHAIRPERSON: Thank you very much for that. 23 Please go ahead with your precautionary approach 24 arguments. Thank you. 25 DR HOFSTÖTTER: Thank you.</p> <p style="text-align: center;">Page 65</p>	<p>11:59 1 approach is a lack of adequate scientific information. 2 I refer to the United Kingdom's Written Submission, 3 paragraph 221. 4 The EU doesn't call into question that the 5 precautionary approach, which is a manifestation of 6 the precautionary principle, is potentially relevant in 7 relation to fisheries management measures. This is 8 already suggested by Article 495 and the definition of 9 the "precautionary approach" contained in that article. 10 However, the EU argues that the UK is invoking the 11 precautionary approach in circumstances where invoking 12 that approach is not called for. 13 The precautionary principle certainly is 14 a well-established principle of public international 15 law, going back to Principle 15 of the Rio Declaration. 16 And in Case No. 21, the International Tribunal for the 17 Law of the Sea held that the precautionary approach has 18 been incorporated into a growing number of international 19 treaties and other instruments, many of which reflect 20 the formulation of exactly Principle 15 of the 21 Rio Declaration. 22 In Case No. 31 (C-21), the Advisory Opinion on 23 Climate Change, ITLOS held, against the background of 24 Article 194(1) of UNCLOS, on the prevention of marine 25 pollution, that:</p> <p style="text-align: center;">Page 67</p>
<p>11:58 1 I will now come back to the third question which 2 I introduced before the break, and that third question 3 is: under what circumstances are the parties allowed to 4 rely on the precautionary approach? 5 Now, it is not in dispute that, according to 6 Article 495(1)(b) of the TCA: 7 "... 'precautionary approach ...' means an approach 8 according to which the absence of adequate scientific 9 information does not justify postponing or failing to 10 take management measures to conserve target species, 11 associated or dependent species and non-target species 12 and the environment ..." 13 The precautionary approach is also referred to in 14 Article 356 of the TCA; also this is in full agreement 15 between the parties. There, one can read that: 16 "The parties acknowledge that, in accordance with 17 the precautionary approach, where there are reasonable 18 grounds for concern that there are potential threats of 19 serious or irreversible damage to the environment or 20 human health, the lack of full scientific certainty 21 shall not be used as a reason for preventing a Party 22 from adopting appropriate measures to prevent such 23 damage." 24 Both parties agree that one of the material 25 conditions for the application of the precautionary</p> <p style="text-align: center;">Page 66</p>	<p>12:01 1 "While the precautionary approach is not explicitly 2 referred to in the Convention ..." 3 The "Convention" being UNCLOS: 4 "... such approach is implicit in the very notion of 5 pollution of the marine environment, which encompasses 6 potential deleterious effects." 7 Paragraph 213. ITLOS then continued and developed 8 further on the relevance of the precautionary approach 9 in international law. 10 Similar things can be said about the Convention on 11 Biological Diversity, and references to the 12 precautionary approach are also being made in the FAO 13 Code of Conduct. 14 Nothing of this is controversial, none of this is in 15 dispute. But the central question is whether the UK 16 could rely in casu on an absence of adequate scientific 17 information in adopting the sandeel fishing prohibition, 18 and thus whether the first material condition for 19 applying the principle or the approach has been met. 20 The precautionary approach presupposes an objective 21 absence of adequate scientific information. Therefore, 22 its application presupposes that there is no best 23 available scientific advice on which to base a measure. 24 In fact, the UK fully recognises that the precautionary 25 approach under the TCA does not obviate the need to base</p> <p style="text-align: center;">Page 68</p>

12:02 1 fisheries management measures on the best available  
 2 scientific advice.  
 3 As my colleague will show in a minute, there was  
 4 reasonably obtainable data to fill the flaws and caveats  
 5 identified in the Natural England scientific report. In  
 6 light of this fact, there can be no doubt that there was  
 7 obtainable data in the present case. Since the absence  
 8 of adequate scientific information is an objective  
 9 standard, the inescapable conclusion is that there was  
 10 no absence of adequate scientific information in the  
 11 present case, and thus the first material condition for  
 12 the application of the precautionary approach is not  
 13 met.  
 14 I would like to conclude by saying that, against  
 15 this legal background which I just sketched out, the  
 16 parties can therefore not rely upon an absence of  
 17 adequate scientific information and invoke the  
 18 precautionary approach unless they have made reasonable  
 19 efforts, as discussed before, to obtain relevant  
 20 scientific advice or to analyse available research data.  
 21 If there could and should have been such scientific  
 22 advice, the precautionary approach is simply not  
 23 applicable. And this is exactly the case here.  
 24 My co-Agent is now going to apply the legal standard  
 25 which I just sketched out to the first limb of the EU's

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12:05 1 should and could have addressed those flaws, and I will  
 2 show how.  
 3 Essentially, the five flaws identified consider  
 4 parametrisation. Parametrisation is how and what  
 5 information was fed into the model in order to answer  
 6 the research question.  
 7 Now, the first one that I will look at is the  
 8 assumption made regarding the level of catches, referred  
 9 [to] in point 484 of the EU submission. This is  
 10 important, as I will show, because overestimating the  
 11 proportion of fishing catches inevitably leads to  
 12 overestimation of results in the benefits.  
 13 Second, there is the issue of aggregation of  
 14 functional groups, in particular seabirds and sandeels,  
 15 which are referred [to] in point 486 and point 488 of  
 16 the EU's submission. This essentially leads to not  
 17 properly identifying who is eating what and how, which  
 18 also will lead to incorrect results on the actual  
 19 benefits of the closure.  
 20 Third is not accounting for the special distribution  
 21 of the predators, and how this overlaps with the fishing  
 22 grounds, and this is point 489 of the EU's submission.  
 23 This is fundamental: to assess where the other predators  
 24 are, and how these overlap the fishery grounds, and  
 25 therefore whether there is a benefit from a closure of

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12:04 1 first claim.  
 2 DR PUCCIO: As my colleague just mentioned, the first limb  
 3 of the EU's first claim is that scientific advice that  
 4 the UK identifies as the basis for its full closure  
 5 measure cannot be considered as "best available  
 6 scientific advice" within the meaning of Article 496(2)  
 7 of the TCA and Article 493(3)(c) of the TCA.  
 8 As mentioned in point 491 of the EU's submission,  
 9 the scientific advice on which such a full closure  
 10 measure is actually based is only the Ecosim model  
 11 contained in the Natural England scientific report.  
 12 This is because it's the only one that assesses this  
 13 full closure and its impact.  
 14 The UK update of the Ecosim model in this case  
 15 lacked the necessary methodological rigour to be  
 16 considered "best available scientific advice", and this  
 17 because of five flaws that the EU has identified in the  
 18 way this model was parametrised by the UK, leading to  
 19 overestimation of the result. I have the daunting task  
 20 to walk through these flaws and to show why those are so  
 21 important as to put in doubt this methodological rigour.  
 22 Now, the UK recognises itself those flaws in the  
 23 Natural England scientific report, as well as in its  
 24 submission, but argues that it could not have addressed  
 25 those flaws. The EU instead considers that the UK

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12:07 1 the fishing on those predators.  
 2 Last, the EU made a point on the idea of fixed  
 3 fishing pressure for time limits, and this was in point  
 4 485. For time limits, the EU will not address this in  
 5 the pleading but refers to its submission in the case.  
 6 I can answer questions if necessary.  
 7 So on the first point, on the point raised in  
 8 point 484 of the EU's submission regarding the average  
 9 reduction of catches, accounting for 58%, what is this  
 10 average reduction of catches?  
 11 This measure is important. Why? Because the model  
 12 of the UK is assuming that fishing mortality will be  
 13 reduced by the measure only insofar as you reduce  
 14 fishery, because you are closing the fishery, and  
 15 therefore the reduction of the fishery catches  
 16 corresponds to the reduction that the model expects in  
 17 fishing mortality. And therefore what the model will do  
 18 is that it will look at how that expected reduction in  
 19 fishing mortality impacts the biomass of the other  
 20 predators. So that variable is a key variable.  
 21 Now, before the UK's submission, the EU had no idea  
 22 of how the UK reached this average of 58% reduction in  
 23 catches, and therefore reduction in fishing mortality.  
 24 The UK's submission presented in table 2 how they  
 25 reached that level.

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<p>12:09 1 (Slide 1) So essentially what we are looking at is 2 they have analysed -- so from the total catches that 3 they refer [to] here, they have looked at what is the 4 proportion of the UK catches for every year into these 5 total catches, and got an average, and then they did 6 compute the average over a different time period. 7 (Slide 2) Now, the problem here is that those total 8 catches mentioned here are underestimated. They are not 9 the full amount of the catches. The full amount of the 10 catches, as derived from the ICES official numbers, is 11 the one here (indicating), which is much bigger than the 12 one expected here in 2020 from the UK. This number 13 comes from Exhibit C-0011. That gives you the total 14 catches for all seven areas, and it's clearly a much 15 larger number. 16 This number, also you can see it from table 1 of 17 the UK's submission that shows the total catches in 18 three areas. So they are not all the areas; here it is 19 areas 1, 3 and 4. And if you compute the total of only 20 these three areas, you get a total catch that is much 21 bigger than the total catch calculated by the UK. 22 What is the problem with that? Well, if the 23 proportion of the UK catches is calculated on 24 an underestimated total catch, then obviously the 25 proportion of these UK catches in this total will appear</p> <p style="text-align: center;">Page 73</p>	<p>12:14 1 as we will see, the other flaws that we are analysing 2 will show that actually even those lower proportions 3 that are here, those results on the biomass for the 4 other predators, might actually be also overestimated. 5 The second flaw is the issue of aggregation. So in 6 order to feed the information into the model, you need 7 to define functional groups, and those functional groups 8 essentially define which predator will eat which prey. 9 (Slide 4) Here we see the functional group as 10 defined by the UK, and we see that sandeels are 11 considered as one functional group. 12 Now, in the scientific literature that the UK also 13 cites -- and one can see it, for example, in section 4 14 of the Scottish scientific report (C-50) -- those 15 predators don't eat necessarily the same sandeel that is 16 actually fished. So fishing will be interested in adult 17 sandeels, whereas some seabirds predominantly eat 18 juvenile sandeels that are not affected by fishing. 19 Because they are not affected by fishing, normally they 20 should have no impact from the ceasing of the fishery, 21 because they are not in competition with the fisheries. 22 So the fact that they have not divided that sandeel 23 category into two falsely represents the interaction 24 between predators and prey in the ecosystem, and leads 25 to an overestimation, because here the model assumes</p> <p style="text-align: center;">Page 75</p>
<p>12:11 1 bigger, and therefore the percentage reduction that they 2 expect is bigger. If you use the right number, i.e. the 3 total catches foreseen by the ICES for all areas, then 4 the actual percentage of the UK catches falls from 58% 5 to 39% over the area, 2011 to 2020. 6 (Slide 3) So why this number is important? If, 7 using the right numbers of the total catches, we have in 8 reality an average of 39%, then what we are interested 9 in is not the average result, the results for the 10 average landing proportion that the UK suggests -- so 11 the middle column, which represented the effect on the 12 biomass assuming a 58% average -- but in reality, the 13 changes in the biomass will be more those of the lower 14 landing proportion of the confidence interval, because 15 the UK says, "I am looking at a confidence interval 16 with the lower bound being 38% of reduction of catches", 17 and that corresponds to the 39% average that you would 18 get if you put the right total numbers. 19 Now, there is still an effect, you would say, even 20 if you look at the lower level. So why is this still 21 important? 22 Well, this is, first of all, a methodological error, 23 to have mistaken the calculation of the total catches, 24 and therefore mistaken one of the key variables for 25 having sound results at the end of the estimation. But</p> <p style="text-align: center;">Page 74</p>	<p>12:16 1 that there is a competition between the seabirds and the 2 fishery, which is not justified in accordance with the 3 scientific literature. 4 Also another issue on the aggregation is that 5 seabirds are all considered as one category. Again, 6 scientific literature shows that there are variations in 7 terms of how they depend on sandeel, because they have 8 different characteristics in diving and capacity of 9 reaching the sandeels, in foraging range and in diets. 10 And this is clear also from the Scottish scientific 11 report in section 4. So clearly the UK was aware of 12 these differences in how they interact with sandeels, 13 but they didn't represent it in the model. 14 The third flaw, and probably the most important one, 15 is the flaw concerning the spatial element and not 16 accounting for it. The UK recognises that this is 17 a flaw in the Natural England report, like also the one 18 of not separating juvenile from young sandeels. 19 Just to mention one more thing on the aggregation, 20 the UK says that they could not do the disaggregation. 21 Actually they have done so in previous studies: for 22 example, the 2015 ICES model, which is Exhibit R-0108; 23 and also Exhibit R-0128, which shows that the seabirds 24 were disaggregated when it was necessary. So they could 25 have done it.</p> <p style="text-align: center;">Page 76</p>

<p>12:18 1 So, on the spatial, why is spatial so important? 2 The issue is that the model currently presupposes 3 a uniform distribution of those predators over the area 4 where fishing is actually occurring, and this assumption 5 is actually flawed. 6 So in our submission, we proposed, in footnote 60, 7 to overlap two maps from the literature, the Waggitt 8 et al map and the Jensen et al map, and I will show 9 [what] this shows, because that would show that actually 10 there is very little overlap of concentration of some of 11 those predators -- in particular, seabirds, but not 12 only -- and the fishery grounds. 13 (Slide 5) The UK in its submission (page 129), in 14 reply to this, proposes this map, for example, for the 15 black-legged kittiwake, to show that the foraging range 16 of those animals covers in reality the whole fishing 17 area. But again, this map is not showing the density, 18 it's not showing the concentration. It only shows 19 a possibility of the foraging range, without 20 distinguishing between whether there is actually only 21 one bird or a huge concentration of birds. 22 (Slide 6) Let's take the kittiwake example using the 23 maps mentioned in footnote 60. We have here first the 24 map from Jensen et al (C-23, figure 1) showing the 25 sandeel banks, so where fishery occurs; and here (C-39,</p> <p style="text-align: center;">Page 77</p>	<p>12:23 1 map (C-50, figure 12) showing the fishery location, and 2 we see also the closure that already existed. The 3 fishery locations are using the Jensen reference for 4 which we used the maps in the previous slides. And here 5 (C-50, figure 29), you have the densities of the 6 kittiwake locations. 7 (Slide 11) And we put those together, and you can 8 see how they play out. 9 And what does it mean concretely for the result of 10 this? From this map, we can see it clearly: it means 11 that the benefit that right now is assumed to be 12 uniform, because we are assuming that those animals are 13 uniformly distributed in the area where fishing occurs, 14 well, that benefit from the closure will not be uniform. 15 For example, here (indicating), if we locate 16 ourselves in the area where the previous closure was, 17 if they had put the spatial element, here there is no 18 fishery, because it's already closed. So the measure 19 per se would not have yielded further benefits. 20 Now, if I am moving further away, in this area there 21 are fisheries and there is some concentration of birds, 22 so here I will have a result of some benefits. I would 23 have a higher benefit here, where the concentration is 24 bigger. But then if I move further away, in the area 25 where it's white, I don't have any more overlap between</p> <p style="text-align: center;">Page 79</p>
<p>12:21 1 figure 4), the density distribution of the kittiwakes, 2 represented as one animal per kilometre. 3 Now, the January figure is not important to us, 4 because in January sandeels are spawning, and kittiwakes 5 are actually not therefore eating them; and also there 6 is no fishery, it's not the fishery season. 7 So July would apply to the fishery season. As we 8 see, the concentration is mainly on the coast. The 9 green already represents less. So orange represents one 10 kittiwake per kilometre, so green is even lower. So 11 it's a very low overlap. 12 (Slides 7-8) One can do the same exercise with the 13 second picture provided by the UK on gannet (UK Written 14 Submission, page 128), and the result is even worse, in 15 the sense that here, as we can see from the Waggitt map, 16 gannets are actually more concentrated in areas where 17 fishery does not occur. The only one that I would see 18 is here (indicating). 19 (Slide 9) Now, one can do the same, looking at the 20 same elements, for all the other seabirds that the UK 21 mentions in point 297 of its submission. And the result 22 is the same: distribution is important, because there is 23 sometimes very low overlap, or it's localised. 24 (Slide 10) To do that, we can also use two maps from 25 the Scottish scientific report. So again, we have this</p> <p style="text-align: center;">Page 78</p>	<p>12:25 1 the bird and the fisheries. So fisheries in that area 2 shouldn't have any impacts on the birds. 3 So this is to say that because of the absence of 4 these special elements, the results cannot give the 5 right and cannot assess the right benefit derived from 6 a closure in the different areas. 7 The UK says: well, it's not only about seabirds. So 8 even if we account that there is a difference in 9 distribution of the seabirds, why should we care about 10 special elements? 11 First of all, if the UK had introduced special 12 elements -- which they could, because there is an Ecosim 13 model using the special elements -- they would have 14 still accounted for the other predators in the area, 15 because the Ecosim considers all the predators involved. 16 So they would have had the data also for that. 17 (Slide 12) Second, there are some mammals that are 18 also very much localised. And here we put some figures 19 from the exhibits that show exactly that some of these 20 animals are, again, very specifically localised, and not 21 necessarily overlapping with the fishery grounds. This 22 is particularly clear with the harbour seals, but also 23 with the others. 24 So to conclude, those flaws are overestimating these 25 benefits. They are inconsistent with the literature</p> <p style="text-align: center;">Page 80</p>



<p>12:27 1 that the UK itself is citing, and should have taken into 2 account when constructing and applying the Ecosim model 3 for its own research question. And moreover, the UK 4 could have addressed those flaws that the UK itself 5 mentions in the [Natural England] report. 6 The UK mentions that by doing this, by changing the 7 model, the UK would have lost the ICES key run; like, 8 a medal of quality. In reality, by simply updating the 9 model, it had already lost that ICES key run. 10 Moreover, the ICES key run was given for this 2015 11 ICES study that I mentioned previously, and that already 12 divided birds into at least two categories, depending on 13 their diving capacity, and the UK now changed the model 14 to have only one category. 15 So, in reality, they would have in any case not this 16 ICES key run. And this ICES key run, they can still 17 apply for it in any case with a new model. So it is not 18 a sufficient reason not to have addressed those flaws. 19 And I would stop here. If you have any 20 questions ... 21 JUSTICE UNTERHALTER: I wonder if I could ask you this: 22 in order to show that there has been a failure to 23 conform with the standard of the "best available 24 scientific advice", does it suffice to show that there 25 are methodological flaws of the kind that you've</p> <p style="text-align: center;">Page 81</p>	<p>12:31 1 literature already gave them a lot of elements [which] 2 the model should have absolutely taken into account, 3 because they would have otherwise had an incorrect 4 estimation of the result. 5 So the issue here is that this information of best 6 scientific advice that was outside, and that the UK 7 had -- they had knowledge of it -- was not properly 8 reused in the model so as to assess the actual impact of 9 that closure. In that sense, I would say those elements 10 are key flaws to the model, in such a way that this 11 cannot be considered best available advice as such, even 12 without analysing further the issue of whether that does 13 justify the measure or not; so whether the result, if 14 they had corrected it, would have justified the measure 15 or not. 16 JUSTICE UNTERHALTER: So just to be clear, you are saying 17 that it suffices to show that there are flaws that are 18 material, significant and don't comport with the 19 scientific literature; that suffices. However, it is 20 not necessary to take the further step of showing that, 21 had those flaws been corrected, the measure would no 22 longer be supported by best available scientific advice? 23 DR PUCCIO: Well, here we are still in the part of the 24 characterisation as "best available scientific advice". 25 Do you want to add something?</p> <p style="text-align: center;">Page 83</p>
<p>12:29 1 indicated, or does one have to show that if those flaws 2 had been corrected, the measure that was taken would not 3 have been supported? 4 And just to indicate why I'm asking the question, 5 [it] is that almost every modelling exercise one can 6 imagine is subject to certain assumptions, often 7 simplifying assumptions, in the construction of the 8 model. But the question is whether, in order to show 9 that there has been a failure of the kind that is being 10 alleged, is it sufficient to simply show the flaw, and 11 that the flaw has methodological significance; or is it 12 to show that, had the flaw been taken into account and 13 corrected, the measure would no longer have been 14 supported? 15 DR PUCCIO: So the EU does not dispute that you need to 16 simplify in a model. However, you need to do so with 17 the information that you get from the scientific 18 literature that preceded you, and that gives you 19 indication of what you should absolutely take into 20 account in order to properly answer your research 21 question. 22 So in that case, their research was: what is the 23 impact of closing fisheries, and therefore the expected 24 increase in sandeel from those closures, on the biomass 25 of the other predators? And on this, the scientific</p> <p style="text-align: center;">Page 82</p>	<p>12:33 1 DR HOFSTÖTTER: I would like to add to what my colleague 2 just said. 3 I think a crucial element is that these flaws and 4 caveats are expressly noted in the Natural England 5 report. And the second essential point is: as 6 I explained before, there was available scientific 7 advice to fill exactly those gaps or, to be more 8 precise, to correct these flaws in the setup of 9 the model. 10 It has been already noted that the Ecosim model 11 which has been used by the United Kingdom benefits from 12 key run status. This applies to the Ecosim model as 13 such, but it does not apply to the update which has been 14 run by the United Kingdom. The United Kingdom seems to 15 argue that this update doesn't harm the status which had 16 been given by ICES. But the very fact of the matter is 17 that this update never passed through ICES, so the key 18 run status of the model cannot extend possibly to the 19 update that had been performed by the United Kingdom. 20 The outcome of this unilaterally updated model by 21 the United Kingdom is that certain flaws have been 22 identified, and in this regard the United Kingdom is 23 very transparent. But this is not enough. The United 24 Kingdom would have been required, on the basis of 25 Articles 494 and 496 of the TCA, to fill those gaps,</p> <p style="text-align: center;">Page 84</p>

12:34 1 because there was science available, there was other  
2 available science, and the science, given that it was  
3 reasonably obtainable, would have had to be used by  
4 the United Kingdom.  
5 DR PUCCIO: If I may just add -- so coming back to your  
6 question -- I think there are two moments here that need  
7 to be separated.  
8 The first one is to understand whether this piece of  
9 advice can be considered as "best available scientific  
10 advice". And those flaws show that it cannot, because,  
11 as I said, [there is] material that came from  
12 information that the UK had available and could address  
13 them.  
14 And therefore they are not a mere decision to  
15 simplify the model. If you simplify the model in a way  
16 that is consistent with the literature, and is  
17 consistent with the information that you get from the  
18 literature, in order to reply [to] the question, this is  
19 not a problem. But here this was in contrast with it.  
20 So one thing is that these flaws make it that this  
21 particular piece of evidence cannot be "best [available  
22 scientific] advice". And then indeed there is a second  
23 question that will come afterwards: whether the measure  
24 could have still been justified with something else,  
25 with another advice or not. So those are two different

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12:38 1 first?  
2 DR PUCCIO: Yes.  
3 THE CHAIRPERSON: Yes, good.  
4 So then on figure 12, my understanding is the black  
5 line at the very side, on the right-hand side, is the  
6 edge of the UK EEZ; and then the hatched areas, the  
7 purple hatched area is the sandeel prohibition from  
8 2000, and again the sandeel area 4 is in purple.  
9 DR PUCCIO: Yes.  
10 THE CHAIRPERSON: So when we then go to the next slide (11),  
11 there's a little bit of additional information.  
12 You have the full EEZ of the United Kingdom on the  
13 right-hand side, that solid black line. Is that  
14 correct, that that is the line of the EEZ of the  
15 United Kingdom?  
16 DR PUCCIO: Yes.  
17 THE CHAIRPERSON: I see nods from your colleagues.  
18 DR PUCCIO: Yes.  
19 THE CHAIRPERSON: And in comparison to the pink on this  
20 slide and the pink on the previous slide, there's not as  
21 much pink, can I say. The pink identifies the foraging  
22 range of the black-legged kittiwake.  
23 So am I correct that we should read this slide,  
24 this overlay slide, as a representation of the two  
25 individual slides, rather than looking at that one slide

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12:36 1 questions.  
2 But these flaws, in our view, already justify the  
3 consideration that this particular piece of advice could  
4 not be considered as "best available scientific advice",  
5 and therefore the UK could not base itself on this  
6 specific piece of advice for justifying a full closure.  
7 JUSTICE UNTERHALTER: Yes, I understand your submission.  
8 Thank you.  
9 THE CHAIRPERSON: Dr Puccio, can I just ask a question,  
10 a very practical question, if I may. And if I can ask  
11 you to go back two slides, to the one which has the  
12 figure 12 and figure 29 on the same page; the one before  
13 that, which has the two (slide 10). Yes.  
14 I just want to understand the various lines on this  
15 one, and then I'll ask you to go to the next one.  
16 So my understanding of figure 29 is that those  
17 dotted lines around the edge of the coast of the UK are,  
18 respectively, the foraging range of black kitti[wakes],  
19 the [55] and then the 156 foraging range. And my  
20 understanding is that the blue dotted line is the area  
21 closed to sandeel fishing from the year 2000 --  
22 DR PUCCIO: Yes.  
23 THE CHAIRPERSON: -- and that the sort of a purplish colour  
24 dotted line is the sandeel management area 4.  
25 And then on the figure -- so am I correct on that,

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12:40 1 by itself? Because it doesn't include as much pink, can  
2 I say.  
3 DR PUCCIO: Yes, it's so light that there you couldn't see  
4 it that much. But indeed, within this slide there is  
5 a third layer of very light pink which corresponds to  
6 circa 0.003-0.347 birds per kilometre, so a very small  
7 amount, and which here looks like it was white, but in  
8 reality, yes, there is still a layer of additional pink  
9 that's shown there.  
10 THE CHAIRPERSON: Thank you, yes. So that's very clear now.  
11 It's a question of printing, so I understand. So it's  
12 not a problem.  
13 DR PUCCIO: Yes. It's still a very small density. So  
14 indeed, when you go away from the darker pink to the  
15 lesser pink, normally you should get a lower benefit  
16 from the closure of a fishery.  
17 THE CHAIRPERSON: And may I ask: here we have sandeel  
18 management area 4 highlighted. It doesn't cover all the  
19 UK EEZ, so there are other management areas.  
20 DR PUCCIO: Indeed.  
21 THE CHAIRPERSON: Could you just sort of indicate -- and  
22 I apologise for going into some detail here. But would  
23 you just, simply for my information, indicate that the  
24 top half is perhaps sandeel management area 1r, and the  
25 bottom one 3r? Or maybe that's something that I have

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12:41 1 maybe not got right.  
2 And then where does the border between Scotland and  
3 England lie on this kind of map?  
4 DR PUCCIO: So you would have -- below area 4, so here  
5 (indicating), this area here should be 1r. And up here,  
6 there should be 7r somewhere. And next to area 4 there,  
7 here there should be area 3r; and up here, 5r; and down  
8 there, 2r. Yes, more or less. You can basically  
9 compare it with figure 9 in the UK's submission so as to  
10 see it more clearly.  
11 THE CHAIRPERSON: Thank you very much for that. So I will  
12 go back and make sure that I have a very good  
13 understanding of the map, of the various management  
14 areas overlaid on this kind of map. So thank you very  
15 much.  
16 DR PUCCIO: But indeed, on the exhibits we had only the maps  
17 for the Scottish, but it gives already the idea, and  
18 the same idea applies for the whole of the UK.  
19 THE CHAIRPERSON: Thank you very much. So that concludes  
20 my question.  
21 Professor Ruiz Fabri.  
22 PROFESSOR RUIZ FABRI: Yes, one quick question to follow  
23 [Justice] Unterhalter's questions about the best  
24 available scientific advice.  
25 If I understand well, your contention is that this

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12:45 1 measures to be based on the "best available scientific  
2 advice", and I have interpreted the notion of the "best  
3 available scientific advice". I will now turn to the  
4 interpretation of the notion of "based on".  
5 The EU argues that the parties must establish  
6 a rational or objective relationship --  
7 JUSTICE UNTERHALTER: I'm so sorry to interrupt, if I may.  
8 But since you're going on to another topic, could I just  
9 be clear on the question around transparency, unless  
10 you're coming to that in due course. You have mentioned  
11 it already, the failure to adhere to proper norms of  
12 transparency as part of what "best available scientific  
13 advice" means.  
14 DR HOFSTÖTTER: I had not intended to argue on this basis  
15 because I am really now discussing the standard of  
16 "based on". But if you would like me to go back  
17 to it --  
18 JUSTICE UNTERHALTER: It's just one question which arose  
19 immediately, but you can of course answer entirely when  
20 it suits you.  
21 But as I had understood, the flaws that are being  
22 identified in the model are flaws that the UK had  
23 acknowledged in the modelling exercise, by and large;  
24 these are features of the model that they identified.  
25 That would suggest that the model was transparent;

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12:43 1 model cannot be best available scientific advice because  
2 the update was flawed. If the flaws would have been  
3 corrected according to what you pointed out, it could  
4 have been best available scientific advice, although you  
5 don't contend that it would have been, because it would  
6 have to be checked.  
7 But the issue there: one question which could  
8 arise -- because it was raised in the UK's submission --  
9 is that it was for the EU to prove that there would have  
10 been best available scientific advice to support the  
11 measure. So what can you say in terms of burden of  
12 proof in this regard?  
13 Now or later, because it is also among the questions  
14 by the Tribunal, so it is for you to decide when you  
15 answer it.  
16 Am I clear?  
17 DR PUCCIO: We will come back to that later.  
18 PROFESSOR RUIZ FABRI: Thank you. No further question from  
19 me.  
20 THE CHAIRPERSON: Thank you.  
21 European Union, please continue. Thank you so much  
22 for your indulgence.  
23 DR HOFSTÖTTER: Thank you, Madam Chair.  
24 I have already explained earlier this morning that  
25 Article 496 TCA and Article 494(3)(c) TCA require

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12:46 1 it may or may not be flawed, as you say, but there was  
2 an acknowledgement of some of its limitations.  
3 What are the other attributes or what are the other  
4 things that you say don't meet the requirements of  
5 transparency?  
6 DR HOFSTÖTTER: So there is no doubt that the UK was  
7 transparent about this issue, but our proposition is  
8 that transparency is not the legal standard. The legal  
9 standard is for a measure to be based on the best  
10 available scientific advice.  
11 So if a party identifies gaps, flaws, methodological  
12 errors in a study, it is not sufficient for the party  
13 just to record these flaws in a study. This recording  
14 will of course inform the larger public and the  
15 scientific community that the study is not flawless, but  
16 it will still not fix the problem. And thus, by way of  
17 conclusion, such study could not meet the test of the  
18 "best available scientific advice".  
19 JUSTICE UNTERHALTER: No, I understand your submission now.  
20 Thank you very much.  
21 DR HOFSTÖTTER: As said, I will now turn to the expression  
22 of "based on".  
23 As already said, rational or objective relationship  
24 is the key proposition of the EU. So there has to be  
25 a rational or objective relationship between the best

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12:47 1 available scientific advice, on the one hand, and the  
 2 conservation and management measure adopted pursuant to  
 3 that advice, on the other hand. I would like to refer  
 4 you to the EU's Written Submissions, paragraphs 313  
 5 to 314.  
 6 The issue on which the parties disagree is the  
 7 degree of proximity between the best available  
 8 scientific advice and the measure adopted on the basis  
 9 of that best available scientific advice. This raises  
 10 two questions that will have to be addressed by this  
 11 Tribunal. The first question is: what is the role of  
 12 the best available scientific advice in relation to  
 13 other factors that the decision-maker has to take into  
 14 account? And the second question is: what is the  
 15 necessary scientific foundation for the spatial scope of  
 16 a conservation measure? I will now address both  
 17 questions in turn.  
 18 As regards the first question, so what are the other  
 19 factors, Article 496(2) of the TCA attaches particular  
 20 weight to the requirement for parties to base fisheries  
 21 management measures on the best available scientific  
 22 advice. There is no other provision in Heading Five of  
 23 the TCA that requires parties to base measures, or  
 24 something else, on the foundation of yet something else.  
 25 This particular choice of terminology must therefore be

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12:50 1 mean that science alone shall determine the content of  
 2 necessary measures. By insisting on a rational or  
 3 objective relationship -- on which the UK agrees, by the  
 4 way -- the EU is not suggesting in any way that there  
 5 would be a requirement for measures to conform to  
 6 scientific advice. The EU did never suggest that the  
 7 meaning of "based on" should be to conform to something.  
 8 There is therefore no need for the Tribunal to address  
 9 this issue.  
 10 I'm now turning to my second question, which is:  
 11 what is the necessary scientific foundation for the  
 12 spatial scope of a conservation measure?  
 13 Where the best available scientific advice, and thus  
 14 the scientific foundation of a measure, is reasonably  
 15 available to the parties, the best available scientific  
 16 advice must provide a full foundation for the measure.  
 17 As discussed, there was the best available scientific  
 18 advice available in this case, it was reasonably  
 19 available, but it was chosen not to use the available  
 20 science. Only where there is an absence of adequate  
 21 scientific information [may] the precautionary approach  
 22 be applicable, and I refer to what I said earlier this  
 23 morning.  
 24 Maybe a last observation on this point: the present  
 25 case is not a case where there are divergences of views

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12:49 1 given meaning.  
 2 The EU argues that the effect of this terminology of  
 3 "based on" in Article 496(2) is to signal what the main  
 4 foundation of a measure should be. This requirement  
 5 therefore, by necessity, limits the parties' regulatory  
 6 autonomy and, to an extent, reduces their discretion.  
 7 Contrary to what the UK seems to argue, the EU has  
 8 never suggested that the best available scientific  
 9 advice alone is to determine the content of a measure.  
 10 There are other important principles that may come into  
 11 play, depending on the situation. While the requirement  
 12 of "based on" therefore does not preclude, where  
 13 applicable, consideration by the parties of other  
 14 factors -- and in this respect I refer in particular to  
 15 Article 494(3) of the TCA -- it signals the particular  
 16 weight that Heading Five attaches to the best available  
 17 scientific advice.  
 18 In view of this particular wording, the obligation  
 19 to base measures cannot, therefore, be interpreted as  
 20 relegating this particular requirement to one of the  
 21 many factors influencing a decision by the  
 22 United Kingdom, or by the parties more generally.  
 23 The EU's position is fully in line with the ITLOS  
 24 Advisory Opinion on Climate Change, Case 31, where ITLOS  
 25 found that the crucial role that science plays does not

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12:52 1 within the scientific community. Instead, it is a case  
 2 of lack of scientific rigour or methodological flaws in  
 3 the context of what the UK is trying to test.  
 4 On the basis of the EU's submission on the legal  
 5 standard, I will now proceed to the application of this  
 6 standard to the second limb of the EU's first claim.  
 7 In its Written Submission, paragraph 493 in  
 8 particular, the EU has detailed the reasons why there is  
 9 no rational objective relationship between the  
 10 scientific advice that the UK has identified as the base  
 11 for the sandeel fishing prohibition and the full spatial  
 12 scope of that prohibition. As a result, the UK did not  
 13 base that measure on the best available scientific  
 14 advice.  
 15 As is apparent from the ICES Technical Service,  
 16 since 2011 the sandeel fishery has been managed in  
 17 a risk-averse manner, an escapement strategy, ensuring  
 18 a less than 5% risk of fishery affecting sandeel  
 19 recruitment for the following year. The EU accepts that  
 20 despite this risk-averse management strategy, there may  
 21 be localised depletions of sandeel abundance, as also  
 22 noted in the ICES Technical Service, as well as in the  
 23 Scottish scientific literature review.  
 24 As has already been shown by my colleague, the  
 25 English scientific report, however, does not constitute

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12:54 1 reputable science for lack of scientific rigour. It is  
 2 as unreliable as regards the biomass responses of  
 3 sandeel predators. Correcting the caveats and errors in  
 4 the English scientific report moreover indicates that  
 5 most simulated biomass increases of a closure of all UK  
 6 waters of the North Sea for the sandeel fishery would  
 7 likely be smaller.  
 8 But if the English scientific report is unreliable  
 9 with regard to simulated biomass increases of certain  
 10 sandeel predators, and the ICES Technical Service  
 11 indicates that risk-averse advice could result in  
 12 localised depletions, without any spatial element having  
 13 been considered in the English scientific report, where  
 14 is then the rational objective relationship between the  
 15 scientific advice that the UK has identified as the base  
 16 for the sandeel fishing prohibition and the closure of  
 17 all UK waters of the North Sea for the sandeel fishery?  
 18 The EU submits that there is no such relationship.  
 19 Therefore, the sandeel fishing prohibition is not based  
 20 on the best available scientific advice, even when  
 21 assuming that the Natural England scientific report  
 22 constituted the best available scientific advice, which  
 23 is not the case, for the reasons given.  
 24 A few considerations on this point.  
 25 First, sandeel abundance is mainly driven by natural

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12:57 1 feeding range of chick-rearing seabirds.  
 2 However, there is no rational objective relationship  
 3 between the scientific advice invoked by the UK as the  
 4 base of the sandeel prohibition and a spatial  
 5 prohibition on sandeel fishing in UK waters of the  
 6 North Sea that goes beyond the feeding range of  
 7 chick-rearing seabirds, for which sandeel comprise  
 8 a substantial proportion of the diet. Nor does the  
 9 scientific advice indicate that such spatially broader  
 10 prohibition would further benefit the breeding success  
 11 of these seabirds.  
 12 In view of unreliable biomass responses to the  
 13 sandeel fishing prohibition presented in the Natural  
 14 England report, the UK's proposition that an increase in  
 15 sandeel abundance as a result of closure of all UK  
 16 waters of the North Sea for the fishery could offer some  
 17 resilience at times of adverse natural conditions is  
 18 untenable.  
 19 The UK argues that the sandeel fishing prohibition  
 20 was not solely or primarily intended to benefit  
 21 seabirds. But we cannot lose sight of the fact that,  
 22 according to the Natural England report, seabirds are by  
 23 far the potential primary beneficiaries of the measure,  
 24 with their biomass simulated to increase by 4-8% in  
 25 around ten years; referring to the Natural England

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12:55 1 mortality rather than the impact of the North Sea  
 2 sandeel fishery. This is noted in the Scottish  
 3 scientific literature review, Exhibit C-50, and is not  
 4 contested by the EU.  
 5 Localised depletions of sandeel primarily affect  
 6 predators with a limited foraging range, given their  
 7 limited inability to migrate to other areas where there  
 8 is no absence of sandeel. Other predators -- such as  
 9 minke whales, for example -- move large distances and  
 10 are not at all limited by local sandeel abundance.  
 11 The Natural England scientific report shows that  
 12 there is a correlation between the insufficient  
 13 localised abundance of sandeel and the breeding success  
 14 of chick-rearing seabirds, for which sandeel comprises  
 15 a substantial proportion of their diet. Such  
 16 a correlation is also the reason why sandeel fishing has  
 17 been prohibited since 2000, in an area within English  
 18 waters of ICES area 4b and Scottish waters of ICES  
 19 areas 4a and 4b, so as to minimise the impact of low  
 20 sandeel abundance on seabird productivity.  
 21 The EU therefore does not contest a rational or  
 22 objective relationship between the scientific advice  
 23 invoked by the UK as the base for the sandeel fishing  
 24 prohibition and a prohibition on sandeel fishing in UK  
 25 waters of the North Sea coinciding spatially with the

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12:59 1 report (C-45), page i.  
 2 These figures are unreliable as a result of  
 3 parametric flaws in the context of what the UK is trying  
 4 to test, as discussed by my co-Agent earlier. But it is  
 5 also unreliable because it groups together all seabirds,  
 6 regardless of their spatial distribution, their forage  
 7 range or capacities, or their diet flexibility.  
 8 With regard to the forage range of seabirds  
 9 specifically, the UK has presented new maps in its  
 10 Written Submission, on pages 128 and 129 of the UK's  
 11 Written Submissions. We have seen these maps projected  
 12 on the screen a little earlier.  
 13 I think it's important to say that these maps were  
 14 not part of the scientific advice that the UK has  
 15 identified as the base for the sandeel fishing  
 16 prohibition. The sandeel fishing prohibition cannot,  
 17 therefore, possibly be based on these maps. Already for  
 18 this reason, these maps are irrelevant for adjudicating  
 19 on the EU's first claim. They came only with the UK's  
 20 Written Submissions, and were not part of any scientific  
 21 assessment performed by the UK prior to the adoption of  
 22 the sandeel fishing prohibition.  
 23 Should the Tribunal nevertheless consider that these  
 24 two maps are relevant, the EU points out that these maps  
 25 are contradicted fundamentally with the information

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<p>13:00 1 provided in the Scottish scientific report, according to 2 which: 3 "... a typical foraging range would not regularly 4 include foraging outside of the existing closed 5 area ..." 6 This is Exhibit C-50, page 51. 7 In addition, the new maps presented by the UK are 8 also contradicted by the UK's submissions concerning the 9 risk of local sandeel depletion. If the forage ranges 10 of seabirds were as large as the new maps claim, these 11 seabirds would be entirely insensitive to local 12 depletion. 13 The United Kingdom's scientific evidence shows small 14 simulated biomass increases for species other than 15 seabirds. But even those small simulated biomass 16 increases -- or especially those small biomass 17 increases -- are not reputable science, as a result of 18 the parametric flaws in the context of what the UK is 19 trying to test. 20 All of this shows that there is no rational or 21 objective relationship between the scientific advice 22 that the UK has identified as the base for the sandeel 23 fishing prohibition and this particular measure. 24 The EU finally observes that the United Kingdom also 25 refers to the precautionary approach in an attempt to</p> <p style="text-align: center;">Page 101</p>	<p>13:04 1 the flaws and caveats identified by the UK. 2 Unless the Tribunal has further questions, this 3 concludes the EU's submissions on the first claim. 4 THE CHAIRPERSON: Thank you very much, Dr Hofstötter. 5 I have a first question, which goes backwards a bit, 6 and you can answer it either now or later. It refers 7 back to when you were discussing the interpretation of 8 "based on" best available scientific evidence. You 9 said, on the one hand, that the obligation to base 10 a measure on the best available scientific advice can't 11 be relegated to one of a number of factors; and you also 12 said, after quoting the ITLOS Climate Change Advisory 13 Opinion, that a measure does not have to conform to the 14 best available scientific evidence. 15 So it seems to be quite a nuanced position that the 16 EU is subscribing to. And I wonder, therefore, how you 17 take into account -- where you have a number of factors, 18 are you suggesting, therefore, that, of a number of 19 factors, it is the best available scientific evidence or 20 advice that should be given some degree of preference? 21 Or what are the implications of these two statements? 22 Thank you. 23 DR HOFSTÖTTER: Thank you. The EU would prefer to come back 24 to your question later. Thank you. 25 THE CHAIRPERSON: I think Justice Unterhalter also has</p> <p style="text-align: center;">Page 103</p>
<p>13:02 1 justify the sandeel fishing prohibition. I have already 2 addressed the Tribunal on the issue of the precautionary 3 approach earlier this morning. I will therefore limit 4 myself to the following very brief remarks. 5 As has been shown by my co-Agent, the UK has chosen 6 to parametrise the Ecosim model, on which the results of 7 the Natural England report are based, in a particular 8 manner. Furthermore, as already discussed, the UK has 9 merely recorded the caveats resulting from that 10 particular choice of model and model parametrisation in 11 that report. However, despite the availability of model 12 components allowing to address exactly those caveats, 13 the UK has chosen not to use those models. 14 The UK has thus created by its own volition and 15 choice a situation in which crucial caveats and 16 methodological inaccuracies could and should have been 17 addressed on the basis of the best available scientific 18 advice, but the UK chose not to address these flaws and 19 caveats. The UK can therefore not invoke an absence of 20 adequate scientific information in the present case, 21 which would be one of the material conditions required 22 to render the precautionary approach applicable. 23 Contrary to what the UK submits, there was no 24 absence of better information since, upon objective 25 consideration, there were means available to address</p> <p style="text-align: center;">Page 102</p>	<p>13:05 1 a question. 2 JUSTICE UNTERHALTER: It's actually a follow-up question, 3 more or less in the same vein. And again, come back to 4 it if you wish. 5 I understood your argument to be that a measure may 6 be justified for a number of reasons, one of which is 7 that it must be based on the best available scientific 8 evidence. If the measure does not meet that 9 requirement -- again, just hypothetically, if it did not 10 meet that requirement -- does the fact that there are 11 other justifications for the measure mean that there is 12 not a breach of the treaty, or is this, as it were, 13 a necessary condition for conformity? 14 DR HOFSTÖTTER: Basing measures on the best available 15 scientific advice is indeed a necessary condition, but 16 it's not necessarily a sufficient condition. 17 As I explained in my presentation earlier, there's 18 a number of principles which Article 494(3) of the TCA 19 refers to. Now, not all of these principles may apply 20 in all circumstances. However, what is clear is that, 21 according to Article 496 of the TCA, the best available 22 scientific advice must play a role; it cannot be simply 23 relegated to one of the many factors. 24 So there always has to be best available scientific 25 advice, which of course is also understandable when</p> <p style="text-align: center;">Page 104</p>

13:08 1 bearing in mind the object and purpose of this  
2 particular heading, Heading Five, of the TCA, which is  
3 about fisheries management. Fisheries management  
4 decisions by definition require, in a way, modelling,  
5 require projections of the future, a possible future,  
6 which has to rest on studies, on science, because  
7 otherwise this future cannot be possibly predicted.  
8 For this reason, it is the European Union's position  
9 that the TCA, Heading Five of the TCA, attaches  
10 a particular weight to the requirement of basing  
11 measures on the best available scientific advice, but  
12 not to the exclusion of any other factors. So it is not  
13 the EU's proposition that the decision-maker is only  
14 supposed to look at the best available scientific  
15 advice, and decide on that basis alone.  
16 JUSTICE UNTERHALTER: So if it is a necessary requirement,  
17 then your interpretation of the treaty is that, in  
18 essence, there must be conformity with that requirement,  
19 and other justifications for the measure can't  
20 compensate for any failure to conform. Is that the  
21 logical consequence of your interpretation?  
22 DR HOFSTÖTTER: Indeed. The EU's position is that there  
23 needs to be compliance with the requirement to base  
24 measures on the best available scientific advice, but  
25 this is not the only element.

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13:11 1 But there in the TCA it looks a bit more  
2 complicated, because you have best available scientific  
3 advice, including in the precautionary approach. So the  
4 difficulty is also related to the way the UK argued in  
5 its submission, so I would like to have your feedback,  
6 either now or later.  
7 You have the best available scientific advice. And  
8 then you say: okay, this is not the best available  
9 scientific advice. Then you say: precautionary  
10 approach. But within precautionary approach, you have  
11 best available scientific advice. So how do you relate?  
12 If any relationship is to be made between the first and  
13 the second, if I can put it like that.  
14 This is to articulate the moment when you invoke the  
15 precautionary approach. And just now you answered  
16 indeed that at some point the precautionary approach  
17 could come on board in relation to other factors. But  
18 as we can find best available scientific advice under  
19 both headings somehow, the problem is: is it best  
20 available scientific advice downgraded, because it's  
21 a context of precaution, so lack of information? How do  
22 you relate both?  
23 I think this is something which it would be good  
24 that it's clarified for the Tribunal, or else we will  
25 have the feeling that: okay, there is no best available

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13:09 1 THE CHAIRPERSON: But just to be clear, a failure to conform  
2 would be the end of the story. The measure can't be  
3 justified because in other respects it was needed or  
4 thought to be necessary?  
5 DR HOFSTÖTTER: Well, if there is an objective absence of  
6 the best available scientific advice, then the European  
7 Union would accept that the precautionary approach may  
8 become applicable. However, if there is objectively  
9 available scientific evidence, reasonably available, as  
10 I referred to earlier, then a requirement of the TCA is  
11 exactly to base the measure on the best available  
12 scientific advice.  
13 JUSTICE UNTERHALTER: Thank you, that's clear.  
14 THE CHAIRPERSON: Thank you.  
15 Professor Ruiz Fabri has a question now.  
16 PROFESSOR RUIZ FABRI: Yes, and you made a nice transition,  
17 because it was about the precautionary approach, to  
18 understand or to clarify how you articulate on this.  
19 If you would compare -- because you have referred to  
20 this also in your Written Submission -- to the WTO  
21 approach, you would say that if you come with best  
22 available scientific advice as sufficient scientific  
23 proof, then you couldn't invoke the precautionary  
24 principle, because either you have enough information or  
25 you don't have enough information.

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13:13 1 scientific advice, so it's precaution, but there we find  
2 again the same requirements.  
3 How do you articulate that? The answer can come  
4 later. But I think it would be good to clarify the  
5 articulation between the precautionary approach and  
6 this requirement.  
7 Thank you.  
8 MS NORRIS: Thank you. We will try to give you an answer  
9 now. If we may start already with your reference to  
10 the precautionary approach under WTO law, or  
11 international economic law in the broadest sense.  
12 That's been referred to primarily in the context of  
13 the SPS Agreement, where of course there is this  
14 recognition that you can rely on the precautionary  
15 approach, but it's not unlimited; there is a further  
16 obligation on the parties to then go out and obtain  
17 further scientific evidence, and in that sense it's  
18 temporary.  
19 Here in the TCA there is also the precautionary  
20 approach: it's one of the principles referred to in  
21 Article 494(3)(a). So if we look at the way that it's  
22 articulated here, and just to clarify the European  
23 Union's position, what we're saying is that there is  
24 a primary obligation to base your measures on the best  
25 available scientific advice. That's very clear: it's

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13:14 1 stated in Article 496. The point being that that is  
2 the starting point. And that shouldn't really be  
3 a controversial position. Science-based decision-making  
4 is widely recognised, and I don't think that the UK  
5 contests that one should start from available science.  
6 The question really comes to: what happens if there  
7 is a gap? And here, the European Union is saying: well,  
8 it depends why there is a gap, if I may simplify the  
9 position.  
10 If there is a gap because the parties could have and  
11 should have gone out and used reasonably available  
12 scientific information to complete the picture, and  
13 therefore could have ended up with what would constitute  
14 best available scientific advice, then the European  
15 Union would say: that is not a situation in which the  
16 precautionary principle should be relied upon to come up  
17 with a different conclusion; or, worse, to simply not  
18 even try to address those parametric uncertainties.  
19 And that goes back to the question of whether those  
20 parametric uncertainties could and should have been  
21 addressed. And again, the European Union acknowledges  
22 that there is a little bit of a nuance here, because  
23 clearly it's difficult to say that there would ever be  
24 a perfect model; the question is an objective one. And  
25 you have been taken through the reasons why, on the

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13:15 1 facts of this dispute, the European Union says that the  
2 precise flaws that were enumerated, it wasn't sufficient  
3 to just identify them, but something could and should  
4 have been done to plug them.  
5 So then what about the precautionary approach? The  
6 principle of the relevance of the precautionary approach  
7 is not disputed. The European Union accepts that within  
8 the TCA, a role, or a potential role, is envisaged. And  
9 that applies where the gap is, as it were, not due to  
10 an unwillingness or a positive decision not to use other  
11 scientific information reasonably available to plug the  
12 gap, but such information simply didn't exist or doesn't  
13 meet the standards required.  
14 So in that sense, where there is a lacuna, then of  
15 course the precautionary principle has a very important  
16 role to play in filling a space. And that is how the  
17 European Union would articulate the two. On the facts  
18 of this dispute, we say we are in the first scenario,  
19 and therefore the material condition for applying the  
20 precautionary approach simply didn't arise.  
21 THE CHAIRPERSON: Thank you very much to the Agents of the  
22 European Union.  
23 We will now take a lunch break, and we will return  
24 at 2.15, if that is okay.  
25 Thank you very much. Have a nice lunch. Thank you.

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13:17 1 (1.17 pm)  
2 (Adjourned until 2.15 pm)  
3 (2.15 pm)  
4 THE CHAIRPERSON: Good afternoon, ladies and gentlemen.  
5 I would like to now invite the European Union to  
6 continue your submissions. Thank you, Ms Norris.  
7 MS NORRIS: Madam Chair, members of the Tribunal, we will  
8 continue, in fact, to move towards our submissions on  
9 claim 2. However, to come back to the question that you  
10 posed, Madam Chair, before lunch on the relationship  
11 between the expressions "conform to" and "based on", and  
12 you identified that this is a nuanced position.  
13 The words "conform to" appear actually in the  
14 United Kingdom's Written Statement at paragraph 220.  
15 They made the argument, which in fact the European Union  
16 would agree with, that "based on" is not the same as  
17 "conform to". So I imagine that in fact what the  
18 Tribunal is seeking to ascertain is what lies in between  
19 the shades of the two.  
20 The European Union would say that the structure of  
21 the TCA is intended to acknowledge precisely that there  
22 should be science-based decision-making to the extent  
23 possible, and hence Article 496(2) refers to the fact  
24 that measures should be based on best available  
25 scientific advice. That is not, however, at the expense

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14:17 1 of consideration of the principles in 494(3), and that  
2 is clear from 496(1), we would say.  
3 That's important because the European Union  
4 acknowledges that there may be situations, as we've  
5 already alluded to, where there is a gap, and so there  
6 is no best available scientific advice, and then  
7 logically a principle such as the precautionary approach  
8 would be necessary.  
9 We also say that flows from the ordinary meaning of  
10 the terms. We wouldn't really disagree with anything  
11 that the United Kingdom has said concerning the fact  
12 that the tests are not the same, and certainly "based  
13 on" does not mean "slavishly adhere to". But it  
14 reflects a degree of connection. So to the extent that  
15 there is best available scientific advice, it implies  
16 that there should be a strong degree of connection;  
17 a foundation, in other words.  
18 The other point that I wanted to come back to,  
19 simply because the European Union had said that it would  
20 do so, is the question of the burden of proof under  
21 claim 1.  
22 On that matter the European Union considers it for  
23 the European Union to establish a prima facie case that  
24 a measure is not based on the best available scientific  
25 advice. To the extent that the Tribunal is satisfied

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<p>14:18 1 that it has established a presumption or has a prima 2 facie case that there may be issues with that advice, 3 then the United Kingdom obviously has to show that there 4 is no merit to the points that the European Union was 5 made, and in that sense there is a shifting of the 6 burden of proof. But we would accept that it is for the 7 European Union in the first instance to establish that 8 prima facie case.</p> <p>9 If I may then move on to the second claim advanced 10 by the European Union in this dispute, and that is that 11 in adopting the sandeel fishing prohibition, the United 12 Kingdom acted inconsistently with its obligations under 13 Article 496(1) and (2), read together with 14 Article [494(3)](f) of the TCA.</p> <p>15 In sum, the European Union considers that whilst 16 496(1) undeniably provides a basis for the parties to 17 decide on fisheries management measures, including 18 measures aimed at marine conservation, their regulatory 19 autonomy in deciding on those measures is constrained, 20 and it is constrained by the requirement to have regard 21 to the principles in Article 493(3) of the TCA.</p> <p>22 The principle that is the focus of this particular 23 claim is the one that is numerated in [494(3)](f), which 24 is formulated as: 25 "... applying proportionate and non-discriminatory</p> <p style="text-align: center;">Page 113</p>	<p>14:21 1 And for this claim, the European Union has the 2 burden to establish a prima facie case that the UK acted 3 inconsistently with its obligation to decide on and 4 apply proportionate and non-discriminatory fisheries 5 management measures. The EU accepts that it also has 6 the burden of proof to establish a prima facie case that 7 a proportionate alternative measure was reasonably 8 available to the UK.</p> <p>9 Of course, to the extent that the United Kingdom 10 contends that its measure is proportionate and 11 non-discriminatory, it has the burden of rebutting the 12 EU's case and, notably, of showing why it could not have 13 adopted the alternative measure identified by the 14 European Union.</p> <p>15 Now, in approaching the legal standard, we felt 16 it might be useful to articulate the different positions 17 between the parties around five questions which we 18 consider the Tribunal will need to resolve to settle the 19 dispute between the parties, which is of course not to 20 prejudge or preempt any other questions that the 21 Tribunal may have.</p> <p>22 The first of those is: on the basis of the term 23 "have regard to", when and to what extent must the 24 principles in Article 494(3) be taken into account? 25 The second question is: is there an obligation to</p> <p style="text-align: center;">Page 115</p>
<p>14:19 1 measures for the conservation of marine living resources 2 ... whilst preserving the regulatory autonomy of the 3 Parties ..."</p> <p>4 In other words, as the European Union was at pains 5 to emphasise in its opening this morning, this claim is 6 not about the importance of environmental protection as 7 such, and nor is it about posing a binary opposition 8 between the protection of the marine environment and 9 economic and social rights associated with fishing. 10 This claim is about the interpretation of the provisions 11 in Heading Five of the TCA and Annex 38, which are 12 intended to strike a balance between the two.</p> <p>13 Now, the parties neither agree on the applicable 14 legal standard as regards the claim nor on the 15 application of the legal standard in the circumstances 16 of this dispute, and for that reason the European Union 17 will start with the law and move to the facts.</p> <p>18 So as a preliminary point on the legal standard, 19 we will in fact start with the burden of proof, since 20 that is a question that the Tribunal also put to us 21 yesterday.</p> <p>22 Paragraph 8.1 of Procedural Order No. 1 affirms the 23 basic proposition that: 24 "Each Party [has] the burden of proving the facts 25 relied upon to support its claim or defence."</p> <p style="text-align: center;">Page 114</p>	<p>14:22 1 ensure that a measure decided on and applied for the 2 purposes of the conservation of marine living resources 3 and the management of fisheries resources is 4 proportionate and non-discriminatory?</p> <p>5 The third issue we will look at is: what are the 6 stages in a proportionality assessment?</p> <p>7 Fourth, we will turn to the relationship between 8 proportionality and necessity, and how this would inform 9 the exercise that this Tribunal is required to undertake 10 when applying the legal standard.</p> <p>11 And fifth, we will look at the relevance of the 12 availability of other measures, and whether such other 13 measures would have to achieve an equivalent 14 contribution to the regulatory objective and the level 15 of protection defined by a party.</p> <p>16 So on that framework, I will move straight to the 17 first question, which refers to the meaning of the term 18 "have regard to", and the extent to which, and at what 19 point, the principles in Article 494(3) need to be taken 20 into account.</p> <p>21 The European Union has explained in paragraphs 516 22 to 518 of its Written Statement that it understands the 23 requirement to "have regard to" the principles in 24 Article 494(3) to commend application during the 25 decision-making process, and hence to precede the</p> <p style="text-align: center;">Page 116</p>

<p>14:24 1 determination of the fisheries management measure that 2 will actually be decided on and ultimately applied. 3 The UK argues quite forcefully that, hence, this is 4 purely an obligation of conduct and not an obligation of 5 result; which means, on the UK's analysis, that it does 6 not have to actually comply with those principles, in 7 the sense that the output of the decision-making process 8 is not constrained by the condition that, in substantive 9 terms, the measure it decides on is not disproportionate 10 or not discriminatory. And that's very clear from 11 paragraph 330 of the United Kingdom's Written Statement. 12 And that interpretation really turns on the meaning 13 that is to be ascribed both to "have regard to", as it 14 appears in 496(1), and the meaning of the term "while 15 preserving the regulatory autonomy of the Parties", in 16 494(3)(f), read together. 17 The European Union does have a fundamentally 18 different interpretation of the relationship between 19 regulatory autonomy to decide on fisheries management 20 measures and the constraints on that autonomy reflected 21 in the other provisions of Heading Five. 22 As to the term "having regard to", the 23 European Union's position is that this requires active 24 consideration of those principles. And our position is 25 that this term, in its context, read in that context,</p> <p style="text-align: center;">Page 117</p>	<p>14:26 1 that the UK advances in this respect. It accepts that 2 "regulatory autonomy" has some meaning, it has a meaning 3 under international law, and that meaning is confirmed 4 in the TCA itself. But the difference comes to whether 5 it can simply override everything else. 6 And that is the point where the European Union 7 really parts company with the UK, because it says: no, 8 this is an issue that many tribunals have been 9 confronted with in the past, this idea that you can have 10 a broad margin of regulatory autonomy to set a level of 11 environmental protection and to pursue a high level of 12 environmental ambition. This is something the 13 European Union does itself, and prays in aid of, that 14 right of regulatory autonomy. 15 But that doesn't have primacy in the absolute sense. 16 Where you have an agreement that sets out rights and 17 obligations for both parties, it is not because you have 18 regulatory autonomy that you can simply ignore 19 everything else. 20 And here we have a relatively extreme proposition, 21 we would say: that in a trade and cooperation agreement, 22 a measure could be adopted, even if it's completely 23 discriminatory and accepted to be such by the UK, simply 24 because it can invoke regulatory autonomy. That is 25 a proposition the European Union fundamentally disagrees</p> <p style="text-align: center;">Page 119</p>
<p>14:25 1 was intended to create a link between the right the 2 parties undeniably have to decide on a fisheries 3 management measure in their waters and the principles in 4 494(3). The real difference between the parties is the 5 extent to which those principles must inform the outcome 6 of the decision-making process. 7 The UK argues, in paragraph 332 of its 8 Written Statement, that: 9 "... once the Parties have had regard to applying 10 the principles of proportionality and 11 non-discrimination, they are free under the TCA to adopt 12 measures that do not accord with them." 13 That's at 332. And then at 357.2 of the 14 United Kingdom's Written Statement, we read that: 15 "Provided that the Party has regard to any 16 potentially discriminatory aspect of a measure, the TCA 17 does not prevent it being imposed, recognising the ... 18 role of regulatory autonomy in this area of public 19 policy." 20 Obviously this is a question of interpretation of 21 the TCA, and so this could apply to any fact pattern. 22 We're here talking about an interpretation that could 23 have broader implications. 24 So leaving aside the facts of this dispute, the 25 European Union simply cannot agree with the proposition</p> <p style="text-align: center;">Page 118</p>	<p>14:28 1 with. And that same logic applies to the question of 2 proportionality. 3 So if I now turn to the next point, which is 4 Article 496(1) of the TCA, that says in terms: 5 "Each Party shall decide on any measures ..." 6 The European Union says that this term does not in 7 itself establish exclusively an obligation of conduct, 8 as the [United Kingdom] maintains. It relates to the 9 decision-making process, yes, but it also links to the 10 actual measures themselves that are the output of that 11 decision-making process. 12 Article 494(3)(f) refers to the principle in terms 13 of "applying proportionate and non-discriminatory 14 measures". So the use of the word "applying" 15 demonstrates that this principle is itself not limited 16 to purely the conduct of the decision-making process; 17 the principle relates to what comes out of that process. 18 Evidently, the act of having regard does occur 19 during the decision-making process. But put simply, 20 that does not mean that the obligation is limited to 21 simply thinking about proportionality and 22 non-discrimination. What has to be heeded or had regard 23 to is also the outcome, i.e. a measure that has those 24 qualities or attributes. 25 The European Union considers that if, in this</p> <p style="text-align: center;">Page 120</p>

14:30 1 hypothetical situation, the UK's position were correct,  
 2 this would effectively mean that any measure for the  
 3 conservation of marine living resources and the  
 4 management of fisheries resources which leads to  
 5 an impairment of the economic rights granted under  
 6 Heading Five and Annex 38 could always be justified,  
 7 even if discriminatory, even if disproportionate,  
 8 because in their logic this regulatory autonomy takes  
 9 primacy over all other considerations. And that would  
 10 include the other principles in 494(3) as well. In  
 11 other words, their position is that it is only the  
 12 decision-making process itself that is in any way  
 13 constrained.  
 14 Now, the European Union says that this would  
 15 actually jeopardise the objectives of the TCA, and  
 16 Heading Five in particular, and it is an interpretation  
 17 that runs counter to the implementation in good faith of  
 18 the agreement. In short, Heading Five makes very  
 19 detailed arrangements for the negotiation of TACs for  
 20 shared stocks.  
 21 It is illogical -- and I repeat: illogical -- that  
 22 regulatory autonomy should be understood to override,  
 23 without constraint, the outcome of those negotiations  
 24 and those agreements. It would make all of the  
 25 agreements on TACs, and the right of full access to

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14:31 1 waters to fish those TACs, essentially an empty vessel.  
 2 I move then to the second question, which relates to  
 3 whether there is an obligation for a measure applied for  
 4 the purposes of the conservation of marine living  
 5 resources and the management of fisheries resources to  
 6 actually be proportionate and non-discriminatory. This  
 7 is very closely linked --  
 8 JUSTICE UNTERHALTER: I'm sorry to interrupt, but I wonder,  
 9 since you're going on to a new aspect of the submission,  
 10 perhaps I could ask you a question.  
 11 There is a process of consideration that leads up to  
 12 a decision, and then the decision itself. I understand  
 13 you certainly to say that there must be a relationship  
 14 between both the process by which you reach the decision  
 15 and the yield of that process in the decision itself.  
 16 If a consideration of reasons for the decision takes  
 17 account of the questions of proportionality and  
 18 non-discrimination, but were to consider, again on  
 19 a reasoned basis, that there were other reasons that  
 20 perhaps compromise those principles or attenuate those  
 21 principles to some degree, would you accept that the  
 22 decision would still be compliant if there was that  
 23 proper weighing of reasons that resulted in the  
 24 decision?  
 25 I suppose, just more broadly, I'm wondering a little

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14:33 1 bit about this distinction between process and outcome.  
 2 If the point of the process is to achieve a reasoned  
 3 outcome, then maybe these things are not quite as  
 4 separate as the parties suppose.  
 5 But my real question is: if you have had regard to  
 6 the principles in considering the reasons, but you've  
 7 also looked at other reasons, and there's a reasoned  
 8 basis for coming to the decision which hasn't  
 9 disregarded either of the principles that are at issue  
 10 here, does that suffice, or is something still more  
 11 required by way of the characteristics of the decision  
 12 that then result?  
 13 MS NORRIS: I'll try and break that question down, and  
 14 we may revert to that question in more detail.  
 15 JUSTICE UNTERHALTER: Yes, please, because it had various  
 16 parts.  
 17 MS NORRIS: But to give you an immediate response, it seems  
 18 to me that this turns a little bit on what we understand  
 19 by the precise wording of 496(1), which says:  
 20 "Each Party shall decide on ..."  
 21 In fact, here I would tentatively argue that it is  
 22 the UK that draws the broad distinction between the  
 23 decision-making process and the outcome, and it is the  
 24 European Union that says in fact you cannot divorce  
 25 the two; they don't operate in splendid isolation.

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14:34 1 And if you read Article 496(1) purposively, in  
 2 the full context, in line with its reference back to  
 3 principles, then precisely it is that which is  
 4 artificial: to suggest that you could simply consider,  
 5 have regard to during the decision-making process, and  
 6 still arrive at an end result where you had  
 7 a disproportionate, in this case, or discriminatory  
 8 measure.  
 9 So in that sense, we would say it's a bit difficult  
 10 to conceive of a situation, particularly when we come to  
 11 foundational principles like proportionality and  
 12 non-discrimination, which don't just appear in 494(3).  
 13 And I think that's an important point for this  
 14 Tribunal to bear in mind: the term "proportionality"  
 15 appears more than 60 times in the TCA. The principle of  
 16 non-discrimination is fundamental. This is also a trade  
 17 and cooperation agreement. We are not talking purely  
 18 about the "Fisheries" heading in that sense. Those  
 19 principles have a wider meaning.  
 20 So what are they intended to do here, in this  
 21 particular heading, that is certainly the issue in  
 22 dispute. But one cannot simply consider that without  
 23 bearing in mind the role that those principles play more  
 24 broadly.  
 25 So in this hypothetical, we would say that you can't

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<p>14:35 1 fully divorce the "decide on" from what is at the end of 2 that process. 3 JUSTICE UNTERHALTER: Perhaps in due course you could 4 consider this question as to whether, if you have paid 5 regard to the principles and the reasons that compel 6 a decision in one form, but nevertheless have regard to 7 other reasons that may attenuate those principles, is 8 that a permissible process for nevertheless giving rise 9 to a decision that conforms or not? 10 MS NORRIS: I would again respond on a preliminary basis. 11 Here the principle that is being opposed is the one 12 of regulatory autonomy. And just to reaffirm the 13 European Union's position, we would not accept that 14 regulatory autonomy as such could override all of the 15 other principles in 494(3). Regulatory autonomy is not 16 some magic carte blanche that allows you to disregard 17 everything else. 18 So here, in this dispute, those are the principles 19 that are in opposition, in a sense: it's regulatory 20 autonomy and the width of discretion, the margin of 21 discretion that the UK says that confers, versus the 22 extent to which the principles should inform the 23 decision-making process, and therefore what to have 24 regard to and how much weight should be applied. 25 JUSTICE UNTERHALTER: Yes, thank you.</p> <p style="text-align: center;">Page 125</p>	<p>14:38 1 United Kingdom considers it to be significant that the 2 requirement to base measures on the best available 3 scientific advice and the requirement not to 4 discriminate are reinforced in other provisions, notably 5 Article 496(2). 6 Now, the European Union does not disagree that that 7 article reflects the importance attached to the nature 8 of scientific advice -- we've already addressed that 9 this morning -- or to the foundational, we would say, 10 principle of non-discrimination, which clearly has 11 an overarching role. However, contrary to the United 12 Kingdom, the European Union does not interpret this 13 provision to mean that the other principles such as 14 proportionality do not have a bearing on the measure 15 that is ultimately adopted. And so we would say it's 16 not a factor that can simply be enumerated or considered 17 briefly in the decision-making process. 18 So then what are the stages in the proportionality 19 assessment? Clearly, given the diverging positions of 20 the parties, this is an issue that the Tribunal will 21 need to address, since it determines the analytical 22 exercise that we are in fact inviting this Tribunal to 23 undertake. 24 The European Union again did try to address this at 25 some length in its Written Submission, and it commences</p> <p style="text-align: center;">Page 127</p>
<p>14:37 1 MS NORRIS: Perhaps then if I may now move on to the second 2 question, which, as I already alluded to, is quite 3 closely linked to the first question. 4 And without wanting to repeat myself excessively, 5 the function of the reference to the principle of 6 proportionality, we would say, in Article 494(3)(f) is 7 precisely to limit the manner in which a party could 8 permissibly their regulatory autonomy, and hence to 9 provide a legal standard against which the justification 10 for any impairment to the rights of access to waters to 11 fish, as granted under Heading Five and Annex 38, could 12 then be assessed. 13 Now, to respond to the Tribunal's advance 14 question 10, the European Union would like to indicate 15 that it does agree that the parties can set their level 16 of protection of the environment -- this is again 17 a position that's not unique to the TCA -- but when 18 deciding how to pursue that desired level of protection, 19 they are required to weigh and balance other rights and 20 obligations. And it is for that reason that in this 21 dispute the European Union does not accept the 22 proposition that the United Kingdom could have 23 determined a singular measure, e.g. total prohibition on 24 access to waters of the North Sea to fish sandeel. 25 The European Union does take note that the</p> <p style="text-align: center;">Page 126</p>	<p>14:40 1 at page 163, paragraph 515. And we again repeat: 2 we rely on our own articulation of the proportionality 3 assessment, rather than how the UK has kindly 4 reformulated it for us at paragraph 344 of their 5 Written Submission. 6 Now, the European Union understands that the UK 7 agrees to certain key propositions that it has advanced, 8 but it may be that there are some false debates. 9 We would like to try and separate the two. 10 So first, the parties appear to be aligned that the 11 term "proportionate" implies that there should be 12 a weighing and balancing of the costs and benefits of 13 the measure. And here I refer to the UK's Written 14 Submission at paragraph 352. 15 And the parties also agree that delimiting this 16 legal standard essentially entails two questions: what 17 is to be weighed and how. And that appears at 18 paragraph 351 of the UK's Written Submission. 19 So on this basis, the European Union considers that 20 the core exercise that this Tribunal must undertake is 21 to objectively assess, in the light of the facts giving 22 rise to this dispute, whether the UK complied with that 23 obligation. 24 The parties also agree, as we've said many times 25 now, that the TCA recognises the importance of marine</p> <p style="text-align: center;">Page 128</p>

<p>14:41 1 conservation. Article 496 identifies specific 2 objectives which fisheries management measures may 3 pursue, and this is among them. So the European Union 4 has never contested the legitimacy or importance of that 5 as a regulatory objective. 6 As to the role of that objective in the weighing and 7 balancing exercise, Article 494(3)(f) refers to: 8 "... applying proportionate and non-discriminatory 9 measures for the conservation of marine living 10 resources ..." 11 Therefore, the legitimacy and importance of that 12 objective is acknowledged within the role of the 13 proportionality itself, but it certainly doesn't 14 displace the whole of the rest of the weighing and 15 balancing exercise. It is one of a series of factors, 16 we would say, that must be considered. 17 The third point on which the parties absolutely 18 agree is that the term "proportionality" establishes 19 a different legal standard to that of "necessity", which 20 is the language, of course, that applies in the 21 GATT 1994 and the Agreement on Technical Barriers to 22 Trade, which also provide a legal framework for the 23 balancing of economic and environmental objectives in 24 certain contexts, including between states or WTO 25 members.</p> <p style="text-align: center;">Page 129</p>	<p>14:44 1 the least protective measure in order to show it is 2 proportionate. However, if a measure goes beyond what 3 is necessary, in the sense that it is more restrictive 4 than would be necessary to achieve the legitimate aim, 5 then it will not be proportionate. So in that sense, 6 yes, the European [Union] argues that there is 7 an additional element in the proportionality standard. 8 So we would argue that the weighing and balancing in 9 the framework of proportionality requires a holistic 10 assessment both of the benefits of a policy, which can 11 be assessed by reference to the degree of contribution 12 to an objective, and the costs, which is typically 13 assessed by reference to the degree of impairment to 14 economic and social rights. Where there is 15 a nullification of the rights, the benefits must be 16 commensurate with that level of impairment. 17 What does this mean exactly? That's actually what 18 I wrote on my page, but I think that is an excellent 19 question for the European Union now to address. 20 The European Union considers that the obligation is 21 to look at the differential. You could have a situation 22 where the costs and the benefits are at a very similar 23 level: this would not raise a proportionality issue. 24 You could have a situation where an increase in the 25 benefits above that baseline would only lead to a small</p> <p style="text-align: center;">Page 131</p>
<p>14:42 1 So the principal difference between the parties 2 concerns how the degree of the impairment of rights 3 associated with a measure is a factor to be weighed in 4 the balance. And this is also a factor which is 5 relevant to the EU's third claim, but I will address it 6 here. 7 The other point, of course, is that how that factor 8 is weighed has implications when one considers the 9 relevance of the availability of other measures. 10 There have been -- this is essentially my fourth 11 question -- extensive discussions in the parties' 12 Written Statements on the relationship between 13 proportionality and necessity. 14 So the European Union would say, first, that 15 the difference between a necessity standard and 16 a proportionality standard is precisely that a measure 17 which fully contributes to a stated and legitimate 18 regulatory objective could pass the necessity test, as 19 has been applied under the GATT 1994, and still fail 20 a proportionality standard. That is a difference 21 between the two, because it is not because a measure is 22 necessary under the standard applied under the GATT that 23 it is also a proportionate measure. 24 And second, it has never been argued by the EU that 25 proportionality means that a party must always adopt</p> <p style="text-align: center;">Page 130</p>	<p>14:46 1 increase in costs, in the sense of the impairment of the 2 rights: that may also still be proportionate. In other 3 words, there doesn't have to be absolute equality 4 between the two. 5 The issue arises when an increase in the benefits -- 6 here, we would say, from partial closure to the full 7 closure -- is matched by a significant increase in 8 costs, meaning that the two become very far apart on the 9 scale: we've moved from here to here (indicating). 10 Now, there is no disagreement between the parties 11 that when conducting this assessment, both quantitative 12 and qualitative factors are relevant. When looking at 13 the benefits, the scientific basis or foundation for 14 a measure is a factor the Tribunal should plainly 15 consider; however, it is not dispositive. And that is 16 why the European Union argues that even were this 17 Tribunal to determine that the measure at issue in this 18 dispute is based on the best available scientific 19 advice, it does not follow a fortiori that the same 20 measure is proportionate. 21 I turn now to the final question that I signalled 22 that we felt would be useful to address by way of legal 23 standard: that concerns the relevance of the 24 availability of other measures. And for the purposes of 25 proportionality --</p> <p style="text-align: center;">Page 132</p>

<p>14:47 1 JUSTICE UNTERHALTER: Could I just ask you: I understand 2 that ultimately your proportionality analysis is 3 a weighing-up, a holistic weighing-up of cost and 4 benefits, and there is an acknowledgement that that is 5 both qualitative and quantitative. Sometimes in this 6 approach there is a problem of commensurability, as it 7 were: how do you weigh up what might seem to be 8 a relatively small potential yield of biomass against 9 the exclusion of people's livelihoods, or an element of 10 their livelihoods, in respect of vessels that fish 11 sandeel? 12 On a sort of pure quantitative basis, you might say: 13 well, it's something small versus something much bigger, 14 and therefore the cost/benefit analysis doesn't work 15 out. But sometimes in this sort of approach, one has 16 a difference of the -- what you're trying to weigh is 17 hard to weigh in the same scale in order to reach -- 18 other than at extremes, it's sometimes hard to weigh in 19 what I'm calling the same scale, because you're weighing 20 up different things, different kinds of rights that 21 don't all cash out in the same currency, if I could use 22 that metaphor. 23 I'm just wondering how you think about that problem. 24 MS NORRIS: I think the European Union is alive to 25 the difficulties that that presents on a practical</p> <p style="text-align: center;">Page 133</p>	<p>14:51 1 actual quantification, perhaps you can't weigh them in 2 exactly the same way, but one can nonetheless form 3 a view as to the degree of impairment. 4 Here we have an absolute prohibition on fishing. 5 So it's fairly clear that on the spectrum, we are at the 6 far end of the spectrum in terms of impairment, so one 7 would expect there to be a very high level of benefit in 8 that sense. Now, how you quantify that scientifically 9 may be a different way to how you would quantify 10 economic cost. 11 JUSTICE UNTERHALTER: Yes, thank you. 12 THE CHAIRPERSON: Ms Norris, can I ask a question. 13 Because you just said that: 14 "... the European Union would say that looking at 15 the availability of another proportionate measure can 16 provide a useful baseline in that assessment [of 17 proportionality]." 18 So my question is: you said it's a "useful 19 baseline". Is it essential that a decision-maker take 20 into account the availability of another sort of more 21 proportionate, if I can say, measure? Is that 22 a requirement, as part of the proportionality 23 assessment, to do that? Or is it just a useful 24 mechanism in order to undertake a proper weighing and 25 balancing of the various costs and benefits of</p> <p style="text-align: center;">Page 135</p>
<p>14:49 1 level. And this is something that another Agent for the 2 European Union will be addressing when it comes to 3 applying this legal standard to the precise measure at 4 issue, so without going into that particular premise. 5 I think that this is actually exactly why the 6 European Union would say that looking at the 7 availability of another proportionate measure can 8 provide a useful baseline in that assessment. Because 9 as we've said, we don't argue that commensurability must 10 mean "equal to". So in a sense, what you are looking 11 at, as we've said, is the delta between the two. 12 And here we have put forward the proposition that 13 there is a reasonably available alternative measure that 14 would be proportionate. And when you look at that 15 measure, we would say than if you take that as 16 a baseline, the additional benefits in terms of the 17 environmental outcome, when compared to the 18 significantly lower costs in terms of economic and 19 social rights, provide precisely an illustration of why 20 this full prohibition on access to UK waters of the 21 North Sea to fish sandeel is disproportionate. 22 So, in a sense, on the theoretical level we would 23 say that part of that assessment must draw on the 24 positive assertion that there is another way of doing it 25 that would be more commensurate. When it comes to</p> <p style="text-align: center;">Page 134</p>	<p>14:52 1 a measure? 2 MS NORRIS: I think it's very difficult to give 3 a one-size-fits-all answer. I think what we would say 4 is that where you're contemplating a measure that 5 you know is evidently going to nullify economic rights 6 granted under this agreement because you are 7 contemplating a full prohibition, then one would have 8 an obligation to consider, given the obvious extreme 9 impairment of economic and social rights, whether that 10 could be achieved in another way. 11 Now, in terms of how the alternative measure plays 12 out in an analysis, that is also a useful device that 13 has been used extensively in the framework of necessity 14 tests in front of the WTO precisely because it became 15 a mechanism through which to assess this question of: 16 is there a less restrictive measure available? And in 17 a sense, you can see why that same logic applies on 18 proportionality: is there another measure available that 19 would be proportionate? It's not a question of being 20 more proportionate or not; it's a question where 21 the balance is not so extreme. 22 I think that to answer your question, one does have 23 to look at the measure that is being contemplated here. 24 We are talking about the maximum possible impairment of 25 rights, and that is the factual scenario in which</p> <p style="text-align: center;">Page 136</p>

<p>14:53 1 we find ourselves. 2 THE CHAIRPERSON: Thank you very much. 3 MS NORRIS: I think that perhaps if I may move to -- without 4 wishing to cut short any further question the Tribunal 5 may have had -- the two final points really on this. 6 The first is that the UK points to the absence of 7 a clearly defined proportionality standard under 8 international economic law and international 9 environmental law. 10 Now, the European Union is not suggesting that there 11 is a proportionality standard that one can simply lift 12 from either international economic law or international 13 environmental law. However -- and this must be 14 stressed -- proportionality is a core principle in the 15 European Union's legal order; and, as the European Union 16 set out in its Written Submission, it is also 17 a principle in the United Kingdom's legal order. 18 We are in the framework of an agreement which uses 19 that term, rather than the term "necessity". This 20 Tribunal will have to ascribe meaning to that term. And 21 it is for that reason that the European Union says: 22 applying the principles of customary international law, 23 what is the relevant context that this Tribunal can look 24 at? And that must and does include in this specific 25 case, because of the specificity linked to this term,</p> <p style="text-align: center;">Page 137</p>	<p>14:56 1 the difference in costs. 2 This also has implications for the burden of proof. 3 Since the European Union says that it has established 4 a prima facie case that a partial closure would have 5 been a proportionate means for the UK to pursue its 6 regulatory objective, it says that the UK needs to 7 engage with that position. And instead it has 8 reformulated the legal standard to avoid this analytical 9 step. 10 Now, this is an important point of difference 11 between the parties because, as I said, the European 12 Union's position is that that is a useful, and in fact 13 necessary, part of the analytic process. 14 So those would conclude my remarks on 15 proportionality. 16 I could briefly address the Tribunal on 17 discrimination, just simply because the parties do not 18 agree on the legal standard as applicable to 19 discrimination either. And to avoid repetition, I would 20 try and respond, by reference to the Tribunal's advance 21 question 16, by highlighting the following propositions. 22 The first is that the EU has addressed what it 23 considers would be permissible differential treatment in 24 its Written Submission. And the European Union 25 considers that this refers to a difference in treatment</p> <p style="text-align: center;">Page 139</p>
<p>14:55 1 the way that proportionality has been understood by both 2 parties in their legal orders. 3 That's not to say that it is determinative, and that 4 is why the European Union also tried to draw elements 5 from other standards to show that its test is one which 6 reflects a proper interpretation of that term. 7 Now, the second issue just to come back to refers to 8 your advance question 13. And here it's really to 9 repeat something I have alluded to already: the 10 European Union's position that, unlike in the framework 11 of a necessity analysis, a proportionate alternative 12 measure is not required to make an equivalent 13 contribution to the regulatory objective pursued. 14 In fact, therefore, to respond to the question, the 15 Tribunal is neither required to consider whether the 16 least restrictive measure would be likely to achieve 17 substantially the same result or to consider whether 18 a less restrictive measure would be likely to achieve 19 substantially the same result. The Tribunal is required 20 to consider whether there is a proportionate measure 21 which would have better reflected the balance of rights 22 and obligations between the parties. And to do that, 23 the Tribunal should look at the degree of the additional 24 benefit gained when comparing the total prohibition with 25 the EU's proposed alternative, as well as the degree of</p> <p style="text-align: center;">Page 138</p>	<p>14:58 1 that stems exclusively from a legitimate regulatory 2 objective, and that would be permissible differential 3 treatment. The European Union does not argue that 4 a differential treatment in itself is enough to 5 establish discrimination. 6 As to the relevance of the sandeel as a shared 7 stock, what this actually means is that it was in both 8 parties' waters at the time of conclusion of the TCA, 9 and still is. We would suggest that, given the agreed 10 shares in Annex 35, any measure addressing sandeel would 11 have a differential impact on the EU. 12 As a matter of principle, again without belabouring 13 the point, the EU does not accept the proposition that 14 Heading Five can be interpreted to mean that regulatory 15 autonomy and the right to regulate, as described in 16 Recital 7 of the preamble, allows a party to simply 17 adopt a discriminatory fisheries management measure. 18 Nor does the European Union agree that the concept 19 of non-discrimination, as referred to in Heading Five, 20 can be interpreted in splendid isolation from the 21 meaning accorded to that term elsewhere in the TCA, or 22 the meaning accorded to that term under international 23 law, including international economic law. 24 So in terms of the legal standard, those are the 25 points that the European Union would make at this stage.</p> <p style="text-align: center;">Page 140</p>

<p>14:59 1 THE CHAIRPERSON: Thank you very much, Ms Norris. 2 Thank you. I invite the European Union Agent 3 Mr Dawes: I believe you have the floor now. 4 MR DAWES: Thank you, Madam Chair. 5 The EU will now address the Tribunal on the 6 application of the legal standard to the facts of this 7 dispute, and this -- I should give the Tribunal advance 8 warning -- will require the EU to take the Tribunal 9 through a number of documents in the core bundle. 10 But maybe I will start on a happier note. The 11 parties can agree that the measure is apt to contribute 12 to the objective identified by the UK. By that, the EU 13 means that by prohibiting all sandeel fishing in UK 14 waters of the North Sea, there is a contribution to 15 the stated objective of marine conservation. 16 By contrast, the parties disagree on the following 17 four points, all of which will require factual 18 determination by this Tribunal. 19 The first point of disagreement is on whether the UK 20 has properly assessed the benefits of the sandeel 21 fishing prohibition. 22 The second point on which the parties disagree is on 23 whether the United Kingdom has properly assessed the 24 economic and social impacts of the measure. 25 The third point of disagreement is on whether the</p> <p style="text-align: center;">Page 141</p>	<p>15:03 1 Those documents essentially indicate that the 2 prohibition on sandeel fishing in all UK waters of the 3 North Sea can bring about benefits to the extent that 4 there is a localised depletion of sandeel, and that the 5 relevant predators that are dependent on sandeel cannot 6 forage -- by that, I mean feed themselves on sandeel -- 7 outside of any such locally depleted area. In such 8 circumstances, a prohibition on sandeel fishing in those 9 waters can bring about benefits because it removes any 10 competition between the fishery and the predators in 11 a locally depleted area. 12 Those documents also essentially indicate that to 13 the extent there is either no localised depletion or 14 that predators can forage outside of any locally 15 depleted area, a prohibition on sandeel fishing cannot 16 bring about additional benefits. 17 The EU will now take the Tribunal to the relevant 18 passages of the three documents, and the EU will do so 19 in relation to each of the points that I just made, so 20 starting with the fact that there may be instances of 21 localised sandeel depletion. 22 If the EU could ask the Tribunal to turn to tab 4, 23 which is Exhibit C-22, the ICES Technical Service 24 report, and it's page 89 of the core bundle. If the 25 Tribunal sees just above the bold -- there is a bold</p> <p style="text-align: center;">Page 143</p>
<p>15:01 1 United Kingdom has properly weighed the benefits of the 2 measure and its economic and social impacts. 3 And the fourth point of factual disagreement is on 4 whether the United Kingdom could have decided on 5 alternative proportionate measures. 6 The EU will start with the benefits of the measure. 7 The EU's position is that the United Kingdom has 8 overstated the benefits of the measure. This is because 9 the scientific advice identified by the United Kingdom 10 as the basis for the measure does not support the 11 existence of benefits beyond those for certain seabirds, 12 namely -- and you've heard this term before -- 13 black-legged kittiwakes. 14 The scientific advice identified by the UK as the 15 basis for its measure is threefold. And I will mention 16 the names of documents and I will indicate where they 17 are in the core bundle, as the EU will take the Tribunal 18 to these documents in a few moments. 19 The first document is the ICES Technical Service 20 response, which is Exhibit C-0022 and tab 4 of your core 21 bundle. The second document is the English scientific 22 report, which is Exhibit C-0045, which you will find at 23 tab 15 of the core bundle. And the third document is 24 the Scottish scientific report, which is Exhibit C-0050, 25 which you can find at tab 25 of the core bundle.</p> <p style="text-align: center;">Page 142</p>	<p>15:05 1 "Sandeel" in the middle of the page, and it's the 2 sentence just before that bold heading. It says: 3 "... for some predators, it is the local 4 concentration of prey that matters, at a scale below any 5 feasible stock assessment." 6 What does that mean? It means, in other words, 7 while the stock assessments are done at a higher level, 8 a broader level, there may be localised instances where 9 there is a depletion of sandeel. 10 And if one carries on down the page, on the same 11 page, to below now the bold heading, there is 12 a reference to the fact that there are: 13 "... a number of seabird species where there is 14 evidence that breeding success is correlated with 15 (local) sandeel abundance." 16 So those are the two relevant passages for 17 the purpose of this point. 18 If the EU could then ask the Tribunal to turn to 19 tab 23 of the core bundle, Exhibit C-50. So this is the 20 Scottish scientific report. And if the Tribunal could 21 turn to page 361 of the core bundle, which is also page 22 number 5 of the numbering, it's the passage at the 23 bottom of the page, the last paragraph. There it is 24 stated: 25 "The combination of limited adult movements between</p> <p style="text-align: center;">Page 144</p>



15:06 1 sandbanks and the patchiness of available suitable  
 2 habitat indicates that the local conditions affecting  
 3 adult mortality (fishing pressure, food availability and  
 4 predator abundance) can lead to significant variation in  
 5 sandeel age and length composition over a relatively  
 6 fine spatial scale."  
 7 And then there's a reference:  
 8 "Local depletion of sandeel aggregations is  
 9 therefore unlikely to be compensated by ..."  
 10 So, again, a reference to the fact that what is  
 11 relevant is the local depletion.  
 12 That was on the local depletions of sandeel. So  
 13 turning now to the ability of the different predators to  
 14 forage outside of any locally depleted area.  
 15 As the European Union has already indicated, there  
 16 are three main -- I'll call them "categories" of  
 17 predators, if one can call them like that: seabirds,  
 18 marine mammals and other fish. The European Union will  
 19 take each of these in turn.  
 20 So if we can start with the ability of seabirds to  
 21 forage outside of any locally depleted area.  
 22 The European Union would ask the Tribunal to turn  
 23 back -- and this may happen several times -- to tab 4 of  
 24 the core bundle (C-22), which is the ICES Technical  
 25 Service report, and to page 8 of that document. It's in

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15:10 1 razorbill and puffin) and so are less affected by  
 2 a decrease in absolute abundance of sandeel ..."  
 3 And if you could then just turn to the next page in  
 4 the same document, so page 411, the third paragraph on  
 5 that page, which begins "Prey availability". And again,  
 6 it says:  
 7 "Prey availability, rather than abundance or  
 8 biomass, plays a key role in the breeding success of  
 9 some seabirds. Prey need to be within foraging distance  
 10 of seabird colonies, they need to be within the water  
 11 column, and they need to be within dive depth (which  
 12 varies considerably among seabird species).  
 13 Similarly ..."  
 14 And this is the point on which the EU addressed  
 15 the Tribunal this morning:  
 16 "... prey of the right age or size class must be  
 17 available at the right time of the year for provisioning  
 18 to chicks."  
 19 So that's the reference to the breeding season.  
 20 Before moving on to the marine mammals, the EU would  
 21 take this opportunity to react to a point made by the  
 22 United Kingdom in its Written Submission regarding  
 23 the protection of seabirds outside of the breeding  
 24 season, and even for kittiwakes.  
 25 There, if the Tribunal could just turn back to

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15:08 1 the middle of the page, the third paragraph under the  
 2 heading "Ecosystem aspects", and the last sentence of  
 3 that paragraph. It's the paragraph that begins:  
 4 "Spatial distributions of forage stocks ..."  
 5 And the last sentence there says:  
 6 "Seabirds are the most sensitive predators to  
 7 changes in sandeel abundance, with terns and kittiwakes  
 8 the most sensitive among seabirds."  
 9 Now, if the Tribunal could again jump forward in the  
 10 bundle to tab 23 (C-50), so back to the Scottish  
 11 scientific report, and to page 54 of the internal  
 12 numbering, which is page 410 of the core bundle.  
 13 So as I said, in the ICES Technical Service there  
 14 was a reference to terns and to kittiwakes. In the  
 15 Scottish scientific report, it's the second paragraph on  
 16 page 410. There is a description of two scientific  
 17 studies, which:  
 18 "... did not deduct any increase in breeding success  
 19 following the Wee Bankie sandeel closure for any other  
 20 species than kittiwakes."  
 21 And then:  
 22 "[One of these studies] concluded this was because  
 23 some species feed close inshore in un-fished areas ..."  
 24 And there, there's a reference to "(terns, shag)":  
 25 "... or can dive in the water column (guillemot,

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15:11 1 page 409 of the document in which you are, and it's the  
 2 paragraph that begins "While". So page 409 of the core  
 3 bundle. It says:  
 4 "... seabirds are not constrained to feeding around  
 5 their colonies or provisioning offspring during the  
 6 non-breeding period ..."  
 7 So essentially that means they are able to travel  
 8 further because they do not need to travel back as often  
 9 to their nests.  
 10 So that was on the ability of seabirds to forage  
 11 outside of any locally depleted area.  
 12 We can now move on to the ability of marine mammals  
 13 to forage outside of any locally depleted area. Again,  
 14 if the Tribunal could jump back to the ICES Technical  
 15 Service report (C-22), so tab 4, and page 89 in the core  
 16 bundle.  
 17 There, under the bold heading "Sandeel", "Overview",  
 18 it is said that:  
 19 "Sandeel are also important prey ..."  
 20 It's the fifth line.  
 21 "Sandeel are also important prey for seals and minke  
 22 whales ..."  
 23 So these are marine mammals.  
 24 "... however, these species can forage over a wider  
 25 area than nesting birds."

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<p>15:13 1 And then it goes on to specifically consider the 2 situation of minke whales, where it says that they are 3 "in particular ... able to forage over large distances". 4 And it says that they are: 5 "... unlikely to be seriously affected by local 6 depletion of a particular prey, while seals are likely 7 intermediate between wide-ranging Minkes and locally 8 dependent seabirds." 9 The reference to "locally dependent seabirds". 10 So that was the ability of marine mammals to forage 11 outside of any locally depleted area. 12 Finally on this point, regarding the ability of 13 other birds, I would like to take the Tribunal to 14 [C-]45, which is the English scientific report or the 15 Natural England report that has been discussed at length 16 this morning. But the good news is we will not discuss 17 this aspect of the English scientific report again. 18 It's tab 15 of the core bundle and page 13 of the 19 document, so page 212 in the bundle. 20 There it's under the heading "Marine fish" in bold. 21 So there it says: 22 "The diet 'flexibility' and ability of predatory 23 commercial fish to substitute diet shortfalls with other 24 prey species suggests that they are less crucially 25 dependent on local sandeel abundance than, for example,</p> <p style="text-align: center;">Page 149</p>	<p>15:17 1 There again, at the top of the page under "Benefits 2 of a sandeel closure on predatory fish", there are 3 statements that: 4 "Predatory fish ..." 5 Sorry. 6 THE CHAIRPERSON: Could you just point us to the exact 7 page number, please, and tab? 8 MR DAWES: Pardon me. My apologies, Madam Chair. Page 391 9 of tab 24. 10 THE CHAIRPERSON: I think you mean tab 23. 11 MR DAWES: Do I mean tab ... I do mean tab 23. 12 My apologies. Tab 23, indeed. 13 The page number is correct: 391. So there, under 14 section 3.1.1: 15 "Predatory fish are often generalist feeders, where 16 the diet typically consists of no more than 20% of any 17 species, as predators switch between prey species based 18 on availability ..." 19 And then: 20 "The importance of sandeel ... is more variable for 21 predatory fish than for seabirds and mammals ..." 22 So based on those factual elements, that's the basis 23 on which the EU says that the UK has not properly 24 assessed the benefits of the measure, based on the 25 scientific advice that the UK identified for the basis</p> <p style="text-align: center;">Page 151</p>
<p>15:15 1 seabird colonies off Scotland ..." 2 So essentially that means that in the event of 3 a local depletion of sandeel, the other fish are able to 4 replace sandeel with other fish. So that's why they, in 5 a way, are not affected by any localised depletion. 6 And then -- 7 THE CHAIRPERSON: Excuse me, Mr Dawes, can I just ask 8 a question there. Because it says here they're "less 9 crucially dependent on local sandeel abundance". 10 MR DAWES: Yes. 11 THE CHAIRPERSON: But does that also mean that they may 12 be -- they're less crucially dependent, but they may be 13 dependent? 14 MR DAWES: I mean, there I think one would have to look also 15 at the area in which -- what is meant by "local sandeel 16 abundance". Yes, it means that to the extent that there 17 is a local depletion, at least in principle, they are 18 more able than the seabirds to replace sandeel with 19 other fish. So they were less dependent on sandeel in 20 the first place, yes. 21 THE CHAIRPERSON: Thank you. Please continue. 22 MR DAWES: And then maybe, Madam Chair, if one goes then 23 forward to the Scottish scientific report, because 24 there, there is also a similar statement. So it's 25 tab 24, page 391.</p> <p style="text-align: center;">Page 150</p>	<p>15:18 1 of the measure. 2 JUSTICE UNTERHALTER: Can I just ask: among the references 3 you gave us was the dependence that seabirds have; well, 4 their ability to feed outside depleted areas. There 5 seemed to be some qualification around the breeding 6 season, where there was a greater dependency on 7 localisation. Does that make a difference to your 8 analysis or not? 9 MR DAWES: I think the EU's position is: one of the 10 constraints on the foraging range of these nesting 11 seabirds is the fact that during their breeding season, 12 because of where the seabird colonies are, the adults 13 must, when they feed, not only go out and eat sandeel 14 for themselves, but they must also bring back sandeel or 15 other fish to their young, who are in the nests on the 16 coast. 17 So to that extent, yes, there is a difference during 18 the breeding season because -- and that was shown also 19 by some of the slides you were shown this morning -- the 20 foraging ranges are smaller during the breeding season 21 than maybe they are when the adults are not required to 22 bring back the sandeel in order to feed their young. 23 JUSTICE UNTERHALTER: Does that make a difference to 24 the dependence of various species on localised depleted 25 areas? Because I assume that the breeding season is</p> <p style="text-align: center;">Page 152</p>

15:20 1 rather critical to the perpetuation and flourishing of  
2 the species. So the fact that outside the breeding  
3 season they have less dependence would still seem to  
4 require careful consideration as to what dependency  
5 exists during the breeding season.  
6 MR DAWES: But I think to that point, the position would be  
7 that to the extent there is a localised depletion, then  
8 those seabirds are even more able to travel longer  
9 distances; if sandeel is an important part of their  
10 diet, they are able to travel even further. And  
11 therefore any dependency in the localised area is  
12 reduced because the seabirds are able to go even further  
13 than during the breeding season, and to obtain sandeel  
14 in a wider range of areas, geographically.  
15 JUSTICE UNTERHALTER: Thank you.  
16 MR DAWES: Before moving on, the European Union would also  
17 like to respond to the UK's summaries of the benefits of  
18 the measure in the United Kingdom's Written Submission,  
19 because these also overstate the benefits, but in  
20 a manner different to the scientific advice. So these  
21 are paragraphs 391 to 395 of the United Kingdom's  
22 Written Submission, and I'll take the paragraphs in  
23 order. (Pause)  
24 For now you can put away your bundle, but I cannot  
25 promise that you will not have to get it out again soon.

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15:24 1 we have already discussed, and why they cannot be relied  
2 on. But to the extent that there is any claim of likely  
3 biomass increases, they are based on the results  
4 generated based on that model, and you have the EU's  
5 submissions on that point.  
6 So that was the claim in paragraph 391 about  
7 the likely biomass increases.  
8 But importantly is the next paragraph, 392, where  
9 the European Union understands the UK to make a claim  
10 which it does not seem to have made before, where  
11 it says that:  
12 "... the [United Kingdom] was entitled to place  
13 significant weight on the ... gravity of the situation  
14 to be addressed ..."  
15 Because:  
16 "... at the time of the adoption of the measures,  
17 there was a real and pressing need to take appropriate  
18 measures to protect sandeel abundance and  
19 resilience ..."  
20 So that's paragraph 392.3 of the United Kingdom's  
21 Written Submission.  
22 In support of that statement regarding "a real and  
23 pressing need to [act]", it refers to the two preceding  
24 subparagraphs, 392.1 and 392.2. And I think it's  
25 necessary for the Tribunal to look more closely at those

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15:22 1 It will be back!  
2 At the end of paragraph 391, there is a statement:  
3 "By increasing the availability of sandeel as food  
4 for their predators, a closure of sandeel waters was  
5 likely to increase the biomass of those predators ..."  
6 And it's not to reopen the debate that we have  
7 already had, but if one looks at footnote 767 of the  
8 UK's Written Submission, which is the support for that  
9 statement, there are references to two of the documents  
10 in the core bundle. So it's the Scottish scientific  
11 report (C-50), which is tab 23, and not 24; and also to  
12 the English scientific report (C-45).  
13 I don't propose to take the Tribunal to those now,  
14 but if the Tribunal looks at those references -- so it's  
15 page 13 of Exhibit C-50 and pages 7 and 10 of  
16 Exhibit C-45 -- there is nothing in those particular  
17 pages of those documents to support this statement about  
18 the likelihood.  
19 Now, it is unsurprising, the EU submits, that those  
20 paragraphs do not support the statement in the United  
21 Kingdom's Written Submission because, for the reasons  
22 we already discussed this morning, the likely biomass  
23 increases referred to are the simulations generated  
24 based on this updated Ecosim model.  
25 I do not propose to recall the parametric flaws that

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15:25 1 two subparagraphs, and the arguments and the evidence  
2 identified by the UK regarding the "real and pressing  
3 need".  
4 So if the Tribunal could turn back to 392.1,  
5 essentially, when one looks at that paragraph, the last  
6 sentence summarises the points being made, that "there  
7 is a risk of sandeel stock collapse", "Even with low  
8 levels of fishing". That's the last sentence of  
9 paragraph 392.1.  
10 But simply, this is not the case regarding the  
11 North Sea sandeel fishery and the way it is currently  
12 managed. As the European Union explained this morning,  
13 it is an agreed fact that since 2011 the management  
14 strategy for sandeel is designed to avoid the risk of  
15 sandeel stock collapse by aiming to ensure, essentially,  
16 that a sufficient proportion of the sandeel population  
17 escapes fishing pressure, and that ensures that the  
18 fishery can be continued in a sustainable manner. And  
19 that's both the EU's position in paragraph 72 of its  
20 Written Submission and also the United Kingdom's  
21 position at paragraph 266 of its Written Submission.  
22 If one also looks at some of the footnotes of that  
23 paragraph, you'll see there is a general cross-reference  
24 in footnote 768 of the United Kingdom's Written  
25 Submission to sections IV and V of its Written

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<p>15:27 1 Submission.</p> <p>2 Now, with a bit of detective work -- because that</p> <p>3 covers paragraphs 87 to 110, and 111 to 129 -- there are</p> <p>4 two actually two relevant paragraphs in sections IV and</p> <p>5 V where the United Kingdom discusses this risk of</p> <p>6 sandeel stock collapse even with limited fishing, and</p> <p>7 those are paragraphs 96 and 115 of the United Kingdom's</p> <p>8 Written Submission.</p> <p>9 The European Union will not take the Tribunal</p> <p>10 through all of those, but the simple point is that both</p> <p>11 those paragraphs, so paragraphs 96 and 115, essentially</p> <p>12 rely on one and the same scientific study: it's</p> <p>13 a scientific study from 2004 which the Tribunal will</p> <p>14 find in Exhibit R-0027.</p> <p>15 As I said, this is a study from 2004. It's thus</p> <p>16 a study that predates the management strategy that has</p> <p>17 been applied since 2011. And as I said, that strategy</p> <p>18 is designed to avoid precisely the risk of sandeel stock</p> <p>19 collapse due to fishing.</p> <p>20 More generally, the study, because it's from 2004,</p> <p>21 doesn't reflect the way in which the fishery is managed,</p> <p>22 because it assumed that fishing mortality due to the</p> <p>23 fishery would be the same year on year, whereas the</p> <p>24 management strategy is designed to reduce fishing</p> <p>25 mortality in years where indeed the stock size might be</p> <p style="text-align: center;">Page 157</p>	<p>15:30 1 is indicating that nevertheless, even with the</p> <p>2 precautionary framework adopted by ICES, it's possible</p> <p>3 that the resulting biomasses may be too low.</p> <p>4 So I'm not quite sure where, in either footnote 162</p> <p>5 or 163 -- which again refers to the "English Scientific</p> <p>6 Report", the "Scottish Scientific Report" and</p> <p>7 a "De Minimis [Report]" -- where the reference to the</p> <p>8 2004 study comes in.</p> <p>9 I must admit, I did not look at paragraph 96, which</p> <p>10 you also referred us to. But it would be helpful if you</p> <p>11 explained that.</p> <p>12 MR DAWES: I'm happy to clarify, Madam Chair.</p> <p>13 So if one takes footnote 163, and the references</p> <p>14 that are made there to the English scientific report and</p> <p>15 to the Scottish scientific report, and when one compares</p> <p>16 them with the references -- if one then jumps back to</p> <p>17 paragraph 95 of the United Kingdom's Written</p> <p>18 Submission -- and apologies, I seem to have lost</p> <p>19 paragraph 95 of the United Kingdom's Written Submission.</p> <p>20 If the Tribunal just permits me to ... (Pause)</p> <p>21 Sorry, paragraph 96, apologies. Not 95, 96. That</p> <p>22 was the source of my confusion.</p> <p>23 There you will see it says:</p> <p>24 "The fact ..."</p> <p>25 It's essentially the same point that is made in</p> <p style="text-align: center;">Page 159</p>
<p>15:29 1 lower in a particular sandeel management area.</p> <p>2 If the Tribunal requires the reference to the fixed</p> <p>3 fishing pressure in the study from 2004, it's at page 3</p> <p>4 of Exhibit R-0027. And there are references to three</p> <p>5 variables that are used for fishing pressure, and those</p> <p>6 are all variables which are based on a fixed fishing</p> <p>7 mortality.</p> <p>8 So one of the two arguments on which the United</p> <p>9 Kingdom relies for the "real and pressing need" is the</p> <p>10 risk of stock collapse, which simply, under the current</p> <p>11 management strategy, that risk is taken into account in</p> <p>12 the management strategy that's now applied.</p> <p>13 THE CHAIRPERSON: Mr Dawes, I did go back to your paragraph</p> <p>14 references. In paragraph 115, the footnote 162 refers</p> <p>15 to the "English Scientific Report" --</p> <p>16 MR DAWES: Yes.</p> <p>17 THE CHAIRPERSON: -- and the "De Minimis Assessment", as</p> <p>18 well as the "ICES Technical Service Response", which</p> <p>19 says:</p> <p>20 "It is possible that exploitation levels consistent</p> <p>21 with [ICES' precautionary] framework would result in</p> <p>22 a high enough biomass required to sustain ... However,</p> <p>23 it is ... possible that resulting biomasses may be too</p> <p>24 low."</p> <p>25 So it seems that the ICES Technical Service response</p> <p style="text-align: center;">Page 158</p>	<p>15:32 1 paragraph 115.</p> <p>2 "The fact that sandeel experience high levels of</p> <p>3 natural fluctuation means that even without the</p> <p>4 additional pressure of fishing, sandeel abundance can</p> <p>5 vary from year to year."</p> <p>6 That is not contested. But then, and it's the key</p> <p>7 sentence:</p> <p>8 "A modelling study has found that even with a low</p> <p>9 level of fishing pressure, there remains a risk that</p> <p>10 sandeel populations will 'crash!'"</p> <p>11 And if one looks at footnote 103, there you will see</p> <p>12 the references to the Scottish scientific report and to</p> <p>13 the English scientific report are the same. So again,</p> <p>14 there it's referred to Exhibit C-0045, page 11; and the</p> <p>15 Scottish scientific report, Exhibit C-0050, pages 25</p> <p>16 and 26.</p> <p>17 So the references in footnote 103 and in</p> <p>18 footnote 163 are the same. So, in a sense, they all</p> <p>19 come back in the end to this one and the same study from</p> <p>20 2004.</p> <p>21 THE CHAIRPERSON: Thank you very much, Mr Dawes, for taking</p> <p>22 us through that.</p> <p>23 MR DAWES: I attempted a shortcut. Next time I think</p> <p>24 we will take the longer route. Apologies for that.</p> <p>25 If we can move on then from paragraph 392.1 of</p> <p style="text-align: center;">Page 160</p>

<p>15:33 1 the United Kingdom's Written Submission to the next 2 subparagraph, so 392.2. And here, in a way, it will not 3 be necessary to refer to any documents, but what is 4 important is to unpack this paragraph. Because it makes 5 several statements with which the European Union agrees, 6 but when one tries to put them together, they don't 7 actually support the proposition the UK is making about 8 the real and urgent need to act.</p> <p>9 So if I could just take the Tribunal through, 10 I think there are four statements.</p> <p>11 The first statement is essentially that there is 12 a general decline in seabird populations. And that is 13 unfortunate, but it's not an element that is disputed by 14 anyone.</p> <p>15 The second statement, which again is not disputed, 16 is that avian flu also has an impact on certain seabird 17 populations. And I think the reference is in particular 18 to 2022, when there was this impact.</p> <p>19 Then the third statement, which again is not in 20 dispute: declines in sandeel abundance can impact 21 breeding success of certain seabirds, most notably 22 kittiwakes. Again, there is nothing disputed there.</p> <p>23 And the fourth and final statement, which is of 24 a general nature and with which the EU can agree, is 25 that:</p> <p style="text-align: center;">Page 161</p>	<p>15:36 1 biomass of commercially valuable fish ... and tourism 2 opportunities". 3 Very briefly on that. 4 On the increased biomass of commercially viable 5 fish, the European Union would again ask the Tribunal to 6 turn back to the Scottish scientific report, which is at 7 tab 23 (C-50), and to page 391. So it's the sentence 8 after the ones we've already considered, where it says: 9 "Some fish species such as whiting, haddock, cod, 10 plaice ... have shown higher body condition indices or 11 growth in years of high sandeel abundances ..." 12 And the simple point there is: whilst there may be 13 indications of higher body masses in those years, that 14 does not mean that in years where there is less sandeel 15 abundance, that there is necessarily an impact on 16 the biomass of those fish.</p> <p>17 Then finally, regarding tourism, the 18 European Union's simple point is that this was not 19 something which the United Kingdom itself purported to 20 have taken into account during its decision-making 21 process. This is something that the United Kingdom -- 22 and one can see that in paragraph 395 there is 23 a reference to responses that the United Kingdom 24 received to consultations. But when one looks at the 25 various consultation documents and the various</p> <p style="text-align: center;">Page 163</p>
<p>15:35 1 "... spatial sandeel fishing closures may build 2 seabird resilience as well as having wider ecosystem 3 benefits." 4 As a general proposition, the EU can agree that 5 spatial closures may have these effects. 6 So, essentially, all of the elements on which the 7 United Kingdom relies in its written statement about the 8 real and urgent need to act do not support that claim.</p> <p>9 Then I will just very briefly take the Tribunal 10 through the last three paragraphs of the United 11 Kingdom's Written Submission on the benefits, and there 12 I can be brief.</p> <p>13 The first is on paragraph 393, where it is stated 14 that: 15 "... the [United Kingdom] ... was entitled to weigh 16 in the balance the potential adverse consequences of not 17 taking action, or of taking less robust action." 18 The EU's submission is that that is relevant for the 19 aptitude of the measure to contribute to the objectives 20 identified, rather than to any benefits of acting 21 itself. It doesn't say about the benefits of acting. 22 The same is true of paragraph 394, where there's 23 a reference to the domestic support. 24 Then finally, paragraph 395, there's a reference to 25 additional benefits in terms of "expected increase in</p> <p style="text-align: center;">Page 162</p>	<p>15:38 1 ministerial submissions that were made, there is no 2 reference actually to tourism being taken into account. 3 So unless the Tribunal has questions at this 4 juncture, I will turn to the second point of 5 disagreement between the parties, namely regarding 6 the economic and social impacts of the measure. 7 The EU's position is that the United Kingdom has 8 understated those economic and social impacts. The UK's 9 position is essentially that those economic and social 10 impacts are mitigated by the fact that EU vessels that 11 previously finished sandeel in UK waters of the 12 North Sea can still access EU waters to fish sandeel or 13 they can access UK waters to fish other stocks. 14 The United Kingdom sets out its position in 15 paragraphs 396.3 and 396.4 on this point, and in 16 Exhibits R-0077 and R-0098, and I would like to briefly 17 take the Tribunal through each of these points. 18 If we could start with the United Kingdom's 19 Written Submission. There the Tribunal will see it is 20 stated: 21 "... EU vessels were not solely reliant on English 22 waters or sandeel for their fishing activity and 23 revenues ... It was therefore likely that EU vessels 24 would displace their fishing effort ..." 25 That means they would fish elsewhere:</p> <p style="text-align: center;">Page 164</p>

15:40 1 "... [either] to other stocks in UK waters and would  
2 be able to continue to finish their sandeel quota in EU  
3 waters ..."  
4 And then if one goes on to the next paragraph of the  
5 United Kingdom's Written Statement, there's a reference  
6 to the fact that:  
7 "Conditions of access were considered both as  
8 regards access to UK waters to fish sandeel (which was  
9 to cease) and access to UK waters to continue to fish  
10 other agreed stocks ..."  
11 So there again, the position is being stated that  
12 any impacts on the EU because of the prohibition of  
13 fishing sandeel in UK waters are mitigated.  
14 And the same is true in the ministerial submissions,  
15 which I will now take you to. So there are two  
16 documents. The first is the ministerial submission  
17 which is at R-0077, which is tab 17 of your core bundle.  
18 We will come back to this ministerial submission  
19 several times in the next few minutes. But just as  
20 background, this is the ministerial submission -- so the  
21 United Kingdom explains in its Written Submission,  
22 paragraph 409.7, that this was a submission made to UK  
23 ministers concerning whether to approve the sandeel  
24 fishing prohibition insofar as it concerns English  
25 waters of the North Sea.

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15:43 1 And the same is said in the other ministerial  
2 submission, which I would ask the Tribunal to turn to,  
3 which is at tab 26. This is a ministerial submission of  
4 26 January 2024. And the UK explains in its Written  
5 Submission, paragraph 414.5, that this is the  
6 ministerial submission concerning whether to approve  
7 the closure of sandeel fishing in Scottish waters.  
8 And there, if I could ask the Tribunal to turn to  
9 page 583 of the bundle, so it's the last page of the  
10 relevant annex. There it is the second paragraph:  
11 "However, it is expected that there will be  
12 an impact on EU vessels, primarily the Danish fleet."  
13 And then there are figures given.  
14 "However, this does not account for the likelihood  
15 that EU vessels will move their fishing of sandeel to  
16 other waters and therefore offset the loss of a closure  
17 in Scottish waters."  
18 We will come back to this ministerial submission  
19 a little later. But what it shows, and what all of the  
20 documents I have taken the Tribunal to show -- well,  
21 these submissions primarily -- is that this is simply  
22 an irrelevant consideration whether or not EU vessels  
23 that previously fished sandeel in UK waters of the  
24 North Sea can still access EU waters to fish sandeel or  
25 UK waters to fish other stocks. That is simply

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15:41 1 And there what is relevant for present purposes --  
2 it's page 5, so 273 of the core bundle. It's the last  
3 sentence of paragraph 25, where it is said:  
4 "Therefore, it is likely [that] these vessels ..."  
5 So these are EU vessels, as the start of the  
6 paragraph confirms:  
7 "Therefore, it is likely [that] these vessels  
8 currently fish other pelagic and industrial stocks and  
9 would continue to be able to do this."  
10 So this is being stated within the framework of the  
11 impact on the EU industry of the potential measure at  
12 that stage. So the impact again is being said to be  
13 mitigated because of the ability of EU vessels to fish  
14 other stocks.  
15 Then if one turns over the page to paragraph 26,  
16 again there is a reference to the facts, at the end,  
17 that:  
18 "... we would expect the EU sandeel fleet to  
19 primarily target herring when outside the sandeel  
20 season -- and some vessels may target other pelagic  
21 stocks ..."  
22 So again it's a reference to the fact that whatever  
23 the impact of the measure on EU vessels, it can be  
24 mitigated by the fact that EU vessels can fish other  
25 stocks.

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15:45 1 an irrelevant consideration when assessing the economic  
2 and social impacts of the measure.  
3 Why is that? Because Article 2(1)(a) of Annex 38 of  
4 the TCA grants EU vessels the right of full access to UK  
5 water to fish the EU share of each and every stock for  
6 which a quota has been agreed. So it was therefore  
7 the economic and social impacts associated with the  
8 impairment, and -- we would go further -- the  
9 nullification of that specific right of the EU, that the  
10 UK was required to assess. So that was why the UK has  
11 understated the economic and social impacts of the  
12 measure.  
13 One final point before I move on: more generally,  
14 the degree of scrutiny during the UK's decision-making  
15 process was, we would submit, UK-centric. And the EU  
16 would like to illustrate that by referring the Tribunal  
17 to two documents.  
18 The first is tab 13, which is Exhibit C-0044. This  
19 is what is called the "De Minimis Assessment", so it's  
20 part of the English consultation document. And I would  
21 ask the Tribunal to turn to page 4 of that document, and  
22 it's the heading "Rationale for producing [a] DMA", so  
23 a de minimis assessment, as opposed to an impact  
24 assessment.  
25 Before turning to that, if one looks at the previous

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<p>15:47 1 paragraph, "Summary of monetised impacts", it talks 2 about the costs having been monetised on UK businesses, 3 and there are references to figures which are all below 4 £5 million. And then under the next box, "Rationale for 5 producing [a] DMA (as opposed to an IA)", it is said 6 that they "fall under the 'low cost' criteria", given 7 that essentially the impact is under £5 million. 8 And the EU's point there simply is that this is 9 a reference to the impact on UK's businesses, and not 10 the impact on EU businesses. 11 The same is also true when one looks at the 12 documents from the Scottish consultation. And if I can 13 take the Tribunal to tab 22 of the core bundle, which is 14 essentially the Scottish consultation document (C-49), 15 at page 23, so it's (core bundle) page 338, under the 16 heading "Potential impact on business", and there 17 it says: 18 "Sandeel quota has not been allocated to UK vessels 19 since 2021, therefore only a partial Business and 20 Regulatory Impact Assessment ... has been produced." 21 Now, the EU's submission is: whether or not this may 22 be permissible as a matter of UK law, that may very well 23 be the case. But the EU's submission is simply that 24 this shows that the UK's decision-making process, and in 25 particular its assessment of the economic and social</p> <p style="text-align: center;">Page 169</p>	<p>15:51 1 is it that is being nullified? And it's that right, or 2 it's, I would say, the economic and social impacts of 3 impairing or nullifying that right that need to be put 4 on one end of the scale, and then balanced with the 5 benefits on the other end of the scale. 6 So in this particular context, the European Union's 7 position is that whether or not the losses or the impact 8 can be offset by the ability of vessels to fish other 9 stocks in UK waters or sandeel in EU waters is not 10 something that can be put on that end of the scale. 11 So indeed it may be possible, in a way, to litigate 12 those losses, but that is not a relevant consideration 13 in deciding what should be put on the scales in the 14 balancing exercise. 15 JUSTICE UNTERHALTER: And are you saying that is so as 16 a matter of law, or is that so as a matter of, as it 17 were, factual assessment of costs and benefits? 18 MR DAWES: I'm saying that as a matter of law, what needs 19 to be put on the cost side of the scale is the losses 20 associated with the impairment or nullification of that 21 specific right to fish sandeel in EU waters. 22 Now, as a factual matter, the EU would not dispute 23 that, factually, EU vessels can indeed fish for other 24 stocks in UK waters and in EU waters. 25 JUSTICE UNTERHALTER: Thank you. That's helpful.</p> <p style="text-align: center;">Page 171</p>
<p>15:49 1 impacts, was informed by the view that what was relevant 2 were not the impacts on the European Union. 3 JUSTICE UNTERHALTER: Mr Dawes, I wonder if I could just 4 take you back to the proposition that you were raising 5 about irrelevance because of the right of full access to 6 every fishing stock. 7 Do you think, in a cost/benefit analysis, that there 8 is a difference between a deadweight loss -- in other 9 words, the fact that you can't have access to 10 a particular species, a particular stock is 11 irreplaceable -- versus an opportunity cost; in other 12 words, that there's a loss, but it is capable of some 13 substitution? Because in the broad scheme of trying to 14 understand benefits and losses, there might be 15 a distinction between an out-and-out loss, which you 16 can't recover in any way from an economic perspective, 17 and one where there's an opportunity cost loss. 18 So I'm wondering about the difference between what 19 seems to be a concept of, I think you are suggesting, 20 legal irrelevance versus economic relevance. If there 21 is a difference; maybe there isn't. But I wondered what 22 your thought is about that. 23 MR DAWES: I think -- and again, I think it was mentioned 24 in your question -- I think one has to start, when one 25 is weighing the benefits and the costs, with: what right</p> <p style="text-align: center;">Page 170</p>	<p>15:52 1 THE CHAIRPERSON: Thank you, Mr Dawes. 2 I wonder if this would be an appropriate time to 3 take a 15-minute break, because you've both been very 4 patient with us and taking us through documents. 5 So I propose then that we break until 4.10. Thank 6 you very much. 7 (3.53 pm) 8 (A short break) 9 (4.11 pm) 10 THE CHAIRPERSON: Thank you. 11 Mr Dawes, you have the floor again. Please go 12 ahead. 13 MR DAWES: Thank you, Madam Chair. 14 Unless the Tribunal has any questions, the EU will 15 move on to the third point of disagreement, namely the 16 weighing of the benefits of the measure and of its 17 economic and social impacts. 18 The EU's position is that the UK has failed to 19 properly weigh those benefits and impacts. As the EU 20 has explained, proportionality is about both what has to 21 be weighed and how to weigh it. 22 Before the break, the EU has explained how the UK 23 incorrectly identified what was to be weighed, and the 24 European Union will now explain how the weighing 25 exercise itself was not undertaken correctly. And this</p> <p style="text-align: center;">Page 172</p>

16:12 1 is also the subject of the Tribunal's advance  
 2 question 14, to a certain extent.  
 3 The European Union and the United Kingdom have  
 4 fundamentally different understandings as to what  
 5 a weighing exercise entails.  
 6 The United Kingdom's position seems to be that it is  
 7 sufficient to identify elements in a document that  
 8 formed part of a decision-making process in order to  
 9 show that the weighing exercise has been conducted  
 10 properly.  
 11 By contrast, the European Union's position is that  
 12 this Tribunal should scrutinise not only what elements  
 13 the UK has identified, but have those elements been  
 14 properly weighed; and if so, whether the measure could  
 15 or could not have been adopted.  
 16 In its Written Submission, paragraphs 734 to 742,  
 17 the European Union demonstrated the United Kingdom's  
 18 failure to weigh properly the benefits and the impacts  
 19 by reference to the information available in the public  
 20 domain. This was the only information that was  
 21 available to the European Union at the time of  
 22 its Written Submission.  
 23 The United Kingdom has, as part of its Written  
 24 Submission, exhibited additional documents which  
 25 it claims show that the weighing exercise was conducted

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16:14 1 properly. The European Union's position is that those  
 2 document do not change anything. On the contrary, they  
 3 support the European Union's position. Some of those  
 4 additional documents include what we have already  
 5 referred to as ministerial submissions. There are six  
 6 of those documents: they are Exhibits R-74, R-77, R-91,  
 7 R-92, R-94 and R-98.  
 8 I will not take you, mercifully, through all of  
 9 those six documents, but only the two ministerial  
 10 submissions that the European Union has already taken  
 11 you to. They are the ministerial submissions of  
 12 14 September 2023 (R-77) and of 26 January 2024 (R-98),  
 13 so they are the ones in the core bundle at tabs 17  
 14 and 26.  
 15 Starting with the ministerial submission of  
 16 14 September 2023: as the European Union explained,  
 17 this was the submission whether or not to approve the  
 18 sandeel fishing prohibition insofar as it concerns  
 19 English waters of the North Sea.  
 20 I refer the Tribunal to paragraph 369 of the UK's  
 21 Written Submission, where the United Kingdom explains  
 22 that that ministerial submission of 14 September:  
 23 "... specifically considered the EU's position  
 24 'whether a full closure could lead to a large negative  
 25 impact on industry compared to the possible proposed

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16:16 1 benefits' ..."  
 2 I would like to take the Tribunal through the actual  
 3 language of the ministerial submission, which is at  
 4 tab 17, and see whether it supports that statement.  
 5 So if the Tribunal could turn to tab 17 (R-77), and  
 6 starting with paragraph 19, which is on page 272, under  
 7 the heading "EU Considerations".  
 8 Paragraph 19 merely recalls -- and these are figures  
 9 that are also referred to in the written submissions --  
 10 the economic impact on the EU fishing industry, so just  
 11 the numbers. And then paragraph 20 also refers to other  
 12 impacts on fishmeal and fish oil factories. So they are  
 13 recalled as background.  
 14 Then if the Tribunal could turn over the page to 273  
 15 and paragraph 25, it is said:  
 16 "The impact on EU industry is difficult to quantify  
 17 and limited information has been provided ..."  
 18 And then the rest of the paragraph refers to other  
 19 documents, and also to the statements that we have  
 20 already gone through regarding the inability of the EU  
 21 fleet to fish either other stocks or in other waters.  
 22 But the simple point here to be made is that  
 23 paragraph 25 does not disclose any weighing as such.  
 24 It's just a reference to what is to be put on the  
 25 scales, if one can call it like that, but not any actual

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16:18 1 weighing of what has been put on the scales.  
 2 The same is true of the next paragraph, which is  
 3 paragraph 26. The Tribunal has been taken to that  
 4 paragraph. Again, it's about what should be put on the  
 5 scale, but not in fact any actual weighing of the costs  
 6 and the benefits. And there are no other paragraphs in  
 7 that ministerial submission that disclose any other  
 8 further weighing of the costs and the benefits.  
 9 So the EU's position is simply that when one looks  
 10 at the language of the ministerial submission of  
 11 14 September, which is the one where the decision-maker  
 12 was being asked to approve the measure, there is no  
 13 indication of any weighing or balancing of the costs and  
 14 the benefits of the measure. There is just simply  
 15 reference to what are the costs, what are the benefits,  
 16 but there is no reference to any actual weighing.  
 17 The same also applies to the ministerial submission  
 18 of 26 January 2024, which is at tab 26 (R-98).  
 19 Now, before the Tribunal turns to tab 26, the EU  
 20 notes that, unlike for the ministerial submission of  
 21 14 September 2023, in its Written Submission the UK does  
 22 not state that the ministerial submission of  
 23 26 January 2024 -- [it] doesn't have any similar  
 24 language to what was said in relation to the ministerial  
 25 submission of 14 September. So it does not claim that

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<p>16:20 1 it considered, for example, the EU's position whether 2 a full closure could lead to a large negative impact on 3 industry, compared to the benefits. 4 What paragraph 376 of the UK's Written Submission 5 states is simply the following: 6 "The alleged disproportionality of the proposed 7 prohibition was also raised directly by the EU and 8 Denmark in their responses to the ... consultation and 9 correspondence to the Scottish government. In response 10 to this concern, the Ministerial submission of 11 26 January 2024 concluded that the measure was 12 'appropriate and proportionate given the current 13 evidence base and the precautionary principle.' 14 So the UK itself, in its Written Submission, doesn't 15 claim, in relation to the closure in the Scottish 16 waters, that there was any consideration or weighing and 17 balancing. 18 Now, the EU accepts that that's not the end of 19 the story, and that one must also look at the actual 20 language of the ministerial submission of 26 January, 21 and there the EU would ask the Tribunal to turn to 22 tab 26 (R-98). We will go through the relevant 23 passages, but there the core point is: again, this 24 submission does not disclose any weighing by 25 the decision-maker.</p> <p style="text-align: center;">Page 177</p>	<p>16:23 1 simply a discussion of the EU's claim about 2 discrimination; nothing on proportionality or any 3 weighing. 4 Then there is a section on 582 which is irrelevant 5 for purposes of the present dispute. 6 And then finally, we get to page 583, "Financial 7 considerations". There are three paragraphs. 8 The first paragraph refers to Scottish vessels, so 9 not relevant for present purposes. 10 The second paragraph there says: 11 "... it is expected that there will be an impact on 12 EU vessels, primarily the Danish fleet." 13 There's a reference to the amounts: 14 "However, this does not account for the likelihood 15 that EU vessels will move their fishing of sandeel to 16 other waters and ... offset the loss ..." 17 But again, nothing in that paragraph about any 18 weighing or balancing. 19 And that brings us to the end of the Scottish 20 ministerial submission. 21 So the EU's simple point is that when one looks at 22 the evidence -- the EU already, in its Written 23 Submission, explained why the consultation documents do 24 not show there was any weighing of the benefits or the 25 costs. And when one looks at these additional documents</p> <p style="text-align: center;">Page 179</p>
<p>16:21 1 If the Tribunal could start with page 568, under the 2 heading "Options Considered and Advice". And there it's 3 the last sentence: 4 "Our considerations on these and other key elements, 5 including compliance with the Trade [and] Cooperation 6 Agreement ... are set out ... in Annex F for Ministers 7 consideration." 8 So what does Annex F actually say? You will find 9 that as of page 580 of the core bundle. 10 Maybe just to go through it by sections -- we don't 11 need to go through them, but there are several sections. 12 The first is the "Scientific advice for the preferred 13 option"; that's on page 580. There's no reference in 14 there to any weighing or balancing or to any rights. 15 The same under the heading "ICES advice on forage 16 fish", which is on page 581. Under the heading 17 "Compliance of the measures with the [TCA]", there's the 18 references to the shares of the parties; that's at the 19 bottom of page 581. There is a reference to the fact 20 that: 21 "... until 30 June 2026 ..." 22 And then you have to turn the page: 23 "... the UK and the EU have full mutual access to 24 their respective "waters" ..." 25 And then when one carries on, on page 582 there is</p> <p style="text-align: center;">Page 178</p>	<p>16:25 1 that I've taken the Tribunal to, this is confirmed by 2 those documents. 3 So that was the third point of disagreement between 4 the parties about how the actual weighing took place. 5 Unless the Tribunal has any questions at this stage, 6 I'll move on to the fourth point of disagreement between 7 the parties, namely whether another proportionate 8 measure could have been adopted. 9 The EU's position is that one or more spatially 10 targeted prohibitions on sandeel fishing in parts of UK 11 waters of the North Sea, coinciding with the feeding 12 range of chick-rearing seabirds for which sandeel 13 comprises a substantial proportion of their diet, would 14 have been a proportionate measure. Why? Because such 15 a measure was both reasonably available to the UK and 16 could have been designed in a way to ensure that the 17 economic and social impacts would have been commensurate 18 with the benefits. 19 So starting with the reasonable availability. 20 This alternative measure was reasonably available 21 because it fell within the range of measures 22 contemplated by the UK's legal framework and it would 23 also not impose an undue burden on the UK. And the EU 24 has set out its position on these matters in 25 paragraphs 751 and 755 of its Written Submission.</p> <p style="text-align: center;">Page 180</p>

16:26 1 The EU also explained in its Written Submission why  
 2 the social and economic impacts would have been  
 3 commensurate with the benefits. To put matters simply,  
 4 while such a measure would still have entailed economic  
 5 and social impacts that would have been borne by EU  
 6 vessels and the EU fishmeal and fish oil factories, such  
 7 impact would have been significantly lower.  
 8 As I said, the European Union made these points in  
 9 its Written Submission, and the UK has not addressed  
 10 them. This is despite what was said by the bodies that  
 11 authored the English scientific report.  
 12 And this will be the last document in the core  
 13 bundle that I will take the Tribunal to today. It is  
 14 document R-0076, which is at tab 16.  
 15 This document, as its name indicates -- it's called  
 16 "Summary review of the evidence presented by respondents  
 17 to the consultation [about English] waters". And the  
 18 relevant paragraphs for present purposes can be found on  
 19 pages 266 and 267. It's in response to whether or not  
 20 alternative measures could have been considered. And  
 21 there, the authors of the English scientific report  
 22 note, at the bottom of the page:  
 23 "Benefits of the fishery closure may therefore be  
 24 disproportionately greater in areas with greater  
 25 predator dependence or forage overlap."

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16:29 1 The EU submits that this statement confirms that  
 2 an alternative measure was available, and that the UK  
 3 should be required to justify why it did not  
 4 consider it.  
 5 JUSTICE UNTERHALTER: Sorry, would you tell me exactly where  
 6 that is? I don't have it.  
 7 MR DAWES: Pardon me. The bottom of 266 and at the top of  
 8 267; it literally runs over it.  
 9 JUSTICE UNTERHALTER: Yes, thank you.  
 10 MR DAWES: It is very unhelpful in that sense.  
 11 So to conclude, the EU has taken the Tribunal to  
 12 a large number of documents in the last few minutes.  
 13 The Tribunal may be asking: why do all these documents  
 14 matter? What do they show? They matter for several  
 15 reasons.  
 16 They matter firstly because of the specific context  
 17 in which the proportionality claim arises, because of  
 18 the provisions on TACs in the TCA. The TACs are  
 19 negotiated individually for each and every stock,  
 20 including sandeel, and then there is a right associated  
 21 with each and every agreed TAC to fish the agreed stock  
 22 in the waters of the parties. And if one follows the  
 23 United Kingdom's logic, this right related to each and  
 24 every TAC could be eroded on a gradual basis if it were  
 25 possible to restrict the rights that are derived from

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16:30 1 these TACs.  
 2 But all these documents, they also matter because  
 3 they show a simple factual proposition: they show that  
 4 the United Kingdom overstated the benefits of the  
 5 measure that it adopted; they show that the European  
 6 Union's interests were not properly considered; and  
 7 therefore they show that the weighing and balancing  
 8 exercise that the parties agreed had to be conducted by  
 9 the United Kingdom was simply not done in a correct  
 10 manner, neither what was to be weighed or how those  
 11 costs and benefits were to be weighed.  
 12 So unless the Tribunal has any further questions at  
 13 this juncture, I will pass the floor to my co-Agent to  
 14 address the Tribunal on the European Union's third  
 15 claim.  
 16 JUSTICE UNTERHALTER: I just wanted to be sure that  
 17 I understand the scheme of the argument and where the  
 18 differences between the parties lie.  
 19 A good deal of the difference seems to rest upon the  
 20 content of the principle of proportionality, because if  
 21 this weighing of costs and benefits in the manner that  
 22 the EU contends for is not what proportionality entails,  
 23 then a fair amount of this factual material won't  
 24 matter, I suppose, because there is a greater freedom to  
 25 restrict the rights than the EU contends for. Would

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16:32 1 that be correct?  
 2 MR DAWES: I will let my colleague deal with it.  
 3 JUSTICE UNTERHALTER: Yes, of course. This is just to shape  
 4 the differences, obviously.  
 5 So the thrust of the EU's position is that  
 6 proportionality entails a cost/benefit analysis and  
 7 a proper balancing that must take place. If the UK says  
 8 that is not the content of the principle of  
 9 proportionality, then some of this factual material will  
 10 not really matter, will it?  
 11 That's, I suppose, my first question.  
 12 MS NORRIS: As the European Union said at the beginning,  
 13 the parties do have a very different position as to the  
 14 content of proportionality; but more than that, they  
 15 have a different position as to when that is relevant,  
 16 for instance, in the decision-making process, or does it  
 17 even apply to the measure at the end. So I think that  
 18 all of those differences would play into the extent to  
 19 which this evidence goes to the question.  
 20 JUSTICE UNTERHALTER: Yes. But if the -- let us call it  
 21 the stronger doctrine of proportionality that the EU  
 22 proposes is the right interpretation, then the fact that  
 23 you say there wasn't the balancing undertaken in the  
 24 process of coming to a decision would suffice for the  
 25 purposes of non-compliance in your argument.

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<p>16:34 1 In other words, as I understand your argument, 2 at the least, there has to be a weighing in order to 3 come to a compliant decision. If the weighing didn't 4 take place, as you say it should have, then that would 5 give rise to a breach. Is that right? 6 MS NORRIS: I think there are two limbs to what the 7 European Union is arguing as part of its proportionality 8 assessment. So to paraphrase what my co-Agent said, 9 there's also a question of what it is that you're 10 weighing. And there I think that there is also 11 a disagreement between the European Union and the UK 12 as to qualitatively what is on one side versus the 13 other, and that is part of what this evidence goes to. 14 A large part of what was discussed is: how do you 15 assess the benefits in the first place? We say they've 16 been overstated. How do you assess the costs? We say 17 they've been understated or not properly considered -- 18 understated, in fact. 19 Then you come to the second limb, which is how you 20 weigh and balance them. Now, the European Union does 21 not understand the UK to argue that proportionality in 22 general does not require a weighing and balancing; 23 I think that the difference is again when it comes into 24 play. 25 But I think we would argue that all of the evidence</p> <p style="text-align: center;">Page 185</p>	<p>16:37 1 fundamentally supported by looking at the reasonable 2 alternative measure. 3 So the evidence that is being presented to the 4 Tribunal this afternoon is aimed to show you those 5 different elements in that process. So the question of 6 the scientific evidence showing you whether the benefits 7 were really as great as is claimed, the evidence showing 8 whether the costs are really as small as is claimed, 9 that's goes to what's going into the equation. But then 10 how it's all considered -- it's very difficult to 11 divorce them completely the one from the other. 12 JUSTICE UNTERHALTER: I understand. And I understand 13 the first line is what are the inputs into the 14 cost/benefit analysis, and you've explained that. 15 Then you come to the balancing. Is your contention 16 that had a proper balancing been done in conformity with 17 the treaty, the outcome that was reached -- in other 18 words, the decision that was reached of prohibition -- 19 does not match up to a standard of reasonableness or 20 rationality? Or is there some other standard that you 21 would like us to think about in relation to why this 22 decision is not supported by a measured balancing of 23 the costs and benefits? 24 I'm just trying to understand what standard we need 25 to measure it against if you say, as I think you do,</p> <p style="text-align: center;">Page 187</p>
<p>16:35 1 we've said is material when you're looking at how you 2 weigh and balance, for the simple reason that you can't 3 divorce what's on the scales from how they relate to one 4 another. 5 JUSTICE UNTERHALTER: Because one of the propositions that 6 was advanced was to suggest that the weighing that has 7 to be done is susceptible of review as to whether the 8 best outcome is achieved in respect of a consideration 9 of costs and benefits. Is that the standard that you 10 say must be met for the purposes of the weighing and 11 balancing that you say should take place? 12 MS NORRIS: The European Union hasn't said that the Tribunal 13 has to identify the best possible outcome. The Tribunal 14 has to look at the exercise that was undertaken, which 15 is precisely what the inputs into that exercise go to 16 show. Here, as I've said, the European Union challenges 17 the way in which the two sides were constituted, as it 18 were. 19 Then there's also a question of the actual exercise 20 itself. And in very simple terms, the European Union 21 would probably be able to say: had the United Kingdom 22 done this exercise properly, it simply could not have 23 concluded that a total prohibition on access to waters 24 [was possible], because of the full impairment of 25 the rights. And that is also something that we say is</p> <p style="text-align: center;">Page 186</p>	<p>16:39 1 that we are not to be placed in the shoes of the United 2 Kingdom to do a fine-grain determination of the 3 exercise. There's some other standard. 4 MS NORRIS: The language of proportionality takes you 5 towards this question of: is it commensurate? One could 6 argue that that doesn't take you much further. But that 7 is the language of proportionality. 8 So what we tried to address is to say that we are 9 not arguing that you have to have equality between 10 the costs and the benefit; it's really a question of 11 examining the delta between the two. Is there such 12 a large distinction that one cannot reasonably conclude 13 that the measure is commensurate, proportionate, that 14 there is an imbalance that is so great -- it's about the 15 magnitude of the imbalance between the rights and 16 the benefits. 17 JUSTICE UNTERHALTER: Yes. 18 And then just lastly, on the lesser measure, again 19 just so that we can be clear as to what precisely you're 20 saying. 21 Is it the claim that there must be a lesser measure 22 analysis, or simply that it's an important sense-check 23 to see whether, as you've put it here, the 24 incommensurate relationship between costs and benefits 25 in fact could be so much better brought into alignment</p> <p style="text-align: center;">Page 188</p>

16:40 1 with a better measure? Is it a sense-check or is it  
2 a necessary requirement to comply with the principle of  
3 proportionality?  
4 MS NORRIS: The notion of there being an alternative measure  
5 comes directly from the way that necessity has been  
6 analysed in WTO law, but it also comes from the way that  
7 proportionality has been generally considered in the  
8 domestic law of the parties.  
9 If one takes the idea of there being another measure  
10 in a necessity test, then there have been circumstances  
11 in which the Appellate Body has held that you wouldn't  
12 need to conduct an analysis of whether there's another  
13 less restrictive measure, but the general proposition is  
14 that it provides a useful framework.  
15 The European Union's position is that this is a term  
16 which we all agree is in the TCA, but it's not defined  
17 as such in the TCA, but yet it must mean something.  
18 The European Union's position is it must give a legal  
19 standard.  
20 And it argues that this idea of presenting  
21 an alternative measure -- once the European Union comes  
22 forward and says, "There is an alternative measure which  
23 would have contributed significantly towards the stated  
24 environmental aim, and which would have had  
25 significantly less impairment to the rights", then there

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16:42 1 is a question of the extent to which you can look at the  
2 added benefits and the added costs as compared to that,  
3 and therefore it is a useful framework of assessment.  
4 That's different to saying that there is a binding  
5 legal obligation always to consider whether there's  
6 a reasonable, proportionate alternative measure. But  
7 here the European Union is before you submitting there  
8 is: we are advancing a positive claim. That's not just  
9 a submission we made today; that's a submission that was  
10 already in our Written Submission. A partial closure  
11 we would accept could have been -- could have been --  
12 a proportionate way to achieve what is acknowledged to  
13 be a legitimate regulatory objective without fully  
14 impairing the rights.  
15 So, in a sense, it's difficult to divorce completely  
16 from the facts of this dispute. Certainly in this  
17 particular dispute, we would argue that that is part of  
18 the necessary framework of assessment.  
19 JUSTICE UNTERHALTER: Yes, thank you.  
20 THE CHAIRPERSON: So, please, European Union, your next  
21 Agent, please go ahead.  
22 MS GAUCI: Madam Chair, honourable members of the Tribunal,  
23 the EU will now walk you through the third claim: that  
24 the UK has acted inconsistently with its obligations  
25 under Article 2(1)(a) of Annex 38 of the TCA, and

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16:43 1 in doing so, the UK has nullified the EU's right to full  
2 access to UK waters of the North Sea to fish for  
3 sandeel. The claim is addressed in paragraph 765 to 781  
4 of the EU's Written Submission.  
5 The EU will first address the legal standard.  
6 We will then move on to explain what the application of  
7 the legal standard means for the present dispute.  
8 The EU will insist on three points on which the parties  
9 disagree in order to assist the Tribunal.  
10 On the legal standard, firstly, Article 2(1)(a) of  
11 Annex 38 of the TCA provides that:  
12 "By way of derogation from Article 500(1), (3), (4),  
13 (5), (6) and (7) of [the] Agreement, during the  
14 adjustment period each Party shall grant to the vessels  
15 of the other Party full access to its waters to  
16 fish: ..."  
17 For each and every stock listed in Annex 35, which  
18 includes sandeel:  
19 "... at a level that is reasonably commensurate with  
20 the Parties' respective shares of the [agreed TAC] ..."  
21 In that regard, and in reply also to advance  
22 question 4 from the Tribunal on the operation of  
23 Annex 38, the EU's position is that Annex 38 is  
24 an integral part of Heading Five, as stated clearly in  
25 Article 778(1) of the TCA.

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16:46 1 The annex, which relates to an adjustment period,  
2 operates as a derogation from the mentioned paragraphs  
3 of Article 500 TCA, an article which is an article that  
4 is part of Heading Five.  
5 Secondly, the parties agree that the right to full  
6 access to fish under Annex 38 may be derogated from.  
7 This means precisely that the parties can take fisheries  
8 management measures; and to the extent that those  
9 measures are decided on and applied in line with the  
10 requirements of Heading Five, the impairment of the  
11 other party's rights could be justified.  
12 In that regard, the provisions of Heading Five, and  
13 in particular its Article 296, read together with  
14 Article 294 TCA, must be read in light of Annex 38  
15 during the adjustment period. This means that when  
16 adopting fisheries management measures such as the  
17 sandeel fisheries prohibition, the parties cannot ignore  
18 the legal reality that we are in the adjustment period,  
19 and hence the terms of Annex 38 must be considered.  
20 Annex 38 must be given meaning.  
21 There must be a particular onus on the parties to  
22 consider the impairment of the rights of the other party  
23 that derive from the objectives of the protocol in  
24 Annex 38, which establishes a transition period to  
25 provide for "a further period of stability". The EU

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<p>16:48 1 will now explain what this legal standard means to the 2 present dispute. 3 The EU's position is that since the UK decided upon 4 and applied a fisheries management measure that is 5 inconsistent with Article 496 TCA, read together with 6 Article 494, the UK also committed a consequential 7 breach of Article 2(1)(a) of Annex 38, and in doing so, 8 it nullified the EU's rights of full access to fish in 9 UK waters guaranteed by that provision. 10 The EU notes here that this dispute takes place 11 during the adjustment period agreed upon by the parties. 12 During that period, when adopting measures such as the 13 sandeel fisheries prohibition, the parties must consider 14 the specific terms and rationale of Annex 38 in view of 15 the further period of stability and the social and 16 economic benefits of that period of stability. 17 In this regard, the timing matters. The UK agreed 18 to an adjustment period, and to shares on an agreed TAC, 19 in December 2020, and launched a public consultation for 20 the sandeel fisheries prohibition only ten months later. 21 This disregard for the period of further stability, 22 and its economic and social rationale, and to access to 23 waters that is reasonably commensurate with the parties' 24 respective shares, must also be considered when 25 determining whether the nullification of the right to</p> <p style="text-align: center;">Page 193</p>	<p>16:51 1 exercised by the parties are affirmed in the recitals of 2 the annex, the parties also noted: 3 "... the social and economic benefits of a further 4 period of stability, during which fishers would be 5 permitted until 30 June 2026 to continue to access the 6 waters of the other Party as before the entry into force 7 of [the] Agreement ..." 8 The annex, moreover, includes Article 2(1)(a), which 9 provides for full access to waters to fish, including in 10 this regard the stocks listed in Annex 35, which 11 includes various fish stocks, among which, sandeels. 12 And this full access to fish is to be at a level that is 13 reasonably commensurate with the parties' respective 14 shares of the fishing opportunities in Annex 35. 15 The fact that the parties agreed on all these 16 elements in a protocol to the TCA is relevant to the 17 nature of the EU's rights. The protocol must be taken 18 into account when considering if the impairment of the 19 right of access to UK waters which results from the 20 sandeel fisheries prohibition can be justified. 21 Moreover, the EU notes that the UK not only 22 misrepresents the rationale of Annex 38 in its Written 23 Submission, it has also not explained what it considers 24 to be the objective of Annex 38 and what terms it 25 affords to this protocol, which was agreed by the</p> <p style="text-align: center;">Page 195</p>
<p>16:50 1 full access to fish which results from the sandeel 2 fisheries prohibition is justified. 3 The EU adds here, and in regard to advance 4 question 17, that it is not aware of any urgency 5 involved in implementing the sandeel fisheries 6 prohibition. It is in any case for the UK to reply to 7 this specific question 17. 8 The Union will now focus on three key points on 9 which the parties disagree, and on which the Tribunal 10 will be required to adjudicate. 11 First, in paragraph 429 of its Written Submission, 12 the UK states that: 13 "The EU's third claim ... adds nothing to its first 14 and second claims ..." 15 This is incorrect. The EU's submissions on the 16 first and second claims address the inconsistency of the 17 sandeel fisheries prohibition, with the obligations set 18 down in Article 496 TCA, read together with Article 494 19 TCA. 20 The third claim addresses the additional breach of 21 a specific protocol of the TCA, which first has 22 a specific aim and purpose of establishing an adjustment 23 period from 1 January 2021 until 30 June 2026, as 24 clearly indicated in its Article 1. While the sovereign 25 rights and obligations of independent coastal states</p> <p style="text-align: center;">Page 194</p>	<p>16:54 1 parties as an integral part of Heading Five. 2 We will now move to the second point. 3 The EU has clearly stated in its Written Submission 4 at paragraph 774 that it does not claim that the right 5 of full access to waters to fish in Annex 38 must 6 systematically take precedence over the legitimate 7 objectives of other provisions of Heading Five. The EU 8 maintains this position, and therefore reiterates that 9 claim 3 is consequential on claims 1 and 2. On this, 10 the parties agree. 11 The EU repeats that it recognises the legitimate 12 objectives of marine conservation, which may be achieved 13 through fisheries management measures under Article 496, 14 read together with Article 494 TCA. However, the UK's 15 suggestion that, despite its specific terms and 16 explicitly stated rationale, Annex 38 can be ignored, 17 would significantly diminish its meaning and role within 18 the architecture of Heading Five. 19 The UK, in doing so, is seeking to deny and 20 undermine the objective of having this adjustment 21 period, and the benefits, economic and social, which 22 derive from the preservation of rights in that further 23 period of stability. Moreover, it does not provide 24 a positive justification why Annex 38 should not be 25 considered, and why its terms and objectives are not</p> <p style="text-align: center;">Page 196</p>

<p>16:56 1 afforded any meaning. 2 In this regard, the EU would like to highlight 3 the following. 4 First, the temporary nature of the adjustment period 5 has a specific purpose; it has to be given meaning. 6 That adjustment period follows the entry into force of 7 the TCA, which is an agreement that regulates the EU-UK 8 partnership following the UK's withdrawal from the EU. 9 As has already been stated, the TCA comes after 10 decades of the parties regulating fisheries by their 11 vessels to the EU Common Fisheries Policy. It is, 12 hence, logical that the parties sought to provide some 13 stability for vessels, fishers and related industry. 14 The parties, by concluding this annex, deemed it 15 necessary to ensure not only the long term cooperation 16 of fisheries between the parties provided under 17 Heading Five, but also to have a protocol with specific 18 provisions that ensured this further period of 19 stability. 20 Moreover -- and this is also in reply to the 21 Tribunal's question 4(c) -- if the parties' aim was to 22 prioritise the regulatory autonomy of each party above 23 all else, as the UK seems to claim in its 24 paragraph 425.4 of its Written Submission, then it is 25 difficult to understand the objective of Heading Five of</p> <p style="text-align: center;">Page 197</p>	<p>16:59 1 the UK argues that it continues to observe the right of 2 access simply because EU vessels retain the right to 3 access UK waters to fish, but not for sandeel. 4 The EU cannot accept that narrative. Because if 5 this reasoning were to be followed, prohibitions of 6 specific fisheries could never be considered to be 7 against the right of full access to fish under 8 Article 2(1)(a), as long as they are adopted in relation 9 to specific fish, and not the global array of fish 10 covered by Heading Five of the TCA and the relevant 11 annexes. 12 The EU's position is a simple one. It is not 13 because the EU vessels can access UK waters to fish 14 other stocks that EU rights guaranteed under Annex 38, 15 read together with the provisions in Heading Five, are 16 not impaired by a prohibition such as the one on access 17 to fish in the UK waters of the North Sea for sandeel. 18 Before concluding, the EU will reply to question 7 19 on the burden of proof, insofar as it concerns this 20 claim. 21 Since the EU accepts that a fisheries management 22 measure that complies with Article 496, read together 23 with Article 494, could be a justifiable derogation from 24 Annex 38, this means that it is for the EU to prove that 25 its full right of access to UK waters of the North Sea</p> <p style="text-align: center;">Page 199</p>
<p>16:57 1 the TCA, let alone the specific provisions of Annex 38. 2 At this juncture, the EU refers the Tribunal to 3 paragraph 428.1 of the UK's Written Submissions. The EU 4 emphasises that it has not used the terms which the UK 5 suggests, namely that Annex 38 "make[s] 'social and 6 economic benefits' an overriding priority", or that it 7 "otherwise operate[s] effectively to prevent a coastal 8 State from taking action to conserve and manage its 9 living resources and protect marine ecosystems". The EU 10 has not made that argument. 11 On the contrary, the EU accepts that there is 12 a cost/benefit analysis to be made when determining 13 whether there is a breach of Article 296, read together 14 with Article 294 TCA. What the EU says is that when 15 making that analysis during the transitional period, 16 the special status afforded to the social and economic 17 benefits, in view of the parties' agreement on a further 18 period of stability, must be considered. 19 Coming to the third point of disagreement, the EU 20 will explain why we maintain our position that the 21 prohibition on the sandeel fishery by EU vessels is 22 diametrically opposite of the right of access. 23 Since 26 March 2024, no EU vessel may enter UK 24 waters to fish sandeel. That is a fact that is not 25 denied. In paragraph 426 of its Written Submission,</p> <p style="text-align: center;">Page 198</p>	<p>17:01 1 to fish sandeel under Annex 38 has been impaired, which 2 it has proven in its submissions. However, the UK has 3 the burden to prove that the measure is consistent with 4 Article 496, read together with Article 494, and taking 5 into consideration the specific nature of the 6 transitional regime in Annex 38. It is for the UK to 7 show that Annex 38 is taken into consideration when 8 deciding on and applying the measure. 9 To conclude, even though the EU accepts that claim 3 10 is consequential, the EU seeks findings on this issue, 11 because the sandeel fisheries prohibition is impairing 12 Article 2(1)(a) of Annex 38, and that impairment is 13 additional to and it is separate from the breaches 14 claimed under claim 1 and claim 2. 15 Madam Chair, honourable members of the Tribunal, 16 unless the Tribunal has any questions, this brings us to 17 an end of the EU's submissions today. The Agents of 18 the EU are available to answer any further questions 19 from the Tribunal. 20 Thank you. 21 THE CHAIRPERSON: Thank you very much, [Ms Gauchi]. 22 Just in regard to your final conclusion on Annex 38, 23 I just want to ensure that we clearly understand your 24 position. 25 You clearly agree that there is a claim for</p> <p style="text-align: center;">Page 200</p>

<p>17:03 1 a consequential breach if claims 1 or 2 are found. But 2 you also, in your first statement, said that your third 3 claim is a claim for additional breach. So you're 4 arguing it is not only a consequential breach, but there 5 is also a separate claim for a separate breach of the 6 Annex 38 provisions. 7 Am I correct in that understanding? 8 MS GAUCI: I will go through it again. 9 So the EU has formulated this claim as consequential 10 on claims 1 and 2. It does so because it recognises 11 that the right of full access under Article 2(1)(a) of 12 Annex 38 does not systematically takes precedence over 13 the other objectives of Heading Five. However, this 14 does not mean that the claim does not have any value, as 15 the UK seeks to claim. 16 First of all, Article 2(1)(a), the breach to full 17 access to fish in the UK waters, is in the annex and 18 it must be taken into account. 19 Moreover, my co-Agents have spoken about the 20 balancing act between regulatory autonomy and the rights 21 that the parties derive from other provisions of 22 Heading Five. And in that weighing and balancing 23 exercise, the provisions, the terms and the rationale of 24 Annex 38 must also be considered. 25 So this is how we view the claim tree.</p> <p style="text-align: center;">Page 201</p>	<p>17:07 1 that there hasn't been a breach of Annex 38 and its 2 access rights. Does that also follow? 3 MS GAUCI: Yes. 4 THE CHAIRPERSON: Is it consequential symmetrically, as it 5 were? 6 MS GAUCI: Yes, the consequential element is symmetrical. 7 What we do add also in claim 3 is that the rationale 8 behind the adjustment period, and the need for the 9 period that provides for stability, needs also to be 10 taken into consideration. 11 JUSTICE UNTERHALTER: Thank you. 12 THE CHAIRPERSON: Thank you to the Agents, counsel and 13 delegation of the European Union. That, I believe, 14 concludes the submissions of the European Union for 15 today. So we will meet again tomorrow morning at 16 10 o'clock and hear the submissions of the 17 United Kingdom Agents and counsel. 18 So I wish you all a very nice evening and we will 19 see you back here tomorrow morning at 10 o'clock. Thank 20 you very much. We are now adjourned. 21 (5.08 pm) 22 (The hearing adjourned until 10.00 am the following day) 23 24 25</p> <p style="text-align: center;">Page 203</p>
<p>17:05 1 Have I replied to your question? 2 THE CHAIRPERSON: Thank you. 3 Yes, you have stated that you accept that there's 4 a consequential breach if claims 1 or 2 are found, and 5 you've also argued that there is a breach of full access 6 under Article 2(1)(a) of Annex 38. So you are seeking 7 findings of both those two, in a sense, both the 8 consequential breach and the separate breach of full 9 access under Article 2(1)(a) of Annex 38. 10 Am I correct in that understanding? 11 MS GAUCI: Yes, that is a correct understanding. 12 THE CHAIRPERSON: Thank you. 13 MS GAUCI: Thank you. 14 THE CHAIRPERSON: Justice Unterhalter. 15 JUSTICE UNTERHALTER: Just following up, just again for 16 the sake of clarity. 17 Is it the case that if the measure doesn't survive 18 the disciplines of Article 496, read with 494, and is in 19 breach, then it flows, as it were, automatically that 20 the rights of access granted under the annex have also 21 been breached? 22 MS GAUCI: Yes. 23 JUSTICE UNTERHALTER: In that sense, it's consequential. 24 But equally, if the measure does survive the 25 disciplines of 496 and 494, then it would also follow</p> <p style="text-align: center;">Page 202</p>	

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