

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 2

Wednesday, 29 January 2025

Before:

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

THE EUROPEAN UNION

Complainant

-v-

THE UNITED KINGDOM
OF GREAT BRITAIN AND NORTHERN IRELAND

Respondent

UK-SANDEEL ARBITRATION

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<p>09:31 1 Wednesday, 29 January 2025</p> <p>2 (10.00 am)</p> <p>3 THE CHAIRPERSON: Good morning, ladies and gentlemen.</p> <p>4 This is the second day of the oral hearing in PCA Case</p> <p>5 No. 2024-45, UK-Sandeel, European Union</p> <p>6 v United Kingdom.</p> <p>7 Today we will hear from the United Kingdom. So you</p> <p>8 have the floor. Thank you.</p> <p>9 Opening statement on behalf of the United Kingdom</p> <p>10 MR JURATOWITCH: Thank you very much, Madam Chairperson,</p> <p>11 members of the Tribunal.</p> <p>12 The United Kingdom's objective was to pursue good</p> <p>13 environmental status for the North Sea ecosystem. The</p> <p>14 United Kingdom sought, received and considered detailed</p> <p>15 scientific advice explaining the role of sandeel in that</p> <p>16 ecosystem. It considered all other relevant matters,</p> <p>17 and then it decided to prohibit fishing for sandeel in</p> <p>18 its waters in order to pursue that objective; in</p> <p>19 particular, through seeking to increase sandeel</p> <p>20 abundance so as to increase the biomass and resilience</p> <p>21 of the species that feed on sandeel.</p> <p>22 The European Union now challenges that prohibition,</p> <p>23 and there are two short and complete answers to the EU's</p> <p>24 claims.</p> <p>25 The first is that whatever criticism the EU might</p> <p>Page 1</p>	<p>10:04 1 claim 1. Mr Westaway will address you on claim 2, on</p> <p>2 having regard to applying measures that are</p> <p>3 proportionate and non-discriminatory, and he will deal</p> <p>4 with aspects of claim 3 so far as that remains</p> <p>5 necessary.</p> <p>6 We are conscious from the Tribunal's written</p> <p>7 questions on Monday and its questions to the EU during</p> <p>8 the course of yesterday that the Tribunal has already</p> <p>9 carefully read and considered the written submissions.</p> <p>10 But we are also conscious that in the tight timeframe</p> <p>11 applicable to this case, the Tribunal may not yet have</p> <p>12 been able to fully absorb at least some of the relevant</p> <p>13 content of the exhibits.</p> <p>14 With that in mind, we will today have three</p> <p>15 objectives.</p> <p>16 The first is to draw the Tribunal's attention to the</p> <p>17 key aspects of the evidence. Where a document is in the</p> <p>18 core bundle, we will ask you to look at that, and we</p> <p>19 would ask you, with respect, to have it to hand during</p> <p>20 the course of our submissions. Where a document is not</p> <p>21 in the core bundle, or where it's a diagram benefiting</p> <p>22 from being enlarged, we will resort to PowerPoint</p> <p>23 slides, as ominously foreshadowed on the screens.</p> <p>24 The second objective is to encapsulate the UK's</p> <p>25 positions on the application of the terms of the TCA to</p> <p>Page 3</p>
<p>10:02 1 make of the science the UK relied on, the EU puts</p> <p>2 forward no other available scientific advice, let alone</p> <p>3 any better scientific advice, concerning the same issue.</p> <p>4 That, members of the Tribunal, is dispositive of the</p> <p>5 claim under Article 496(2) of the TCA.</p> <p>6 The second point is that Article 496(1), read with</p> <p>7 the subsection of 494 concerning proportionality and</p> <p>8 non-discrimination, requires the UK to have had regard</p> <p>9 to applying proportionate and non-discriminatory</p> <p>10 measures in its waters. The UK explicitly considered</p> <p>11 those matters, and went further and concluded that the</p> <p>12 measures were proportionate and non-discriminatory, and</p> <p>13 thus the UK obviously performed that obligation. The</p> <p>14 measures were themselves also not disproportionate or</p> <p>15 discriminatory considered objectively, but that is not</p> <p>16 what the TCA requires.</p> <p>17 Members of the Tribunal, today I will next consider</p> <p>18 three points of overall context. And to provide you</p> <p>19 with a sketch of the submissions of the UK overall, once</p> <p>20 I have covered those three points of context, Ms Boileau</p> <p>21 and I will deal with claim 1, concerning whether the</p> <p>22 measures were based on the best available scientific</p> <p>23 advice. She will deal specifically with the modelling</p> <p>24 that formed part of the English scientific report; and</p> <p>25 before she does that, I will address the remainder of</p> <p>Page 2</p>	<p>10:06 1 the matters covered in that evidence.</p> <p>2 And the third is to respond to the Tribunal's</p> <p>3 questions, whether those in writing just in advance of</p> <p>4 the hearing, those posed to the EU yesterday or any</p> <p>5 further ones that the Tribunal may have today. And of</p> <p>6 course we certainly welcome any questions from the</p> <p>7 Tribunal as they occur to you during the course of our</p> <p>8 submissions.</p> <p>9 Members of the Tribunal, I then turn to context, and</p> <p>10 to the first point of context that I will address. The</p> <p>11 first two are factual, and the third is legal.</p> <p>12 The first is that even just from the perspective of</p> <p>13 the ICES's approach of advising on maximum sustainable</p> <p>14 yield of sandeel stocks, the precautionary stock level</p> <p>15 in relevant areas of the North Sea is now and in the</p> <p>16 relevant past has often not been met.</p> <p>17 I'm conscious of a question that the Chairperson</p> <p>18 posed yesterday about the different areas. So on</p> <p>19 slide 2, the Tribunal will see a map. It comes from</p> <p>20 C-45 at page 8.</p> <p>21 For management purposes, ICES divides ocean space</p> <p>22 into different areas, and the Greater North Sea is</p> <p>23 ICES's sub-area 4. Within it, there are seven sandeel</p> <p>24 stock assessment areas. The Tribunal might see in the</p> <p>25 documents reference to divisions 4a, b and c within the</p> <p>Page 4</p>

<p>10:07 1 North Sea, but nothing turns on those particular 2 subdivisions for the purposes of this case. 3 Where there is an "r", it means that the sandeel 4 area was revised in 2016, following the creation of 5 these seven areas in 2011. The ones without the "r" are 6 now as they were upon creation in 2011. 7 The black line of course shows maritime boundaries. 8 And one can see from that that English waters are in 1r, 9 3 and 4, and Scottish waters in 3r, 4, 5r and 7r. 10 The sandeel areas are determined according to the 11 locations of the sandeel populations, and so of course 12 they don't respect the boundaries. ICES is interested 13 in the stock, not the boundaries. 14 With that map as the context, I propose now to take 15 the Tribunal to the most recent ICES stock advice for 16 each of those areas, and if I could ask you now to take 17 up your bundles. 18 The first document to which I'd ask you to turn is 19 at tab 5, it's C-11, and it's the most recent advice for 20 sandeel area 1r. It need not detain us long, because 21 the first substantive line simply notes that: 22 "ICES advises that when the maximum sustainable 23 yield approach is applied, catches should be no more 24 than 132 315 tonnes in 2004." 25 So you can see as against the map, that's for</p> <p>Page 5</p>	<p>10:11 1 Scottish waters. 2 "ICES advises that when the precautionary approach 3 is applied, there should be zero catches in each of the 4 years 2023 and 2024." 5 And that advice is from February 2023. 6 For sandeel area 6, that's bundle tab 10, C-16. 7 We're now between Denmark and Sweden. 8 "ICES advises that when the precautionary approach 9 is applied, catches should be no more than 140 tonnes in 10 each of the years 2023 and 2024." 11 Then the last in our march through the seven sandeel 12 areas is, it will not surprise you to hear, behind 13 tab 11. That is C-[17] for sandeel area 7r, which 14 surrounds the Shetland Islands. 15 "ICES advises that when the precautionary approach 16 is applied, there should be zero catches in each of the 17 years 2023 and 2024." 18 So looking at the North Sea as a whole, current 19 advice, just on the basis of considering sandeel stocks, 20 before considering the needs of their predators as such, 21 is zero catch, or close to it, for much of the North Sea 22 in any event. 23 For Scottish waters, ICES currently advises zero 24 catch for the entirety of those waters. For English 25 waters, it is only the southernmost area that is</p> <p>Page 7</p>
<p>10:10 1 sandeel area 1r. 2 The next one is the next tab, tab 6 (C-12). This is 3 the most recent advice for sandeel area 2, which of 4 course doesn't involve UK waters, but for the context of 5 the North Sea ecosystem as a whole, I bring it to your 6 attention. ICES advises that for sandeel stock: 7 "... when the maximum sustainable yield approach is 8 applied ..." 9 This is the first line of that document: 10 "... catches in 2024 should be no more than 11 35 925 tonnes." 12 That's sandeel area 2r. 13 Tab 7 (C-13) has the most recent advice for sandeel 14 area 3r, a part of which does involve UK waters. And 15 it says, in the first line: 16 "ICES advises that when the maximum sustainable 17 yield approach is applied, there should be zero catch in 18 2004." 19 That takes us to sandeel area 4 on, which you were 20 concentrating yesterday. It's at tab 8 (C-14). 21 "ICES advises that when the maximum sustainable 22 yield approach is applied, there should be zero catch in 23 2024." 24 The next is at tab 9 (C-15). This is for sandeel 25 area 5r, mostly off the coast of Norway, but edging into</p> <p>Page 6</p>	<p>10:13 1 included in a sandeel area where the most recent ICES 2 advice envisages any catch at all; that's sandeel 3 area 1r. For the other two sandeel areas in which 4 English waters fall -- that's 3r and 4 -- ICES's catch 5 advice is zero. 6 The European Union understandably emphasises that 7 ICES's catch advice can vary considerably from year to 8 year. That is certainly correct. But it does not 9 change the character of the status quo, which is as 10 we have just seen. 11 That, members of the Tribunal, is the current 12 position. And still within my first point of context on 13 ICES's advice, I propose now to look also at some of the 14 history. And that involves a document cited by the 15 European Union: it's C-74, it's an ICES 2011 Working 16 Group report. So the document is already some 14 years 17 old, but I'll consider it for what it says about the 18 even more distant past. 19 There's an extract of it on slide 3, where it's said 20 that: 21 "Several banks in the Norwegian EEZ have not 22 provided landings for the last 8-12 years ... These 23 fishing banks are considered commercially depleted, 24 [that is] the concentrations are too low to provide 25 a profitable fishery."</p> <p>Page 8</p>

<p>10:15 1 If we move on to slide 4, which is in the same 2 document: 3 "Some of the more southerly banks in the Norwegian 4 EEZ were repopulated by new recruitment in 2006, but 5 commercially depleted again in 2007 or 2008 ..." 6 If we move now to the next slide, which is now 5, 7 still within the same document, this is the point on 8 which I'd ask the Tribunal to pause in particular: 9 "Most of the fishing grounds in the Norwegian EEZ 10 were commercially depleted during a period when the 11 assessment suggested that [spawning stock biomass] was 12 well above [the precautionary biomass level]. 13 In addition, evidence from 2007 and 2008 suggests that 14 fishing grounds can be commercially depleted within 15 a few weeks without marked decreases in [catch per unit 16 of effort] in tonnes ..." 17 Now, the Bpa, the precautionary biomass level, is 18 the precautionary level of adult spawning stock biomass. 19 That means that the depletion occurred when the spawning 20 stock biomass was -- I quote from ICES -- "well above" 21 what was supposed to be the precautionary level. And 22 the Tribunal has seen that this happened very quickly 23 indeed. 24 It's not, members of the Tribunal, all that 25 surprising that things can change quickly, because the</p> <p>Page 9</p>	<p>10:19 1 that is even just from the perspective of sandeel stock 2 as such. 3 I come then, members of the Tribunal, to 4 a particular application of why that all matters. 5 Paragraph 72 of the EU's Written Submission, which, 6 for convenience, is on slide 6, says that: 7 "The escapement strategy ensures that the North Sea 8 sandeel fishery is exploited in a sustainable manner." 9 The Tribunal had that point emphasised to it again 10 yesterday. "Thus", the Written Submission continues: 11 "... since 2010: 12 "a. the biomass of adults in sandeel management 13 area 1r has been above B lim in every year since 2010 14 apart from 2014 ..." 15 And then the submission cites a 2024 ICES report, 16 which is at C-37. 17 At page 532 of that ICES document, which is on your 18 slide 7, is heading 9.2.8, dealing with sandeel area 1r, 19 and it says this, under the heading "Stock Trends": 20 "The perception of the stock have changed 21 dramatically after the last benchmark ... The stock 22 summary ... shows that [spawning stock biomass] have 23 been at or below [precautionary biomass] in 2004, 24 2013-2015, 2019, and 2021-2022, whereas in 2023 25 [spawning stock biomass] has been above [precautionary</p> <p>Page 11</p>
<p>10:17 1 majority of sandeel are not capable of reproduction 2 until they are more than two years old, and few of them 3 survive beyond three or four years old. The references 4 for that are collected in the UK's Written Submission at 5 paragraph 120. 6 Because of the short lives of sandeel, ICES has 7 since 2011 -- as has been emphasised to you by the EU -- 8 set its catch advice using what it calls an "escapement" 9 approach. That means setting the advice with the goal 10 that after the fishing season, enough fish will have 11 survived so as to reduce the risk of poor recruitment 12 the following year. 13 "Recruitment" in the context of sandeel is simply 14 how many sandeel reach the stage of settling into the 15 sand bank about six months after they have been spawned. 16 ICES uses two reference points for the spawning 17 stock biomass in this context. One you will see 18 referred to as "B lim": that is the biomass limit. 19 That's the size of the spawning stock biomass below 20 which there is a high risk of reduced recruitment. 21 The other reference -- and you've seen this 22 already -- is "Bpa": that's the precautionary biomass. 23 That builds in a safety margin above the biomass limit, 24 above B lim, to account for uncertainty. That margin is 25 not invulnerable, as the Norwegian example shows. And</p> <p>Page 10</p>	<p>10:21 1 biomass]. The stock has only been below [biomass limit] 2 in 2014." 3 The Tribunal will have noticed that the EU is 4 relying just on that last sentence, focusing on B lim. 5 There are, members of the Tribunal, two problems with 6 that. 7 The first is that it obviously needs to be read with 8 the sentence before it. ICES uses the precautionary 9 biomass level for its escapement approach, not the 10 biomass limit. That precautionary level has not been 11 met in those additional six years. If one counts from 12 2013 up to the present for sandeel area 1, the 13 precautionary biomass level has not been met more than 14 half the time. 15 Related to that point, higher on the same page, 16 the same document says: 17 "For recruitment and SSB, there seems to have 18 an overestimation in the previous assessments." 19 I would ask the Tribunal to recall that this is the 20 one sandeel area involving English or Scottish waters in 21 which ICES is not currently advising zero catch. 22 The second problem, members of the Tribunal, with 23 the EU's reliance on this document synthesising data for 24 multiple years is that there is even further relevant 25 context for two recent years. And that context shows</p> <p>Page 12</p>

<p>10:23 1 that for at least two years where the precautionary 2 limit was not met but the absolute biomass limit was not 3 breached, ICES was estimating at the beginning of the 4 year that the stock level had breached the lower biomass 5 limit. 6 The first of those is on slide 8 at C-34. This is 7 an extract from the ICES stock advice for sandeel 8 area 1r for 2019. The ones that I took you through in 9 the bundle are the most recent ones; this is the 10 equivalent document for 2019 for sandeel area 1r. And 11 on page 2, it says: 12 "The large change in the advice from year to year 13 can be explained by the marked interannual variability 14 of biomass and recruitment as well as the early 15 maturation, both of which are typical for a short-living 16 species. Stock size at the beginning of 2019 is 17 estimated to be below [the biomass limit] and this has 18 contributed to the reduction in advised catch for 2019." 19 Ultimately, for 2019 as a whole, the spawning stock 20 biomass was below the precautionary level, but it had 21 not breached the absolute biomass limit species. But in 22 February 2019, ICES was estimating that at the beginning 23 of 2019 the biomass level was below the absolute limit. 24 The second example is on slide 9. This is R-65. 25 It's the ICES stock advice, we're still on sandeel</p> <p style="text-align: center;">Page 13</p>	<p>10:27 1 restore the ecosystem, precautionary levels are 2 obviously far more relevant. 3 Members of the Tribunal, that is the first point of 4 context. And unless I can assist you with it further, 5 I'll now move to the second. 6 THE CHAIRPERSON: Please go ahead. 7 MR JURATOWITCH: The second concerns existing or historical 8 UK measures that are relevant to sandeel, and there are 9 four. 10 The first is the closure of a small sandeel fishery 11 off the Shetland Islands in the 1990s. We don't need to 12 have it detain us longer, but the reference is C-50, 13 pages 48 and 50, and C-45, page 11. 14 The second -- and I have put on your slide 10 15 a figure that's now well known to you (C-50, page 19) -- 16 is the 2000 closure extending from, but by no means 17 limited to, the Firth of Forth. That, as you have 18 heard, was implemented by EU regulation, and it remained 19 in assimilated law within the United Kingdom after the 20 United Kingdom withdrew from the European Union. 21 The southernmost section extends about 40 kilometres 22 from the shore. The Tribunal will see the scale in the 23 bottom right-hand corner. And if one estimates from 24 that scale, the boundary of SA4 -- which, as the 25 Tribunal knows, is the lilac line -- is about</p> <p style="text-align: center;">Page 15</p>
<p>10:25 1 area 1r, this time for 2020. It's on page 3 of the 2 document, but the extract that's relevant is on your 3 screens and on the slide: 4 "[Spawning stock biomass] was estimated to be below 5 [biomass limit] at the beginning of 2020 as a result of 6 the downward revision of the 2018 recruitment and 7 a lower than expected weight-at-age." 8 So the same issue arose in 2020. In February 2020, 9 ICES was estimating that the spawning stock biomass was 10 below the absolute limit, although in the end for that 11 year it was below the precautionary limit, but not in 12 the breach of the absolute biomass limit. 13 The main point, members of the Tribunal, to take 14 from all of this is that even just from the perspective 15 of ICES's advice directed to maintaining the maximum 16 sustainable yield of sandeel, without taking into 17 account the needs of their predators as such, even just 18 from that perspective, the EU is looking at the absolute 19 floor by regarding biomass limit as relevant. 20 ICES aims at the precautionary level. And that 21 precautionary level has not been met in a significant 22 number of recent years, despite the use of the 23 escapement approach on which the EU places such heavy 24 emphasis. For the UK's objective of enhancing the 25 resilience of sandeel populations so as to protect and</p> <p style="text-align: center;">Page 14</p>	<p>10:29 1 100 kilometres out to sea along that same line of 2 latitude, if one extends from the lower edge of the 3 closed area. 4 So to answer one of the Chairperson's questions from 5 yesterday, the limit between the Scottish and English 6 waters is in black, and hits the key just below the 7 green hatching for the marine protected areas. That's 8 the division between English and Scottish waters, and so 9 the closed area straddles just Scottish and English 10 waters. 11 That's the second. 12 The third is marine protected areas that include 13 sandeel as a protected feature. There are three. The 14 first of them is Turbot Bank, which the Tribunal sees 15 just outside and perhaps tending into the hatched closed 16 area; North-West Orkney in the north; and even further 17 north, in close proximity to the Shetland Islands, it's 18 the small green dots around the Shetlands, which you can 19 see from where it says Mousa to Boddam. 20 Now, those marine protected areas were all 21 designated in 2014, as the Scottish Strategic 22 Environmental Assessment, which is at C-52, records at 23 paragraph 2.2.3. 24 That's the third. 25 The fourth is the UK declining to allocate to any</p> <p style="text-align: center;">Page 16</p>

<p>10:31 1 UK vessel its share of the total allowable catch for 2 sandeel since 2021. That's usefully summarised in the 3 Scottish court judgment in which a challenge to those 4 decisions as breaches of Article 1, Protocol 1 of the 5 European Court of Human Rights was dismissed. That's 6 RLA-10 at paragraphs 10 to 12. 7 That decision by the UK is, in my submission, quite 8 a significant point. The UK did not succeed in 9 convincing the EU to reduce the sandeel TAC to zero, but 10 the UK nonetheless unilaterally prevented its own 11 vessels from catching any sandeel in UK waters anyway. 12 The only vessels, as a result, fishing for sandeel in UK 13 waters since 2021 are not UK vessels. 14 To summarise then on the second point of context, 15 it is that the current prohibitions follow those other 16 more restricted efforts to protect sandeel. 17 Those, members of the Tribunal, are the two points 18 of factual context. The third point of context is 19 legal. 20 The Tribunal has in the bundle behind the first tab 21 extracts from the TCA. Heading Five, as the Tribunal 22 knows well, concerns "Fisheries". Chapter 1 contains 23 the "Initial Provisions". One sees that on bundle 24 page 12. 25 The first of those is Article 493, which concerns</p> <p>Page 17</p>	<p>10:35 1 paragraph (f). 2 [Article] 495, still within "Initial Provisions", 3 contains "Definitions". 1(b) is the "precautionary 4 approach to fisheries management". That's the defined 5 term: "precautionary approach to fisheries management". 6 And it means: 7 "... an approach according to which the absence of 8 adequate scientific information does not justify 9 postponing or failing to take management measures to 10 conserve target species, associated or dependent species 11 and non-target species and their environment." 12 That is significant because it specifically includes 13 a precautionary approach to the relevant ecosystem and 14 the different participants in it, not just to the 15 species specifically targeted by a measure. 16 It is, of course, ecosystem considerations that will 17 often involve the most uncertainty: that's because of 18 the complexity of multiple interactions within 19 an ecosystem, and because of the variability in the data 20 available in respect of the different participants in 21 any given ecosystem. That means that it's logical for 22 the precautionary approach as defined here for fisheries 23 management to attach specifically to ecosystem 24 considerations. 25 I will return, members of the Tribunal, to your</p> <p>Page 19</p>
<p>10:33 1 the sovereign rights of coastal states, and the Tribunal 2 will note the specific reference to UNCLOS. That 3 reflects Recital 20 of the TCA. The UK addressed the 4 relevant provisions of UNCLOS in its written submissions 5 at pages 18 to 20. 6 The short but important point is that the coastal 7 state has sovereign rights to exploit, conserve and 8 manage the fish in its territorial sea and exclusive 9 economic zone, and it has jurisdiction with regard to 10 the protection and preservation of the marine 11 environment in those areas. Now, of course the coastal 12 state can exercise those rights and jurisdictions by 13 choosing to cooperate with others. But regulatory power 14 rests exclusively with the coastal state, and others are 15 required to comply with the laws and regulations of the 16 coastal state. 17 Article 494, still within "Initial Provisions", is 18 "Objectives and principles". The Tribunal is well aware 19 that 494(3)(a) refers to applying the precautionary 20 approach to fisheries management. 21 I would emphasise, just over the page on to bundle 22 page 14, that subparagraph (e) specifically refers to 23 the "marine ecosystem": it's at the end of the first 24 line of (e). 25 Mr Westaway, as I've indicated, will return to</p> <p>Page 18</p>	<p>10:37 1 question 9(e), about whether there is a difference 2 between this and the precautionary principle as used in 3 other international instruments. But this is 4 a convenient point to emphasise that what is being 5 defined here, and used not only in the TCA but 6 specifically in Heading Five on "Fisheries", is not 7 a precautionary approach or a precautionary principle in 8 general terms, but specifically a precautionary approach 9 to fisheries management. 10 Continuing -- please. 11 THE CHAIRPERSON: Sorry, may I -- and thank you. 12 I appreciate your understanding with my questions. 13 If I can just simply have a little bit further 14 explanation from you regarding the statement that 15 you made that the "precautionary approach to fisheries 16 management" as defined in Article 495 attaches 17 specifically to ecosystem considerations. 18 You are placing weight, it seems, in your 19 introduction, to the words at the end, "and their 20 environment". So the "management measures to conserve 21 target species, associated or dependent species and 22 non-target species", those are all sort of fisheries 23 management species, and then it adds, "and their 24 environment". 25 So your interpretation of "and their environment"</p> <p>Page 20</p>

<p>10:39 1 means the entire ecosystem is what is the precautionary 2 approach is attaching to; is that correct? 3 MR JURATOWITCH: Thank you, Madam Chair, for raising that. 4 I must not have been sufficiently clear. 5 Target species, if we relate it to this case, the 6 target species of the measure is sandeel. But 7 an associated or dependent species, or a non-target 8 species, in my submission, would cover predators of 9 sandeel. So the ecosystem consideration is incorporated 10 by the reference to "associated or dependent species and 11 non-target species", as well as the point on which the 12 Chair was alighting, "and their environment". So those 13 points, taken together, cover the ecosystem in which the 14 target species lives. 15 THE CHAIRPERSON: Thank you, that's very clear. So the 16 "associated or dependent species" are in fact the marine 17 mammals and the seabirds? 18 MR JURATOWITCH: In this case, yes. 19 THE CHAIRPERSON: In this case. Thank you. 20 MR JURATOWITCH: And the predatory fish. 21 THE CHAIRPERSON: And the predatory fish in particular comes 22 under the "non-target species" as well, wouldn't it? 23 MR JURATOWITCH: As well -- 24 THE CHAIRPERSON: As well as the "associated or dependent". 25 Thank you very much.</p> <p>Page 21</p>	<p>10:43 1 trade area", in conformity with trade instruments. And 2 it's in that context that Article 515 affirms the 3 parties' rights and obligations under the WTO agreement. 4 It's also in that context in which Article 516, on 5 bundle page 41, provides that: 6 "The interpretation and application of the 7 provisions of this Part shall take into account relevant 8 interpretations in reports of WTO panels ..." 9 And it goes on. 10 WTO jurisprudence is only to be taken into account 11 so far as it is relevant. There's certainly no 12 suggestion from this article that it's binding; only 13 that it is to be taken into account, and only insofar as 14 it is relevant. 15 This, members of the Tribunal, is not a case about 16 trade in fish; it is a case about catching fish in 17 waters that are not yours. The starting point is not 18 free access to markets subject to necessary 19 restrictions. The starting point is that there is no 20 right to go into another state's waters and take its 21 living natural resources unless granted, and then only 22 on the terms granted. 23 The UK accepts that WTO jurisprudence may, like 24 other areas of international law, be considered by the 25 Tribunal so far as it is useful. But it has no special</p> <p>Page 23</p>
<p>10:40 1 MR JURATOWITCH: Thank you very much. 2 We then come on to Chapter 2. It starts on bundle 3 page 17. It's on "Conservation and Sustainable 4 Exploitation". And within it is Article 496 on 5 "Fisheries management", and of course I will return to 6 that in the context of the EU's specific claims. 7 The only remaining point of context for now is to 8 note that this Heading Five in the TCA does not concern 9 trade; it concerns cooperation on natural living 10 resources in respect of which the coastal state has 11 sovereign rights. If one disaggregates the "TCA" 12 acronym, this case concerns the C, not the T. 13 That matters in respect of the starting point of the 14 analysis, which, as Article 493 tells us, is UNCLOS. 15 And it matters in respect of the significance which the 16 EU, certainly in its written submissions and at least at 17 some points yesterday, sought to afford to WTO 18 jurisprudence. 19 The EU relies on Article 516 in Heading Six of the 20 TCA, which is the last heading in Part Two. It's on 21 bundle page 34: that's where Heading Six starts. It's 22 titled "Other Provisions". 23 And if we look over on to page 38, one sees 24 Article 513, which is on "WTO Agreements"; and then 25 again over on to 40, it's on "Establishment of a free</p> <p>Page 22</p>	<p>10:45 1 status where it is not relevant to the question before 2 you, and Article 516 does not make it relevant where 3 it is otherwise not relevant. 4 Of more relevance is Article 4 of the TCA -- that's 5 on bundle page 10 -- which simply provides that for the 6 whole of the TCA, the rules of interpretation reflected 7 in the Vienna Convention on the Law of Treaties are to 8 apply; and in particular, that the provisions of the TCA 9 are simply to be: 10 "... interpreted in good faith in accordance with 11 their ordinary meaning, in their context and in light of 12 the object and purpose of the agreement ..." 13 This Tribunal is not a trade panel. It is 14 an Arbitral Tribunal deciding a dispute under a heading 15 of a multifaceted treaty that deals with cooperation in 16 respect of fisheries in the relevant heading, not trade. 17 Those, members of the Tribunal, are the three points 18 of context. And if that's a convenient time, I'll move 19 now to address the EU's first claim. 20 This is a claim for breach of Article 496(2). The 21 Tribunal knows that well, but for your reference it's on 22 page 17 of the bundle. It says: 23 "A Party shall base the measures referred to in 24 paragraph 1 on the best available scientific advice." 25 Given the terms of that article, I will structure my</p> <p>Page 24</p>

<p>10:47 1 submissions by taking it element by element. First, 2 what are the measures? Secondly, what was the advice? 3 Thirdly, was it scientific? Fourthly, was it the best 4 available? Fifthly, did the UK base those measures on 5 that advice? 6 Having been through the elements of 496(2), I will 7 then turn sixthly to the precautionary approach to 8 fisheries management. Once I've taken you through the 9 elements of 496(2), that is when Ms Boileau will deal 10 with the model forming part of the English scientific 11 report, including the EU's criticisms of it. 12 So, members of the Tribunal, we then come to 13 the first question: what are the measures? 14 Taking the English measure first, under the UK 15 Fisheries Act -- that's CLA-6, and the relevant page is 16 11 -- fishing is prohibited for British and foreign 17 fishing boats unless authorised by a licence. That's 18 Section 14(1) for British and Section 16(1) on page 12 19 for foreign. 20 Licences may confer limited authority by reference 21 to descriptions of fish which may be caught. That's 22 Section 15(2)(c) for British on page 12 and 23 Section 17(3)(c) for foreign on page 13. 24 It is the Marine Management Organisation that grants 25 licences in respect of English waters. That's</p> <p>Page 25</p>	<p>10:51 1 referring to the UK having "not allocated sandeel or 2 Norway pout quotas" for 2021. 3 I'm conscious of your question about Norway pout and 4 other forage fish, and I'll return to it in connection 5 with the scientific advice. 6 The fourth paragraph then says: 7 "Despite the introduction of management measures 8 aimed at increasing the resilience to the stocks ..." 9 In my second point of context, I took the Tribunal 10 to the existing measures: 11 "... there is limited evidence of either the 12 recovery of the relevant stocks or the wider ecosystem 13 as a result of these measures. This is hindering the 14 UK's ability to reach Good Environmental Status of 15 seabirds and marine food webs within the UK Marine 16 Strategy. As a result, urgent action is required to 17 protect stock and the wider ecosystem from these 18 increasing pressures." 19 If I could then just draw your attention to the next 20 and fifth paragraph, towards the end of the second line, 21 there's a reference to "additional resilience and 22 protection", and then in the third line to "the wider 23 ecosystem". 24 That's the call for evidence. 25 Just behind the next tab, 13 (C-44), is the</p> <p>Page 27</p>
<p>10:49 1 Section 17(1) and (2) for foreign fishing boats and 2 Section 15(1)(d) for English fishing boats. 3 Schedule 3 of paragraph 2(1) of the UK Fisheries Act 4 then provides that the Marine Management Organisation, 5 the MMO, may vary a licence or a condition attached to 6 it. And this measure was implemented by variation by 7 the MMO of licence conditions to fish in English waters 8 pursuant to the power in Section 3(2) of the 9 Fisheries Act. 10 If I could ask you to turn up bundle tab 21 11 (CLA-14), that is where one finds the variation to which 12 I just referred. It prohibits, from 26 March 2024, the 13 fishing of sandeel in English waters of the North Sea, 14 whether a vessel is over or under 10 metres in length. 15 That's the measure. 16 The objective that the UK sought to achieve was 17 identified in its call for evidence on future management 18 as long ago as October 2021. That's at bundle tab 12. 19 This is Exhibit C-43. 20 It's page 4 of the exhibit. The bundle pages and 21 the document pages have gotten in the way of each other, 22 but it's the fourth page of the document, with 23 "Foreword" at the top. The third paragraph on that page 24 ends, in the last sentence, picking up with the last 25 word of the penultimate line of the third paragraph, by</p> <p>Page 26</p>	<p>10:53 1 de minimis assessment to which you were taken yesterday. 2 If I could ask you to turn to bundle page 161 -- that's 3 page 3 of the document -- just picking up in the very 4 last sentence, which then runs over the page, under the 5 heading "Brief Assessment of Wider Impacts": 6 "The primary environmental benefit is improvements 7 in the resilience of sandeel stocks and the wider marine 8 ecosystem, including marine mammals, seabirds, and 9 predatory fish in the North Sea area." 10 Those are the objectives so far as the English 11 measure is concerned. 12 Unless I can assist you with the English measure 13 further, I'll now turn to the Scottish measure and ask 14 you to turn up bundle tab 29. That's CLA-4. It was 15 an order laid before the Scottish Parliament pursuant to 16 Section 5 of the Sea Fish (Conservation) Act of 1967. 17 The relevant provisions of that are in the UK Written 18 Submissions at paragraph 45. 19 In Section 2(1) of the order, which you have in your 20 bundle, Section 2(1) says: 21 "Fishing for sandeel is prohibited within the 22 Scottish zone." 23 Then there's an explanatory note over the page. And 24 picking up the last line of the first paragraph, 25 it specifies that the "Scottish zone" means "the sea</p> <p>Page 28</p>

<p>10:55 1 adjacent to Scotland", up to the limit of the exclusive 2 economic zone. 3 This order was accompanied by a policy note. It's 4 on slide 11: it's C-65. And it stated that the aim of 5 the prohibition was: 6 "... wider environmental and ecosystem benefits, 7 which include potential benefits to sandeel, seabirds, 8 marine mammals, and other fish species." 9 That's consistent with the objective that had been 10 identified in the business and regulatory impact 11 assessment, which is at bundle [tab] 28. We don't need 12 to turn that up. It's C-66, which sets out the Scottish 13 Government's objective, and at paragraph 2.2(b) 14 (bundle page 598), it refers to the aim of "improv[ing] 15 resilience to changes in the marine environment". 16 THE CHAIRPERSON: Excuse me, Mr Juratowitch, I think we're 17 a little lost, because we're switching pages, we're 18 switching tabs. 19 So we understand tab 29 to be the Sea Fisheries 20 (Conservation of Sea Fish) Order, and Section 2(1). 21 Paragraph 4, where does this come from, that's on 22 the screen right now? 23 MR JURATOWITCH: That's one that I didn't -- the one on 24 the screen is a document that's not in the bundle. 25 THE CHAIRPERSON: I see. Okay.</p> <p>Page 29</p>	<p>10:58 1 Tribunal should be sensitive to those arrangements, and 2 not imply that matters that had separate legal, 3 scientific and factual foundations were all part of the 4 same thing, when, as a matter of fact and as of the law 5 of the United Kingdom, they were not. From the UK's 6 perspective, the distinction therefore matters in this 7 case, and potentially in other circumstances. 8 The third point is of course that I accept as 9 a matter of state responsibility and international law 10 generally that analytically, for the Tribunal, it 11 doesn't matter in the end, because the analytical steps 12 the Tribunal will need to take are the same. If there 13 are two measures, then the science relied on for each 14 and the decision-making process for each needs to be 15 analysed. And if there is one measure, then -- to use 16 the Tribunal's words in its question -- that one measure 17 "has two distinguishable parts", each relying on 18 a scientific report and each having its own 19 decision-making process, and both parts needing to be 20 considered. 21 So it follows that whatever the result as to how you 22 approach whether it's one measure or two, the Tribunal's 23 ruling will need to make findings either in respect of 24 two measures, which is the UK's case, or one measure 25 with two different parts, on the EU's approach to this</p> <p>Page 31</p>
<p>10:56 1 MR JURATOWITCH: The approach that I'll adopt, 2 Madam Chairperson, is that when I have the document 3 available in the bundle, I'll take the Tribunal to it so 4 that you can mark it up and have it as a record for your 5 deliberations. But, the size of the bundle being 6 limited and the record being large, where there are 7 documents that are not in the bundle but where 8 I nonetheless wish to draw your attention to passages, 9 those are the ones for which I've committed the sin of 10 having PowerPoint slides. 11 THE CHAIRPERSON: Thank you. That's very clear now. 12 Thank you. 13 MR JURATOWITCH: Members of the Tribunal, those are 14 the measures and their objectives. The Tribunal's first 15 question in writing -- and there was some discussion of 16 this yesterday -- concerned the EU characterising these 17 as one measure, and the answer to that question is in 18 four parts. 19 The first is that the Scottish Government took its 20 own advice and made its own decision for its own waters; 21 the UK Government took its own advice and made its own 22 decision for English waters. Those are matters of fact. 23 The second point is that that process reflected the 24 devolution arrangements within the United Kingdom, and 25 the United Kingdom respectfully submits that the</p> <p>Page 30</p>	<p>11:00 1 question. Whichever way the Tribunal tackles that, 2 it creates quite serious difficulties for the EU's case, 3 in particular because the EU makes no criticism of the 4 science on which the Scottish measure was based. 5 The Tribunal will recall that the EU said yesterday 6 in oral submissions, it emphasised how similar 7 the analysis of the literature was in the Scottish 8 scientific report and in the part of the English 9 scientific report that analyses the literature. 10 That, members of the Tribunal, brings us to the end 11 of the question what were the measures, and takes us to 12 the second element, which is: what was the advice? 13 On the meaning of advice, the EU says this -- 14 JUSTICE UNTERHALTER: I'm sorry to interrupt, but just on 15 this one or two measures, unless there's more that 16 you wish to say on that. I just wanted to be clear, 17 I suppose, on two things. 18 One is: I assume the logic of your submissions is 19 that -- and again, this is all entirely hypothetical -- 20 since we are required to assess each of the measures, 21 the Scottish and the English measure, separately, 22 we could come to different conclusions on the one and 23 the other? 24 MR JURATOWITCH: That's conceptually correct, although of 25 course the UK says that on the evidence you wouldn't do</p> <p>Page 32</p>

<p>11:01 1 that. But conceptually, yes. 2 JUSTICE UNTERHALTER: This is all just conceptual; 3 it doesn't go to anything about the merits. 4 Does it follow also that the remedial order that 5 could result is that -- again, pure hypothetically -- 6 the Scottish order might be compliant, but the English 7 not? 8 MR JURATOWITCH: On the same basis that also follows, yes. 9 JUSTICE UNTERHALTER: Yes. 10 And then last question on this score. To the extent 11 that there is evidence that is of application to both 12 measures, or the measure in its different parts, 13 depending on how one thinks about this, how does one 14 then -- the evidence isn't necessarily neatly segmented 15 as between the two; there is evidence that has relevance 16 for both. But you're contending that the structure of 17 our approach should nevertheless be to examine the 18 measures separately, the evidence that is applicable to 19 each; and the consistency question, again, each should 20 be considered separately? 21 MR JURATOWITCH: I accept both parts of that, yes. 22 JUSTICE UNTERHALTER: Thank you. 23 MR JURATOWITCH: I turn then to the question of what was 24 the advice. 25 On the meaning of the advice, the EU says, as</p> <p>Page 33</p>	<p>11:04 1 Aquaculture Science. One sees that it responds to 2 a request for advice from the Department for 3 the Environment, Food and Rural Affairs. 4 [Page] i, bundle page 200, then summarises the core 5 advice. And if I could draw the Tribunal's attention to 6 the second bullet point, it says: 7 "Sandeel stocks experience high levels of natural 8 fluctuation due to the influence of environmental 9 variation ..." 10 And then in the third bullet point, picking up in 11 the second line: 12 "Evidence from the literature and ecosystem 13 modelling indicates that seabirds would be the biggest 14 beneficiaries if sandeel fishing in the North Sea was 15 prohibited." 16 And then it goes on to refer to biomass in the 17 penultimate line, accepting that this would be "under 18 constant prevailing environmental conditions". 19 Then in the [fourth] bullet, it says: 20 "[P]ublished research suggests increased sandeel 21 biomass would have localised benefits for the condition 22 of some commercial fish, however the impacts of 23 prohibiting sandeel fishing on the overall stock 24 biomasses of commercial fish would be limited and 25 complex, with a mixture of positive and negative</p> <p>Page 35</p>
<p>11:03 1 you see on the slide (12), at paragraph 478: 2 "... 'advice' may consist of different, individual 3 items of scientific evidence which, collectively are 4 relied upon as the basis for a measure." 5 The UK agrees with that. And the UK also agrees 6 with the next sentence, which is that: 7 "... what has to be assessed is whether that 8 evidence, assessed holistically ..." 9 And I emphasise that, "assessed holistically": 10 "... can be qualified as the 'best available 11 scientific advice'. 12 That answers the Tribunal's twelfth written 13 question, which is that scientific evidence forms the 14 foundation for scientific advice, and scientific advice 15 would not be the best available if it was not founded on 16 the best available evidence. 17 There is no dispute between the parties that the 18 scientific material relied upon by the UK for the 19 measures comprised "advice". And so I will turn now to 20 its content. 21 That takes us to bundle tab 15 (C-45), where the 22 Tribunal will find the English scientific report. The 23 cover page shows its authors: Natural England, the Joint 24 Nature Conservation Committee and Cefas, which stands 25 for the Centre for Environment, Fisheries and</p> <p>Page 34</p>	<p>11:06 1 responses" 2 If I could ask the Tribunal then to turn to the 3 fifth page of the document -- it's 204 of the bundle -- 4 where one finds the "Preface"; the fourth paragraph of 5 which, picking up in the third line, the sentence that 6 begins about halfway along, refers to the evidence 7 "com[ing] with uncertainties", and noting in the 8 penultimate line that "precautionary actions may be 9 required". 10 I'm conscious that this is a document that the 11 Tribunal knows well, and is in any event one that 12 the Tribunal, if it hasn't already, will need to read in 13 full. So my purpose is only to show you specific 14 passages that the UK says are particularly relevant, 15 including for submissions that I will come on to make. 16 On page 11, if I could ask you to turn to that, 17 there's a heading "Sandeel dynamics", under which 18 it says: 19 "Sandeel have been described as the most important 20 forage fish in the North Sea, contributing to the diet 21 of mammals, seabirds, and predatory fish ..." 22 And then skipping a sentence: 23 "In recognition of this, spatially restricted 24 closures to sandeel fishing have been historically 25 introduced ... These closures have been linked to</p> <p>Page 36</p>

<p>11:08 1 increases in the local sandeel population sizes ..."</p> <p>2 And evidence is cited.</p> <p>3 "However, fluctuations in sandeel stocks are driven</p> <p>4 by both top-down (such as predators and fishing) and</p> <p>5 bottom-up (such as prey availability and hydroclimatic</p> <p>6 factors) processes."</p> <p>7 Then in the next paragraph, just focusing on the</p> <p>8 last sentence, there's the salutary observation that:</p> <p>9 "The impacts on extraneous factors on sandeel</p> <p>10 recruitment mean that even with low fishery exploitation</p> <p>11 pressure, the risk of population collapse still exists."</p> <p>12 The Tribunal will see at the very beginning of the</p> <p>13 next paragraph the reference to the Poloczanska article</p> <p>14 of 2004, about which the EU said yesterday that it was</p> <p>15 too old to be useful, because in 2011 ICES introduced</p> <p>16 an escapement strategy. The authors of the English</p> <p>17 scientific report obviously thought that it did continue</p> <p>18 to be useful, and in light of the first point of context</p> <p>19 on which I addressed the Tribunal this morning, one can</p> <p>20 readily see why they might have thought that.</p> <p>21 Pages 12 to 14 of the English scientific report then</p> <p>22 deal with sandeel and their role in the ecosystem. The</p> <p>23 first heading is "Marine mammals", on page 211 of the</p> <p>24 bundle. Just picking up, if one looks at the first</p> <p>25 paragraph, five lines from the end, and the sentence</p> <p style="text-align: center;">Page 37</p>	<p>11:11 1 "The presence of an active fishery can have</p> <p>2 a detrimental effect on seabird populations ..."</p> <p>3 And then picking up after the references:</p> <p>4 "In the context of other countries surrounding the</p> <p>5 North Sea, the UK is unique in terms of the large</p> <p>6 number of internationally important breeding colonies</p> <p>7 for several important sandeel-dependent seabirds ..."</p> <p>8 Then in the sentence straddling the page:</p> <p>9 "Furness and others ... suggest that the closure of</p> <p>10 sandeel and sprat fisheries in UK waters could increase</p> <p>11 the survival and productivity of kittiwakes, common</p> <p>12 guillemots, razorbills, and Atlantic puffins."</p> <p>13 The second paragraph emphasises that:</p> <p>14 "A full prohibition would therefore serve to</p> <p>15 increase resilience of seabirds ..."</p> <p>16 It refers again to external pressures. And then the</p> <p>17 second full paragraph begins by noting the particular</p> <p>18 link between sandeels and black-legged kittiwakes.</p> <p>19 The third full paragraph notes that:</p> <p>20 "The breeding success of kittiwakes has ... been</p> <p>21 shown to negatively correlate with the fishing effort of</p> <p>22 industrial sandeel fisheries, with fishery closures off</p> <p>23 the east coast of Scotland leading to increased breeding</p> <p>24 success ..."</p> <p>25 If I could then -- not needing to say all that much</p> <p style="text-align: center;">Page 39</p>
<p>11:09 1 that begins just after "2019":</p> <p>2 "As the main energetic contributions to the overall</p> <p>3 energy density in the North Sea are from whiting and</p> <p>4 sandeels, it is reasonable to conclude that distribution</p> <p>5 of harbour porpoise is strongly but not exclusively</p> <p>6 linked to sandeel availability in the North Sea.</p> <p>7 Indeed, the condition of harbour porpoise has been</p> <p>8 linked to sandeel availability ..."</p> <p>9 And a scientific article is cited.</p> <p>10 In the next paragraph, picking up in the second line</p> <p>11 towards the end:</p> <p>12 "... observations of minke whale redistribution</p> <p>13 within the North Sea may be related to a decline in</p> <p>14 sandeel availability elsewhere in the North Sea ..."</p> <p>15 And there's another reference.</p> <p>16 The report then turns to "Seabirds". And in the</p> <p>17 first paragraph under that heading, the last sentence,</p> <p>18 starting three lines up from the foot of the paragraph,</p> <p>19 says:</p> <p>20 "Sandeels are particularly important in the diets of</p> <p>21 many seabird species, especially during the breeding</p> <p>22 season and as food for growing chicks ..."</p> <p>23 In light of an exchange yesterday, the Tribunal will</p> <p>24 have noticed the word "especially".</p> <p>25 The second paragraph then says:</p> <p style="text-align: center;">Page 38</p>	<p>11:13 1 more about seabirds, because in principle the link is</p> <p>2 not contested, if I could then turn to "Marine fish",</p> <p>3 which is the next heading on page 13 of the document.</p> <p>4 It begins by saying:</p> <p>5 "The diet 'flexibility' and ability of predatory</p> <p>6 commercial fish to substitute diet shortfalls with other</p> <p>7 prey species suggests that they are less crucially</p> <p>8 dependent on local sandeel abundance ..."</p> <p>9 That's the sentence to which Mr Dawes took the</p> <p>10 Tribunal yesterday, and there was an exchange between</p> <p>11 him and Justice Unterhalter about it. That exchange</p> <p>12 focused on the "less crucially dependent" language. The</p> <p>13 Tribunal has the point that they are dependent in the</p> <p>14 more general sense, and that, as I'll come on to show,</p> <p>15 is up to about a fifth of their diet coming from</p> <p>16 sandeel.</p> <p>17 The point that I would add from this sentence is</p> <p>18 that it is only about dependence on "local sandeel</p> <p>19 abundance". What that means is that if there is a local</p> <p>20 depletion, the predatory fish can swim elsewhere. But</p> <p>21 when they swim elsewhere, they still eat sandeel.</p> <p>22 This entirely undercuts the EU's enthusiasm for</p> <p>23 a partial closure, because once it's appreciated and</p> <p>24 accepted that benefits for predatory fish were part of</p> <p>25 the UK's objective, and everyone agrees that the</p> <p style="text-align: center;">Page 40</p>

<p>11:14 1 objective of the measure is a matter for the UK alone to 2 determine, then that objective is pursued through a full 3 closure, not a partial one. 4 There is more detail on predatory fish in the next 5 paragraph on 13, which then goes over on to page 14, but 6 I don't propose to take more time with it. 7 Turning over on to page 15 and onwards of the 8 report, there are tables that summarise the benefits to 9 specific species, and giving references to the 10 literature in the last column of those tables. 11 So the aspect of the English scientific report that 12 comprised of analysing scientific literature runs up to 13 the end of page 20 of the report; that's 219 of the 14 bundle. The treatment of the primary modelling then 15 starts at page 21. They are two aspects of the one 16 report, to be considered -- if we're to use the word 17 from the EU's submissions that I put on the slide -- 18 holistically. 19 Ms Boileau will return to the EU's criticisms of 20 the modelling. For my purposes, I would just ask the 21 Tribunal to turn to bundle page 226, still within the 22 English scientific report, and now to table 3. 23 Those are numbers that the Tribunal is familiar 24 with, and Ms Boileau will return to them. The points 25 I make about them are these. These are numbers that</p> <p style="text-align: center;">Page 41</p>	<p>11:19 1 a topic of interest to the Tribunal, and with that in 2 mind, if I could ask the Tribunal to turn to page 35 of 3 the document, 234 of the bundle. I'm focusing on the 4 first paragraph after the bullet points, which says: 5 "Experience with partial stock closures where effort 6 is simply displaced into open areas suggest that the 7 anticipated benefits to stocks and predators may not 8 materialise. Whilst the northeast UK closed area covers 9 habitat which accounted for approximately 50% of the 10 catch for Sandeel Area 4, the stock assessment and 11 reference points are based on the entire stock including 12 those sandeels distributed in the closed areas. As 13 a result, the advised Total Allowable Catch ... is 14 disproportionately large relative to the available area 15 open to the fishery." 16 And the second paragraph notes in the first sentence 17 that ICES warns about the risk of that. 18 Just going back up to the second bullet point, the 19 risk identified there is not within UK waters, but that 20 a prohibition in UK waters will increase fishing effort 21 in EU waters. 22 With that in mind, the Tribunal may wish to note 23 that the UK has encouraged the EU to take its own 24 measures, with resilience of the North Sea ecosystem as 25 a whole as the objective. The reference to that is C-58</p> <p style="text-align: center;">Page 43</p>
<p>11:17 1 the model produced, but they need to be considered with 2 common sense and in context, about which I make four 3 points. 4 The first is that they obviously involve uncertainty 5 compared to the real world, because they are simply 6 modelled projections. 7 The second is that the precise numbers are much less 8 significant than the overall trend that they represent, 9 which is that, on the whole, the ecosystem may be 10 expected to benefit from sandeel not being removed from 11 it by fishing. 12 The third point is that in the real world, any 13 positive effects are likely to be dampened by negative 14 changes to the environment, including through climate 15 change. 16 The fourth is that the predictions about the 17 relative degree of benefit for different types of 18 predator that are produced by the model are consistent 19 with the scientific literature and should be considered 20 together with that literature, as the English scientific 21 report does. 22 The treatment of the modelling then finishes on 23 page 34 of the document, where the topic begins "Risks 24 of displacement". That topic continues on to page 35. 25 I know from the Tribunal's question that it's</p> <p style="text-align: center;">Page 42</p>	<p>11:21 1 at page 2: that's a ministerial letter. 2 Page 39 of the English scientific report, which is 3 bundle page 238, is addressing environmental variation. 4 The end of the first paragraph refers to: 5 "Ocean warming in the coming decade [which] may ... 6 threaten the viability of sandeel populations in the 7 North Sea and particularly in the southern North Sea." 8 The second paragraph says: 9 "A full prohibition of sandeel fishing from UK 10 waters has the potential to benefit dependent predators 11 and ecosystem resilience, however the strong influence 12 of environmental variability could negate or dampen any 13 expected benefits." 14 The Tribunal will be interested also in the 15 penultimate and final paragraphs on page 39, but I won't 16 detain you with them further now. 17 On page 41, there's a heading halfway down the page, 18 "TAC accounting for partial closures", and then the 19 paragraph under that explains that the TAC for a sandeel 20 area does not account for partial closures; that this 21 results in what it calls, at the end of the third line, 22 "fish[ing] the line" delimiting the closed area, with 23 accompanying depletion in the open area. It notes that 24 the UK has experience of that in sandeel area 4, which 25 is the closure extending from the Firth of Forth.</p> <p style="text-align: center;">Page 44</p>

<p>11:23 1 So, members of the Tribunal, the answer to your 2 second and third questions is that ICES's advice did not 3 take account of the existence of a closed area within 4 the overall sandeel area for which the advice was being 5 given, and you've seen the scientific advice on the 6 consequences of that. 7 Displacement is a topic on which you heard precious 8 little from the EU yesterday, despite its obvious 9 importance, both as a matter of science and policy, for 10 any suggestion that a partial closure might be 11 a credible alternative. 12 The last point on the English scientific report is 13 at bundle page 248, where I simply draw the Tribunal's 14 attention to the fact that running from there on to 15 page 253 is a list over five pages long of references to 16 scientific papers that were relied on in the formulation 17 of the advice, and all of them are in evidence before 18 you. 19 That, members of the Tribunal, is the English 20 scientific report. 21 THE CHAIRPERSON: Thank you. I have a question regarding 22 the English scientific report; just a few questions of 23 clarification, if I may. 24 On the cover page, it refers to "ICES Area IV". So 25 is that ICES statistical area 4, or is that ICES's</p> <p>Page 45</p>	<p>11:26 1 in material terms the same. The further comfort that 2 the Tribunal can take from it is that much of the 3 literature that the reports refer to is the same. 4 So it's relevant in that broader sense and it can 5 assist the Tribunal in that broader sense, but it's not 6 relevant in the more specific sense of the particular 7 decision-making process. 8 THE CHAIRPERSON: Thank you. That's very clear. 9 I see that it is almost 11.30 and time for our 10 break. Would this be an appropriate time to break for 11 15 minutes? 12 MR JURATOWITCH: It would, Madam Chairperson. Thank you 13 very much indeed. 14 THE CHAIRPERSON: Thank you. 15 So we will return then at 11.45. Thank you very 16 much, everyone. 17 (11.27 am) 18 (A short break) 19 (11.45 am) 20 THE CHAIRPERSON: So please, United Kingdom counsel, please 21 go on. 22 MR JURATOWITCH: Thank you very much. 23 We now turn to the Scottish scientific report. It's 24 at bundle tab 23; it's C-50. 25 On page 1 of the main body of that report, which is</p> <p>Page 47</p>
<p>11:24 1 sandeel management [area] 4. 2 MR JURATOWITCH: That's sub-area 4, which takes up the 3 Greater North Sea. And within sub-area 4 are the seven 4 sandeel areas. 5 THE CHAIRPERSON: Thank you. So that's my first question of 6 clarification. 7 My second question of clarification: I note on 8 page 5 of the English scientific report it refers in the 9 first paragraph to UK legislation, and as part of the UK 10 legislation, it refers to the Scottish Fisheries 11 Management Strategy. And then throughout there's 12 references to the UK and the UK exclusive economic zone. 13 So my question then is: to what extent is the 14 English scientific report also relevant to consideration 15 of fisheries management of sandeel in Scottish waters? 16 MR JURATOWITCH: It is not relevant in the sense that the 17 Scottish decision-makers did not base themselves on it. 18 It is relevant in the sense that fell from Justice 19 Unterhalter, which is that much of the material -- and 20 this is common ground -- is similar. 21 So insofar as the Tribunal is considering the 22 content of the scientific advice, the Tribunal can take 23 comfort from the fact that two different scientific 24 processes produced advice which both sides accept, so 25 far as the analysis of the literature is concerned, is</p> <p>Page 46</p>	<p>11:46 1 bundle page 357, the first paragraph refers to the "Aim 2 of this Report". It's all important, but I'll just 3 emphasise the part picking up at the end of the third 4 line, where it refers to "the importance of sandeel to 5 other fish species, seabirds and marine mammals" in 6 terms of the coverage of the scientific advice. 7 Under heading 2, in the third line, there's 8 a reference to sandeel "playing a key role in 9 North Atlantic marine food webs". 10 I can take the Scottish report more quickly because, 11 as the Tribunal has observed, it's in substantial accord 12 with the literature analysis in the English scientific 13 report. But I will nonetheless draw the Tribunal's 14 attention to certain points for specific reasons which 15 I hope will be evident, and the first of those is bundle 16 page 391; it's 35 of the document. 17 There's a paragraph under the heading 3.1.1 which 18 you'll recognise because Mr Dawes took you to the first 19 part of that paragraph yesterday, and then came back and 20 took you to the second part of the same paragraph. 21 The EU's position was that these fish species -- 22 we're talking here about fish that prey on sandeel -- 23 the EU's position was that them showing "higher body 24 condition ... in years of high sandeel abundance[]" does 25 not mean that less sandeel means less body condition.</p> <p>Page 48</p>

<p>11:47 1 That was the submission that was made to you. And the 2 UK makes two points in response to that submission. 3 The first is that the UK is aiming at improving 4 matters, so it is upwards direction that matters for 5 relevant purposes. 6 The second point is that I accept that this is in 7 the realm of correlation rather than causation, but at 8 the same time, some common sense is called for. 9 The EU's position is based on the idea that if there 10 aren't enough sandeel, it will always be possible for 11 fish that prey on them to eat something else, and to 12 replace them with something else that is equivalent in 13 terms of nutritional value and availability. If that's 14 really the EU's position, then it should prove that 15 position by reference to scientific evidence. 16 On page 36, under the heading "Displacement of 17 fisheries", the Tribunal has already seen this point in 18 the English scientific report, and so I won't labour it. 19 But given your second and third questions, I'd just note 20 for the Tribunal the sentence five lines down, beginning 21 halfway along: 22 "The current ICES advice for sandeel indicates that 23 the assessment model doesn't take account of the current 24 Scottish closure, meaning that the available TAC must be 25 taken from a smaller area than intended. This situation</p> <p>Page 49</p>	<p>11:51 1 on data drawn from surveys of where birds are, whether 2 through photographic evidence or observation or 3 otherwise. 4 Density, members of the Tribunal -- and this is 5 my second point -- density is a different thing from 6 foraging range. 7 The third point is that the greatest density is 8 obviously in and around the colonies of nesting birds, 9 because that is where they leave from and return to when 10 they are nesting in July, and it's where they appear, 11 irrespective of what they are doing. As those birds fly 12 out to sea to forage, they are obviously going in 13 multiple different directions, and they can take and do 14 take different directions. And so density, which is 15 what that paper and pink shading is measuring, will be 16 less the further out to sea one goes. 17 The Tribunal might think about it in terms of 18 an analogy of flight paths into an airport. Air traffic 19 will be dense in a flight path map if one looks close to 20 the airport, because that is where all the planes are 21 leaving from and arriving to, but it doesn't tell you 22 how far the planes go once they fly off and head off to 23 their different destinations. And it would also include 24 planes just moving about the airport. 25 The fourth point, as you will have gathered, is that</p> <p>Page 51</p>
<p>11:49 1 would be exacerbated if the closure was extended." 2 At the foot of that page, a long section on 3 "Seabirds" commences. At page 43, there's a table, 4 table 3, that shows varying sensitivity of breeding 5 success to sandeel abundance of different species of 6 seabirds. The most vulnerable are kittiwake and puffin. 7 If I could just ask the Tribunal to note, at the 8 foot of that page, the particularly dire circumstances 9 in which kittiwake in Scotland find themselves: 10 "Kittiwake breeding abundance in Scotland has 11 undergone a sustained and significant decline ..." 12 And there's a reference: 13 "... with the most recent Seabird Monitoring 14 Programme breeding abundance index, for 2019, being 60% 15 below the 1986 baseline ..." 16 If I could ask the Tribunal then to turn to page 52. 17 There you will find a figure -- it's figure 29 -- about 18 which the EU was very enthusiastic yesterday, and about 19 the text associated with it. And in response to that, 20 I make four points. 21 The first is that the pink shading -- leaving aside 22 the question of how dark the pink is for the moment -- 23 the pink shading shows density of surveyed birds during 24 July. As you see from the blue text below the figure, 25 that comes from the Waggitt 2019 paper, which is based</p> <p>Page 50</p>	<p>11:53 1 what matters much more than density is the mean maximum 2 foraging range, so far as this diagram is concerned. 3 And that's collected, as one sees from the blue text 4 just over on to page 53, from the Woodward paper of 5 2019. One sees that reflected in the two black dotted 6 lines, the first giving the mean foraging range and the 7 second giving the mean maximum foraging range. And that 8 data is collected from GPS trackers on real birds. 9 That is the meaningful data for the purposes of 10 having an idea of how far, on a mean basis, these birds 11 go to feed. But of course it's only an average, which 12 is why the pink shading continues beyond the edge of the 13 mean maximum foraging range and out to the edge of 14 the box. 15 That then takes us, members of the Tribunal, to 16 the case of the disappearing pink shading. The Tribunal 17 will, I'm sure, recall clearly the overlay figure from 18 the EU's presentation yesterday, which is now again on 19 your screens. It's slide 14 for the UK, reproducing EU 20 slide 11. That overlays figures 12 and 29 from the 21 Scottish scientific report; 29 being the one we've just 22 been looking at. 23 The Tribunal has already observed that on this 24 overlay, the pink has shrunk radically. What appears to 25 have happened is that the lightest shade of pink now</p> <p>Page 52</p>

<p>11:55 1 looks, at least to my eyes, to be white. But the more 2 important point, related to it, is that we don't know 3 from figure 29 how far the lightest shade of pink would 4 extend, because it goes to the edge of the figure. 5 The second point is that the scales are different. 6 One sees that looking on the slide (15) now on the 7 screen, which shows original figure 12 as (a), original 8 figure 19 as (b) and the EU's overlay of yesterday as 9 (c). So if one looks at the scales for (a) and (b), one 10 sees that they're not the same. And it may be that the 11 EU has done something clever to adjust the different 12 scales to create the overlay, but the UK is blind to 13 that. 14 The third point is the case of the appearing 15 maritime boundary, which on figure 12, as one sees, is 16 incomplete, but then on what was described to us as 17 an "overlay" has appeared, but we don't know how or from 18 where. 19 The fourth point is: there may be perfectly good 20 explanations for this. But since this is being 21 criticised to criticise the UK's science, I'm 22 constrained to say that the deployment of this overlay 23 to criticise that science would be unlikely to pass any 24 test of methodological rigour. 25 If we go now to page 53 (tab 23, C-50), you were</p> <p style="text-align: center;">Page 53</p>	<p>11:59 1 not in decline ..." 2 And the paragraph continues on to treat harbour 3 seals, and there's a caveat about the age of the data in 4 the next paragraph. 5 Page 74 is the "Summary of evidence on Marine 6 Mammals and Sandeel"; it's bundle page 430. And there 7 is a caveated conclusion, which ends in the last 8 sentence, picking up in the fourth last line with 9 "However": 10 "... it seems a reasonable assumption that any 11 increase in sandeel abundance that might result from 12 a reduction in fisheries pressure might be beneficial to 13 several populations of marine mammals given their 14 dependence on sandeel as a prey source." 15 From page 75 onwards, there is a long list of 16 references that extends down to page 91, listing more 17 than 170 scientific papers which are also in evidence 18 before you. 19 That, members of the Tribunal, is the Scottish 20 scientific report. And it takes us to the third aspect 21 of the relevant advice, and that is the ICES Technical 22 Service's response, which, in coming to it, I'll just 23 deal with a couple of documents that proceed it, for 24 which I'll rely on the slides. 25 (Slide 16) The first is an EU letter to the UK of</p> <p style="text-align: center;">Page 55</p>
<p>11:57 1 taken to the third paragraph, and in particular to the 2 first part of the first sentence, before the comma that 3 appears after the word "period" in the second line of 4 the third full paragraph on page 53. 5 I'm confident the Tribunal will have read on beyond 6 what was cited to it. It's an important point, because 7 after the comma it says: 8 "... the winter months are energetically challenging 9 for many seabirds due to more inclement weather, limited 10 daylight and reduced prey availability ..." 11 And the rest of the paragraph indicates that feeding 12 on sandeel outside the breeding season may also be of 13 significance to some seabirds, where foraging range is 14 not limited by the need to return to chicks on the 15 nests. 16 That, members of the Tribunal, takes us to "Marine 17 Mammals". That heading starts on page 57, but I'd ask 18 if we could pick it up on page 59. 19 In the first paragraph that begins under the foot of 20 the table, there's reference to harbour seals; one sees 21 that in the fourth line. And then picking up the 22 sentence that begins at the end of the fifth line: 23 "This relationship with sandeel stock levels was 24 supported by findings that the diet of harbour seals 25 appeared more diverse in areas where harbour seals are</p> <p style="text-align: center;">Page 54</p>	<p>12:00 1 30 May 2023, which says that: 2 "... given that wider ecological needs are already 3 considered in ICES catch advice and that ICES has not 4 raised so far any specific concerns regarding 5 exploitation of sandeels ..." 6 And then it goes on to refer to breach of the TCA. 7 And it then says that: 8 "It would [form part of] the principle of good 9 cooperation and to base decisions on the best available 10 scientific advice, that any management decision ... 11 should await the outcome of [the] request." 12 That's an important letter, in my submission, for 13 two reasons. The first is that in May 2023, the EU, at 14 least so far as this letter is concerned, appears to 15 have been proceeding on the basis that ICES's catch 16 advice did consider wider ecological needs. And the 17 second is that the EU considered the forthcoming 18 response of the ICES Technical Service to the joint 19 request to be part of the best available scientific 20 advice on which the UK should base its decision. 21 C-57 is an equivalent letter from the EU to Scotland 22 making the same points. 23 Slide 17 contains, for your reference, the actual 24 request to ICES (C-53). This is the joint request of 25 the EU and the UK to ICES. The "Background" is shown on</p> <p style="text-align: center;">Page 56</p>

<p>12:02 1 the slide. It says: 2 "The EU and UK recognise the ecological significance 3 of forage fish species such as sandeel ..." 4 And it goes on: 5 "... for seabirds, other fish species and marine 6 mammals." 7 So that's a joint recognition by both parties. 8 And then it goes on. There's a "Description of 9 [the] requested work" which you see on the slide, which 10 is: 11 "... to clarify and describe how ecosystem 12 considerations are factored in and applied in the 13 provision of single stock advice for forage fish 14 species. Particular reference ..." 15 This is the joint request to ICES: 16 "... should be made to the handling of predator-prey 17 interactions and what considerations/provisions are made 18 for the rebuilding of sensitive higher trophic level 19 species such as certain seabirds." 20 That then takes us to the actual response of the 21 ICES Technical Service. It's tab 4 of the bundle 22 (C-22). 23 This was a document about which we heard some 24 discussion in the afternoon yesterday on 25 proportionality, but precious little indeed in the</p> <p>Page 57</p>	<p>12:05 1 advice on fishing opportunities is given at stock level 2 and cannot function at the level of individual feeding 3 grounds, which goes beyond the detail level of the stock 4 assessment models." 5 "Therefore", ICES says: 6 "Therefore, a large part of the question of whether 7 management is supporting ecosystem functions should 8 occur at the level of national regulations, which is 9 outside the scope of this technical service." 10 The fourth paragraph is also crucial. And I'll just 11 pick it up halfway along the second line, referring to 12 "variable biomass for which advice is based on 13 an escapement strategy", of which sandeel is one. 14 "... the advice is consistent with the maximum 15 sustainable yield approach, the aim of which is to have 16 high stock sizes producing pretty good yields. It is 17 possible that exploitation levels consistent with this 18 framework would result in a higher enough biomass 19 required to sustain ecosystem services. However ..." 20 And it's an important "However": 21 "... it is also possible that the resulting 22 biomasses may be too low. Although the ICES advice 23 framework includes a provision to keep the stocks above 24 a given precautionary level, there is no analysis ..." 25 No analysis:</p> <p>Page 59</p>
<p>12:04 1 discussion of best available science, although it's 2 accepted by both sides that this does form part of it. 3 It's a crucial document, and it's cited extensively by 4 the EU in writing. There are specific passages to which 5 I'll take the Tribunal now. 6 The first paragraph indicates that, in a specific 7 sense, the EU's understanding in the letter to which 8 I took you is correct: 9 "The current ICES advice for forage fish species 10 does include ecosystem effects on the assessed 11 stocks ..." 12 And this is how it does so: 13 "... through both variable predation mortality and 14 qualitative ecosystem considerations." 15 The third paragraph, however, contains a limitation 16 of fundamental importance to this case. It says: 17 "What is not conducted in the assessments is 18 specific analysis of whether the forage fish biomass is 19 kept high enough for specific predator requirements. 20 Such an analysis would depend on the specifics of 21 individual predator populations, and overall stock 22 levels of forage fish are only part of the issue. Minke 23 whales, for example, can move large distances to find 24 food and are not limited by any local abundance, while 25 nesting seabirds have a restricted feeding range. ICES</p> <p>Page 58</p>	<p>12:07 1 "... of whether this precautionary level is 2 sufficient to provide adequate food levels for 3 individual predator populations." 4 Then in the last sentence, there's another reference 5 to "national management measures, and the dynamics of 6 a given predator population", to be taken into account 7 in interplay with the ICES advice. 8 That's the summary. 9 Next is the response of "Reviewer 1". That's on 10 page 2; 88 of the bundle. If I could just ask the 11 Tribunal to rest its eye on the second paragraph, 12 picking up about eight lines down, there's a sentence 13 that begins: 14 "No explicit provision is made in the current ICES 15 quota advice to ensure the provision of such ecosystem 16 services. As a result of the lack of evaluations, it is 17 not possible to make a judgment as to whether or not the 18 current quantitative quota advice for North Sea forage 19 fish is able to sustain critical ecosystem services, 20 specifically food availability for predators." 21 Then in the same paragraph, picking up in the 22 third-last line, about halfway along, there's another 23 "therefore": 24 "... the responsibility to ensure the provision of 25 these local ecosystem services relies on national</p> <p>Page 60</p>

<p>12:09 1 regulations ..."</p> <p>2 If I could ask the Tribunal then to look at page 3,</p> <p>3 there's a heading specific to "Sandeel". And you were</p> <p>4 taken to that paragraph yesterday, the first paragraph</p> <p>5 under the heading of "Sandeel", which begins with the</p> <p>6 subheading "Overview". I'm just giving you that for</p> <p>7 context.</p> <p>8 Then on page 4, five lines down, picking up at the</p> <p>9 end of that line with a sentence that begins with</p> <p>10 another "However":</p> <p>11 "... the B escapement ..."</p> <p>12 You will recall that ICES uses the precautionary</p> <p>13 biomass limit for escapement:</p> <p>14 "... has not been set to account for the ecosystem</p> <p>15 services that this fish provide, and it is therefore not</p> <p>16 possible to make any judgment as to the degree to which</p> <p>17 the overall fishing level impacts on these ecosystem</p> <p>18 services."</p> <p>19 Page 5 then turns to another forage fish called</p> <p>20 "Norway pout", to which I said I would return. And if</p> <p>21 I could just note, in the last paragraph on that page,</p> <p>22 in the penultimate line, it says:</p> <p>23 "... in contrast to sandeel there is a less</p> <p>24 clear-cut link between biomass and predator success ..."</p> <p>25 I just draw that to the Tribunal's attention in</p> <p>Page 61</p>	<p>12:12 1 Technical Service response, agreed by both sides to be</p> <p>2 part of the best available science, that if one's</p> <p>3 interest is in the ecosystem generally, and predators in</p> <p>4 particular, then ICES's stock advice, and the ICES's</p> <p>5 approach to formulating it, will not tell you everything</p> <p>6 that you need to know.</p> <p>7 I'm conscious that the Chairperson asked a question</p> <p>8 yesterday about the ICES Technical Service response not</p> <p>9 being ICES's advice. The parties are at one on that</p> <p>10 point: that whatever specific categorisations ICES may</p> <p>11 use for its own purposes to distinguish between its</p> <p>12 different outputs, and in particular to distinguish its</p> <p>13 stock advice from other outputs, the ICES Technical</p> <p>14 Service response qualifies as "scientific advice" for</p> <p>15 the purposes of the TCA.</p> <p>16 That, members of the Tribunal, is the content of</p> <p>17 the relevant advice. If I can assist --</p> <p>18 JUSTICE UNTERHALTER: Could I just ask one question.</p> <p>19 I'm just wondering, given the caveats that exist in</p> <p>20 the document that you've just taken us through and the</p> <p>21 Technical Services document, how far this document is</p> <p>22 responsive to the work that was requested. Because it</p> <p>23 appears to have been asked to deal with the handling of</p> <p>24 predator-prey interactions at a more granular level, and</p> <p>25 yet there seem to be quite significant exclusions, as it</p> <p>Page 63</p>
<p>12:10 1 light of its question on Norway pout.</p> <p>2 The conclusions of Reviewer 1 applying to all of the</p> <p>3 forage fish studied are then on pages 6 and 7. And I'll</p> <p>4 move now to "Reviewer 2": that begins towards the end of</p> <p>5 page 7.</p> <p>6 If I could pick that up on page 9 in the third full</p> <p>7 paragraph, which begins "Ecosystem considerations":</p> <p>8 "[They] are factored in to North Sea stock</p> <p>9 assessments by including predation mortality estimated</p> <p>10 from multispecies models or other sources. This better</p> <p>11 accounts for mortality on managed stocks ... but does</p> <p>12 not account for prey effects on predators. As noted in</p> <p>13 the Norway pout stock annex, predation mortality is not</p> <p>14 a measure of importance of the forage species in the</p> <p>15 predator's diet. Including predation mortality is not</p> <p>16 intended to evaluate the amount of prey intended by</p> <p>17 predators, only the amount removed by predators."</p> <p>18 The response from these two ICES reviewers was thus</p> <p>19 that the ICES stock advice took into account predation</p> <p>20 mortality of sandeel for the purpose of issuing fishing</p> <p>21 advice in respect of sandeel, but did not take into</p> <p>22 account the needs of predators as such. They</p> <p>23 specifically indicated in the summary that this was</p> <p>24 a matter for national regulations.</p> <p>25 Members of the Tribunal, it is clear from the ICES</p> <p>Page 62</p>	<p>12:14 1 were, as to the conclusions that could be reached in</p> <p>2 this document.</p> <p>3 MR JURATOWITCH: I think it would assist in answering that</p> <p>4 question if we could go back to slide 17, which includes</p> <p>5 the request (C-53). There's a specific description of</p> <p>6 the work requested, and it is that:</p> <p>7 "ICES is asked to clarify and describe how ecosystem</p> <p>8 considerations are factored in ..."</p> <p>9 So this response is, in my respectful submission,</p> <p>10 responsive to that question, because it's explaining</p> <p>11 that when the ICES stock advice is produced, it does not</p> <p>12 take into account ecosystem considerations, and in</p> <p>13 particular predator-prey interactions, as a subject in</p> <p>14 itself. It only does so, as it explains in the very</p> <p>15 first paragraph, for the purposes of the mortality that</p> <p>16 predator takings produce for sandeel as a stock.</p> <p>17 That then takes us, members of the Tribunal, to</p> <p>18 the third element, which is: was all of this advice</p> <p>19 scientific?</p> <p>20 (Slide 18) The EU's submission in writing</p> <p>21 (paragraph 413) said that when one is considering best</p> <p>22 available science in the context of fisheries:</p> <p>23 "... 'organised methods' of science typically rely</p> <p>24 on large amounts of data and the ability to create and</p> <p>25 apply models so as to arrive at objectively verifiable</p> <p>Page 64</p>

<p>12:16 1 and valid conclusions." 2 There are five problems with that. 3 The first is that in the Whaling case at 4 paragraph 86, the ICJ explicitly recorded that it did 5 not consider it necessary to offer a general definition 6 of "scientific research". And despite having devoted 7 some time yesterday to this case, the EU has still not 8 explained why the word "scientific" in the phrase "best 9 available scientific advice" is any more amenable to 10 being narrowed down by an elaborate approach focusing on 11 data and modelling. 12 The second is that this elaborate approach is simply 13 not the ordinary meaning of "scientific", which just 14 means "based on or relating to science". The UK of 15 course accepts that something needs to be systematic or 16 methodical in order to qualify as science. But the EU 17 has made no attempt to establish that its elaborate 18 tailored approach, I would say, is the ordinary meaning 19 of "scientific"; and nor has it made any attempt to 20 locate it in the interpretative rules of the Vienna 21 Convention, and in particular the rules in Article 31(3) 22 and (4). 23 Its reference yesterday (Day 1/54:15-16) to what 24 it called "a common understanding in the practice of 25 fisheries management" was notable both for the complete</p> <p>Page 65</p>	<p>12:19 1 specific to fisheries, but notwithstanding the 2 significant exchanges yesterday between Agents for the 3 European Union and Justice Unterhalter about precisely 4 what the relevant characteristics of ICES advice might 5 be, this approach in fact ignores the approach taken by 6 ICES. And that's relevant to treaty interpretation 7 because Article 494(3)(c) of the TCA specifically refers 8 to ICES in the context of best available science. 9 In March 2024, ICES published a Framework for 10 Ecosystem-Informed Science and Advice. It's on 11 slide 19; it's R-103. It considered indicators on the 12 basis of which to make assessments, and it said that: 13 "Scientific evidence in support of [ecosystems-based 14 measures] covers a wide range of disciplines and 15 includes various types of data, knowledge, and 16 information that may differ greatly in format, 17 precision, availability, spatial and temporal scale, 18 quality and confidence. Indicator systems provide 19 a flexible platform for knowledge development, 20 monitoring, trend identification, and synthesis in all 21 aspects likely to affect the performance of management 22 strategies, plans and operational objectives." 23 It then added the text that you see highlighted 24 further down the slide. 25 It then continued over the page, on the next slide</p> <p>Page 67</p>
<p>12:18 1 absence of even an intent to anchor that in the rules of 2 interpretation in the Vienna Convention and, as I will 3 come on to show in a moment, actually being inconsistent 4 with the approach that ICES takes. 5 The third point is that for some species, there are 6 simply not large amounts of data. To take the example 7 of one of the ICES advices that we looked at at the 8 beginning, behind bundle tab 8 (C-14) -- that's for 9 sandeel area 4 -- it records at the foot of the page -- 10 there's no need to turn it up -- under "Conservation 11 status" that even for sandeel, there is one species that 12 is data-deficient, although it's not the dominant one in 13 the fishery. 14 Members of the Tribunal, the precautionary approach 15 requires that limited data does not justify inaction 16 through the back door by requiring large amounts of data 17 before something is considered scientific. 18 The fourth point is that the EU's expectations of 19 scientific modelling are overly ambitious. Modelling 20 may not produce objectively verifiable and valid 21 conclusions, at least if "valid" is supposed to mean 22 validated by matching the real world. Models are 23 a predictive tool, and they may be more or less useful 24 depending on the circumstances. 25 The fifth point is that this claims to be a meaning</p> <p>Page 66</p>	<p>12:21 1 (20), to say that: 2 "The selection of indicators for use in 3 ecosystem-informed advice may involve (i) qualitative 4 and expert-based syntheses of the available knowledge 5 and information, (ii) an empirical data-mining approach, 6 and/or (iii) the development of full ecosystem models. 7 Each of these steps and approaches will have advantages 8 and limitations considering the time frame and lifespan 9 of the advice." 10 The point to take from this is that ICES does not 11 consider that to be scientific, there must typically be 12 primary quantitative analysis. ICES specifically 13 confirms the relevance of "qualitative and expert-based 14 syntheses of the available knowledge and information". 15 And it's difficult to think of a better description of 16 the first 20 pages of the English scientific report and 17 the parts of the English scientific report that follow 18 the modelling, and the entirety of the Scottish 19 scientific report. 20 That, members of the Tribunal, is why "scientific" 21 just means what it says, and there is no basis for the 22 EU's attempt to impose a more restricted and elaborate 23 meaning on it. 24 Using that, in my respectful submission, artificial 25 definition, the EU appears to be seeking to ignore all</p> <p>Page 68</p>

<p>12:23 1 of the Scottish scientific report and the first 20 pages 2 of the English one, on the basis that they analyse 3 scientific literature rather than conducting primary 4 modelling. And if that's what's being advanced, there 5 are two defects with it: the first is that analysing the 6 existing scientific literature is itself scientific; and 7 the second is that the literature that was analysed 8 itself involved data and modelling. 9 Then on the basis of focusing only on the modelling 10 in the English scientific report, the EU's next point -- 11 and it is, with respect, an extraordinary one -- is that 12 the modelling in the English scientific report "lacks 13 scientific and methodological rigour" to such an extent 14 that the Tribunal should not regard it as scientific. 15 That's the EU Written Submission at [paragraphs] 469 and 16 480. 17 Ms Boileau will explain why the criticisms of the 18 modelling have their limitations. I will limit myself 19 to six more general points. 20 JUSTICE UNTERHALTER: I wonder whether that though is 21 the thrust of what is being said. Is it that it's not 22 scientific or that it can't qualify as best science? 23 Because these two run together. 24 Just backtracking slightly in your submissions, if 25 the definition is based on science, and you say: well,</p> <p>Page 69</p>	<p>12:26 1 just something you can do, but it isn't the basis for 2 making a judgment as to treaty conformity? 3 MR JURATOWITCH: Certainly once you've done it, you can't 4 ignore it. So it's either the best available science, 5 in which case the measure needs to be based on it, or 6 the decision as to whether to impose a measure needs to 7 be based on it. If a measure is imposed, then it needs 8 to be based on it. 9 Or a conclusion theoretically -- not in this case -- 10 could be reached that in fact it's not the best 11 available science and there's a problem with the model, 12 theoretically. And then theoretically, the measure 13 might be based on something else which could be said to 14 be the best available science. 15 But a state doesn't commit itself to the content or 16 the form of the best available science when it 17 commissions it. That assessment is to be made after the 18 scientific advice is produced. 19 JUSTICE UNTERHALTER: You see, I think we would need to be 20 careful about a situation where if one is as unambitious 21 as possible in investigating a question of real 22 importance, you, as it were, end up having a lesser 23 treaty obligation. 24 There must be, I think -- but of course I hear your 25 submission on this -- an objective sense in which</p> <p>Page 71</p>
<p>12:24 1 that can have different components in different 2 settings, including the literature, as you've 3 emphasised, if, as here, the UK has chosen to harvest 4 data and use it in a model, has it not, as it were, 5 acknowledged that by making that choice, it considers 6 that to be, for this purpose at least, the framework for 7 best science? 8 MR JURATOWITCH: I don't accept, with respect, that the UK, 9 in respect of England, is putting the model on any 10 pedestal of that kind. In fact, the English scientific 11 report is specific that there are caveats, and that it 12 needs to be read in conjunction with the scientific 13 analysis of the papers. 14 I do accept that the authors of the English 15 scientific report evidently thought that modelling was 16 a useful exercise to conduct and it formed part of the 17 science on which the decision was then made. I accept 18 that. But I don't accept that the choice to do so 19 necessarily means that modelling would be accepted by 20 the UK to be necessary for something to constitute best 21 available science. 22 JUSTICE UNTERHALTER: Well, just to be clear as to -- in 23 other words, are you saying that if you elect to use 24 data and engage in a modelling exercise, that's not 25 defining of either "science" or "best science"; it's</p> <p>Page 70</p>	<p>12:28 1 there's at least a minimum content that must exist for 2 something to qualify as "science". You may go beyond 3 it. But one couldn't, as it were, have an enormously 4 unambitious approach which sort of had a cursory glance 5 at some of the literature and said: well, that's the 6 science, and that's good enough. 7 So I'm just wondering how you understand this in 8 relation to an objective notion of the minimum content 9 of what could be considered best scientific evidence or 10 advice. 11 MR JURATOWITCH: I entirely accept what's just fallen from 12 the Tribunal. There will be two ways to deal with that 13 situation. 14 One is: if the position was so bad, then it might 15 not constitute "science". That would be one way to deal 16 with it. And the UK doesn't have any particular 17 objection to methodological rigour being required. 18 It simply doesn't arise in this case because on any 19 standard for these purposes, the English scientific 20 report sails over it. But that would be one way to do 21 it, on the content of "science". 22 The other way to do it -- and this comes to 23 a question that the Tribunal has asked -- is on 24 "available". It couldn't be that there was something 25 readily available that could be asked for, that could be</p> <p>Page 72</p>

<p>12:29 1 forthcoming within a short period of time, at 2 insignificant cost, which a state decided not to ask for 3 because it didn't want to know what the answer was. 4 Then "available" would be doing the work to stop that 5 kind of problem. 6 So there are those two ways for the Tribunal, or any 7 TCA tribunal, to deal with the problem that the Tribunal 8 has rightly identified as a conceptual problem in terms 9 of interpretation. 10 JUSTICE UNTERHALTER: Lastly, I'm just interested to know 11 whether, if the definition of "scientific" for the 12 purposes of the treaty is "based on science", whether 13 that's not rather circular. Because how does one know 14 what the content then of that is? 15 I understand that the issue as to what constitutes 16 "science" may have -- one might argue about certain 17 parameters of what that means. But the notion that it's 18 simply "based on science" begs the question as to: well, 19 what is "science"? 20 MR JURATOWITCH: With respect, one can't leave out the word 21 "best", and that's where that work is done. Once 22 something passes the threshold of being "science", once 23 it's available, the question is -- and I'll come to 24 this -- was it the best available? And that's 25 comparative.</p> <p>Page 73</p>	<p>12:32 1 that it doesn't constitute "science", and therefore 2 can't constitute "best available science". But insofar 3 as they're seeking to take that conclusion out of what 4 constitutes "science" and put it into "best available 5 science" as a whole, that's where it falls down for not 6 being comparative. 7 One can see the difficult position that it puts 8 the Tribunal in. Because the Tribunal, not being 9 scientists, could look at something that didn't pass 10 the threshold of constituting "science", and even 11 a non-scientist could probably tell. But once something 12 is over that threshold, what the EU is asking the 13 Tribunal to do is, as non-scientists, to look at a body 14 of scientific work and say: this is so lacking in 15 methodological rigour that it doesn't constitute 16 "science", and therefore can't be "best available 17 science", without providing the Tribunal with 18 a competing body of evidence or an expert scientific 19 witness or other scientific documents on which it 20 relies. 21 Indeed, many of the exhibits on which the EU 22 relies -- and I'll come on to this -- are the same 23 scientific papers that the English and Scottish reports 24 rely on. 25 So that absence of comparison is a key defect in the</p> <p>Page 75</p>
<p>12:31 1 The difficulty for the EU in this case is that they 2 are not saying there's some other body of science with 3 which the science that the UK relied on is competing, 4 and that other body of science is better. That's the 5 essential problem with the EU's case. 6 And what they are seeking to do, because they don't 7 have any science to compare the UK's with in any 8 meaningful sense, is to ask the word "scientific" to do 9 all the work. They are seeking to establish 10 an objective yardstick, as high as they can reasonably 11 make it, against which they can compare the UK's science 12 and then say that it doesn't qualify as "science", and 13 therefore it can't be the best available science. 14 But that's doing the work in the wrong part of 15 496(2). The first question, I accept, is: does it cross 16 the threshold of "science"? But once it's over that 17 threshold, the analysis is comparative. 18 JUSTICE UNTERHALTER: Yes, I think the EU may -- may; they 19 will clarify for themselves -- but they may be saying: 20 the science you have chosen lacks methodological rigour, 21 and consequently can't be "best". 22 MR JURATOWITCH: That I wouldn't accept. 23 I mean, they do say that, I accept that. They say 24 that the modelling in the English scientific report is 25 so lacking in methodological rigour, in their terms,</p> <p>Page 74</p>	<p>12:34 1 EU's case, and can't be overcome by seeking to do all 2 the work on the meaning and application of the word 3 "science". 4 JUSTICE UNTERHALTER: Yes, thank you. 5 THE CHAIRPERSON: Thank you. 6 I would like to follow up on something that you said 7 a little earlier, where you said -- and I'd like to 8 tease out this a bit more, because it seems to be almost 9 like a process issue. You said that you first you look 10 at whether it's "science", then you look at whether it's 11 "available", and then you look at whether it's "best". 12 So is that the sort of process that you think in 13 terms of how the Tribunal might go about looking at the 14 "best available scientific advice"? 15 MR JURATOWITCH: In the end, the Tribunal will have to 16 interpret and apply the provision as a whole. For the 17 purposes of these submissions, I'm breaking it up into 18 those elements because it's a convenient way to address 19 the different issues as they arise. I do think and I do 20 submit that it would be a logical way for the Tribunal 21 to structure its award. But in the end, the question is 22 one of the interpretation and application of the 23 provision as a whole, and this would be one among other 24 ways to do it. 25 THE CHAIRPERSON: Thank you. I was just seeking</p> <p>Page 76</p>

12:35 1 clarification as to what you thought the Tribunal should
2 be doing. But your answer has assisted very much.
3 Thank you.
4 MR JURATOWITCH: We are now at the EU's Submission,
5 paragraph 491 -- it's on your slide 21 -- where the EU
6 confirms that:
7 "... [it] does not challenge the scientific and
8 methodological rigour of: (i) the ICES Technical Service
9 [response], (ii) the remainder of the [English
10 scientific report], and (iii) the Scottish scientific
11 [report] ..."
12 The criticism is reserved only for the modelling,
13 and that forms only one aspect of even the English
14 report considered alone.
15 The model is not the advice. The English scientific
16 report, considered holistically, together with the ICES
17 Technical Service response, is the advice in respect of
18 the English measure, and the modelling is one aspect
19 within the overall package of the English scientific
20 report.
21 I said I had six points; that's the first.
22 The second is that picking out one aspect of the
23 advice and criticising only that one aspect of the
24 overall advice would not undermine the scientific
25 character of the overall advice, even if the criticisms

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12:39 1 The EU yesterday insisted on quality assurance.
2 This is a quality assurance process.
3 The fifth point is that the EU also insisted
4 yesterday on transparency. The English scientific
5 report was publicly available; as the Tribunal noted,
6 the caveats were openly identified; and the scientific
7 papers that it analysed were published. It was open to
8 critique from anyone. And the greatest critiques the EU
9 has been able to make are ones that the authors of the
10 report themselves identified.
11 Unless I can assist the Tribunal, I'll stop there on
12 "scientific", on the basis that those are the UK
13 submissions on why the English report, the Scottish
14 report and the ICES Technical Service response all
15 qualify as "scientific".
16 PROFESSOR RUIZ FABRI: You mentioned six points, and then
17 we had only five.
18 MR JURATOWITCH: Thank you very much for bringing that to
19 my attention. I only dropped the last because, as well
20 as my notes, I also have a clock in front of me. If the
21 Tribunal is particularly interested in this point,
22 I'm happy to make the sixth point.
23 THE CHAIRPERSON: It's up to you.
24 MR JURATOWITCH: I'm confident I've done enough on that
25 point, so I'll move on.

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12:37 1 may be valid.
2 Now, that matters because it leaves the Scottish
3 report untouched by any criticism. And the English
4 report (tab 15, C-45) specifically said at its page 33:
5 "There are several caveats to the modelling work
6 which means it should be viewed in unison with the
7 evidence provided by the wider literature."
8 The third point is that both reports include
9 extensive citation to peer-reviewed scientific
10 literature. The EU doesn't criticise any of it. I made
11 this point in general terms, but to put a number on it,
12 seven of the papers relied on by the UK reports are also
13 exhibits filed and relied on by the EU in this case.
14 The fourth point is that a draft of the English
15 scientific report was reviewed by the UK Fisheries
16 Advisory Panel. That's an expert forum that convenience
17 the chief fishery scientists from each of England,
18 Northern Ireland, Scotland and Wales. And as you see on
19 slide 22, which is R-73, it described the report as
20 "comprehensive and thorough". The panel made some
21 specific suggestions for modifications that were
22 discussed and agreed with the authors, as recorded on
23 the advice output sheet; that's at R-73. And the panel
24 concluded that:
25 "... the evidence and analysis used are sound."

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12:40 1 The third point is: was it the best available
2 science?
3 (Slide 23) Focusing on "best available", there
4 doesn't appear to be any dispute about the meaning of
5 the word "best". The EU cites the Oxford English
6 Dictionary (Written Submission, paragraph 408), with
7 a definition that includes "surpassing others in
8 quality", and yesterday we again heard the word
9 "superlative".
10 It does not mean the best possible advice in
11 an absolute sense. It means that the advice is better
12 than any other advice that is available. And that, as
13 I emphasised a moment ago, is a comparative exercise.
14 On the meaning of "available", there did not appear
15 to be any dispute. The EU's Submission says at 409 that
16 it means "at one's disposal". The advice must be at the
17 disposal of the state at the time that that state takes
18 the decision.
19 There seems to have been a point developed that
20 "available" would cover a situation in which further
21 data was available and a model with different parameters
22 could be built to produce a more finely grained
23 analysis.
24 The UK's principal point is that "available" means
25 already existing. I've already accepted in my response

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<p>12:42 1 to a question a moment ago that theoretically there may 2 be a situation in which something could be added easily 3 and quickly to provide a fuller picture, and that could, 4 in principle, form part of what should properly be 5 considered to be "available", even if, strictly 6 speaking, it did not already exist. 7 That, members of the Tribunal, is certainly not this 8 case. And if the EU considers that more should have 9 been done, it is incumbent on it to articulate what 10 steps it considers should have been taken, how long they 11 would have taken and how much they would have cost, and 12 establish that those factors are insignificant when put 13 in the balance of what should have been done in this 14 case, such that it should have been regarded as 15 "available". 16 Bringing all of that together, the simple and 17 dispositive point is that the EU has not put forward any 18 competing advice on the extent of potential ecosystem 19 benefits of prohibiting fishing for sandeel in English 20 waters of the North Sea and in Scottish waters. That is 21 because there is no such advice, and there is certainly 22 no advice finding that such a prohibition would not be 23 apt to generate ecosystem benefits. 24 It is not, in my respectful submission, enough just 25 to criticise the advice of another; it's necessary to</p> <p>Page 81</p>	<p>12:46 1 that advice? 2 JUSTICE UNTERHALTER: Just before you proceed, I wonder if 3 I could ask you this. We've heard your submissions on 4 the modelling, and I don't want to go into the detail of 5 it, but it's more at the moment on a conceptual basis. 6 If there was, let us assume -- this is purely 7 hypothetical -- an important computational error that 8 systematically skewed certain results in a way that 9 pointed to a conclusion being X when in fact that 10 conclusion isn't supported on either the correct data or 11 with proper computational methods, would it be 12 permissible to bring a challenge and succeed on it 13 because, on its own terms, the advice can't be 14 considered "best" because it just doesn't conform to 15 basic science, as I think you would support as a notion 16 at the heart of the concept? 17 In other words, you don't have to develop another 18 model or an alternative. You just say: there's 19 something so fundamentally wrong with this that 20 it can't, in and of itself and on its own terms, meet 21 the standard that the treaty sets out. 22 Would you accept that? 23 MR JURATOWITCH: I accept that in an extreme case, something 24 may not qualify as "science", and the kind of case that 25 just fell from the Tribunal may be that kind of case.</p> <p>Page 83</p>
<p>12:44 1 show that there was better scientific advice available. 2 I said I would return to your question about Norway 3 pout, and now is perhaps a good time to do so. 4 As the Tribunal will have seen in the scientific 5 reports and the ICES Technical Service response, and for 6 your reference it's also in the Engelhard article that 7 the Tribunal has seen referred to in a number of 8 different documents -- it's C-19, it's an article in the 9 ICES journal -- it is very clear on the science that 10 sandeel are the most important of the North Sea forage 11 fish from the perspective of the ecosystem. 12 The UK continues to consider measures in respect of 13 Norway pout, and already does not allocate its own quota 14 for that species of fish. For Norway pout, that is 23% 15 for the UK and 77% or the EU. 16 For the other major North Sea forage fish, sprat, it 17 is just over 96% for the EU and just under 4% for the 18 UK. Those figures are in paragraph 422.2 of the UK's 19 Submission, with references. And that paragraph makes 20 clear that measures for other forage fish are under 21 consideration, but that sandeel were the priority 22 because of their particular importance to the ecosystem, 23 and the scientific reports therefore focused on them. 24 That brings me, members of the Tribunal, to the next 25 element, which is: did the UK base those measures on</p> <p>Page 82</p>	<p>12:48 1 It may not be "science" in the relevant sense. I accept 2 that. 3 JUSTICE UNTERHALTER: Yes. So even in the build-up of 4 your argument, something could fall at the "science" 5 fence, as it were, because on its own terms it's simply 6 falsifiable or basically so shot through with error that 7 it just cannot, on its own terms, support what it 8 claims. You would accept that? 9 MR JURATOWITCH: I would, yes. 10 JUSTICE UNTERHALTER: You say though that whatever the -- 11 and we'll come to the detail in due course -- but 12 whatever the criticisms, whether they be errors or 13 assumptions, they don't rise to that kind of standard of 14 no longer being "science". Is that your position? 15 MR JURATOWITCH: They're not in the same universe as not 16 amounting to "science". That's my submission. 17 JUSTICE UNTERHALTER: Yes, thank you. 18 MR JURATOWITCH: That brings us, members of the Tribunal, 19 to: did the UK base those measures on that advice? 20 Article 496(2) begins with: 21 "A Party shall base the measures ..." 22 And that calls for an assessment as to whether the 23 UK based the measures on the best available scientific 24 advice. 25 I propose to tackle this first by considering the</p> <p>Page 84</p>

<p>12:49 1 documents as to what the UK did as a matter of fact, and 2 then consider the EU's point about a rational or 3 objective relationship between the measures and 4 the advice. 5 I'll begin with the English measure. At bundle 6 tab 13 (C-44), one find the de minimis assessment, and 7 at page 3 of that, there's the last heading, "Wider 8 Impacts", which we looked at a moment ago. 9 If I could just ask you to turn over the page to 10 page 4, there's a reference at the foot of that first 11 paragraph specifically to the environmental benefits in 12 connection with the scientific advice which is cited in 13 footnote 6. 14 Then at pages 6 and 7, under "Supporting evidence", 15 the English scientific report and the scientific papers 16 cited in it are referred to extensively. 17 And at 17, under the heading "Benefits to the UK", 18 paragraph 61 in particular is based on and cites 19 the English scientific report, and then there's a table 20 over the page which is part of the qualitative table 21 taken from the English scientific report. 22 If I could then ask the Tribunal to go to 23 bundle tab 17 (R-77), where one finds the ministerial 24 submission of 14 September 2023. 25 Paragraph 4 is the recommendation to close the</p> <p>Page 85</p>	<p>12:54 1 accounted for, that these were a matter for national 2 regulation, and that this supported the proposed English 3 measure. 4 Those documents and others like them show that, as 5 a matter of fact, the UK based the English measure on 6 the English scientific report and the ICES Technical 7 Service response. 8 That takes us, members of the Tribunal, to the 9 Scottish measure. And I'd ask you to turn over to 10 bundle tab 22 (C-49), where on page 3 of the document -- 11 it's bundle page 318 -- there's a heading 1.1. In the 12 paragraph just above that, it's explained that the 13 Scottish scientific report was produced to inform 14 consultation and made available as part of it. 15 The document then proceeds to explain the science, 16 with extensive reference to the sources cited in 17 the Scottish scientific report. And it concludes at 18 pages 23 to 24 by summarising the science and indicating 19 an intention to prohibit fishing for sandeel, subject to 20 consultation. 21 If I could ask the Tribunal to turn to bundle 22 tab 26, which is R-98. This is the Scottish ministerial 23 submission recommending that fishing for sandeel be 24 prohibited. 25 On page 568 of the bundle in paragraph 8, one sees</p> <p>Page 87</p>
<p>12:51 1 fishery; paragraph 13 involves explicit reliance on the 2 English scientific report; and paragraph 14 is 3 a recommendation based on that advice in which 4 the uncertainty is acknowledged. 5 [Paragraph] 16 in particular refers to the 6 precautionary approach. 7 Paragraph 21 refers to the Danish Government's 8 reaction to the science, where it says, six lines down, 9 that the Danish Government considered it to be 10 "insufficient or outdated scientific evidence". 11 Paragraph 22 notes that the authors of the English 12 scientific report were commissioned to review those 13 concerns, and they, after consideration, said that they 14 led to no change in their advice. And that response is 15 attached to the ministerial submission as Annex A, and 16 it's in your record R-76 and is at bundle tab 16, where 17 the authors of the English report noted that no 18 conflicting evidence had been submitted. 19 Bundle tab 18 (R-86) is a document submitted with 20 the final advice to the minister on 4 December 2023, and 21 the third paragraph refers to a decision to delay the 22 final decision until after the ICES Technical Service 23 response. Then the fourth paragraph records that the 24 previous week, that response was published, and notes 25 that it confirmed that predator needs were not fully</p> <p>Page 86</p>	<p>12:56 1 that the recommendation is made on the basis of the 2 scientific advice, and the authors of the Scottish 3 scientific report are referred to. And the two 4 following paragraphs explain how that advice supports 5 the conclusion and responds to the Danish and EU 6 positions. 7 Those documents show that, as a matter of fact, the 8 UK based the Scottish measure on the Scottish scientific 9 report and the ICES Technical Service response. 10 I propose, members of the Tribunal, next to turn to 11 the question of a rational or objective relationship. 12 I note the time. And although it's slightly before 13 1.00, this topic will certainly extend longer than the 14 amount of time between now and lunch, and I wonder if 15 it would be convenient for the Tribunal to adjourn now. 16 THE CHAIRPERSON: Thank you very much. I think that's 17 a very good idea. 18 So we will have a break now for lunch and return at 19 2.00 pm. Thank you very much. 20 (12.58 pm) 21 (Adjourned until 2.00 pm) 22 (2.00 pm) 23 THE CHAIRPERSON: United Kingdom counsel, you have 24 the floor. 25 MR JURATOWITCH: Thank you very much.</p> <p>Page 88</p>

<p>14:00 1 I now am still within "based on", and I turn to 2 "rational or objective relationship" between the 3 measures and the scientific advice. That's the 4 expression in the EU's Written Submission at 5 [paragraphs] 313 and 314, and of course the Tribunal 6 heard it yesterday. 7 At paragraph 500 of the EU Submission, which is on 8 slide 35, one sees that: 9 "The EU does not ... contest that there is 10 a rational and objective relationship between the 11 'scientific advice' invoked by the UK as the base for 12 the sandeel fisheries prohibition and a prohibition on 13 sandeel fishing in UK waters of the North Sea coinciding 14 spatially with the feeding range of the chick-rearing 15 seabirds for which sandeels comprise a substantial 16 portion of their diet." 17 Yesterday the EU was explicit that this could be 18 multiple closures. And the question the EU poses is 19 whether there is a rational or objective relationship 20 between the scientific advice and a full closure, as 21 opposed to a series of partial ones. On that, I have 22 four points. 23 The first is: the UK's measures were not motivated 24 only by seabirds, and certainly not only by 25 chick-rearing ones. That is a category in which the</p> <p>Page 89</p>	<p>14:04 1 whiting and haddock, were also part of the motivation. 2 Those benefits were less certain and of a lesser 3 magnitude, to the extent that they could be quantified 4 at all, but that is a question of degree, not of 5 motivation or of the likely existence of a benefit. And 6 again, it cannot be said that that benefit points 7 towards a partial rather than a full closure. 8 The EU is wrong to insist that unless advice 9 quantifies a benefit, and quantifies it in a verifiable 10 manner, there is then no rational or objective 11 relationship between a measure pursuing that benefit and 12 unquantified advice on which it is based. The advice 13 was that there may be benefits for marine mammals and 14 some predatory fish in prohibiting fishing for sandeel, 15 and the UK prohibited fishing for sandeel in part for 16 those reasons. 17 The third point is even if the foraging range of 18 seabirds were especially relevant, or even alone 19 relevant, it does have a rational connection to a full 20 closure. 21 (Slides 36-37) The EU relies on a map at C-23, 22 page 45 for where the sandeels are -- it's a 2011 23 article, so now dated by some 14 years, but accepting it 24 for present purposes -- and a map at C-39, which is 25 figure 5, for where the birds are.</p> <p>Page 91</p>
<p>14:02 1 effect is particularly startling, but it is not the only 2 objective of the measures. The measures aim to benefit 3 the North Sea ecosystem by benefiting sandeel and, 4 through them, seabirds, marine mammals and other fish. 5 The second is that the EU accepts the relationship 6 between reducing fishing mortality and increasing 7 sandeel abundance, and it also accepts that this has 8 a positive effect on seabirds. Those points must be 9 implicit in its approach in that paragraph 500. The EU 10 has not explained how the same relationship would not be 11 true, to one degree or another, for all species that 12 prey on sandeel. 13 Since the diet of minke whales in the North Sea is 14 56% sandeel, it seems quite straightforward that the 15 minke whale population may be more resilient if there is 16 higher sandeel abundance. And since the diet of harbour 17 seals in the North Sea is 37% sandeel, and grey seals 18 41%, it equally seems quite straightforward that their 19 populations may be more resilient if there is greater 20 sandeel abundance. 21 The English and Scottish scientific reports were 22 clear that there may be benefits for marine mammals, and 23 there is no suggestion that these would in any way point 24 towards a partial rather than full closure. 25 The benefits for predatory fish, and in particular</p> <p>Page 90</p>	<p>14:06 1 Now, we know from numerous studies that the bird 2 with the greatest dependence on sandeel for breeding 3 success is the kittiwake, and so I'll focus on that. 4 As you see from the kittiwake entry on the slide 5 (37) -- "Black-Legged Kittiwake" at the top, second from 6 the left -- it is present throughout the North Sea, 7 running seaward from the British coast all the way to 8 the French and Norwegian coasts, more spread out in 9 January and more concentrated near the coast in the 10 breeding season in July, but according to this source, 11 present to some degree throughout the North Sea in both 12 months reported. 13 I do not accept the EU's assertion yesterday that 14 the non-breeding season does not matter, and have shown 15 you some passages in the science concerning that point. 16 But more importantly, this study, on which the EU 17 relies, does not analyse foraging range. It says where 18 the birds were found, not where they came from. 19 Just before leaving this paper, if I could ask you 20 also to look at figure 4, which is on slide 38, from the 21 same paper. This shows cetaceans, in circumstances 22 where the paper covered cetaceans and seabirds. You 23 were shown minke whale yesterday. We know that harbour 24 porpoises have a high sandeel content in their diet and 25 benefit from greater sandeel availability, and the</p> <p>Page 92</p>

<p>14:08 1 references for that are in the UK Submission at 2 [paragraph] 106.2. 3 If I could just ask the Tribunal to look in the 4 second row, second from the left, where the harbour 5 porpoises are. They are concentrated, as the Tribunal 6 will be able to sell, in sandeel area 1r. 7 The information on foraging range, as opposed to 8 just where the birds are, is in the paper by Woodward 9 and others that formed the foraging range lines overlaid 10 on the pink shading in figure 29 of the Scottish 11 scientific report, which is now very familiar to the 12 Tribunal. The data from that paper, as I mentioned, is 13 based on GPS trackers on birds, so that's real-world 14 data. 15 That paper and its data have been used by NatureScot 16 to provide guidance for the purposes of applications for 17 offshore wind projects, to which the foraging range of 18 seabirds is obviously relevant. That's at R-114. The 19 table is on slide 39, and it shows the mean maximum plus 20 one standard deviation. In figure 19 in the Scottish 21 scientific report, it's the mean maximum without the 22 standard deviation, but from the same paper and the same 23 data. 24 The standard deviation is added because that's the 25 limit within which most birds will forage. If it were</p> <p style="text-align: center;">Page 93</p>	<p>14:11 1 of the difficulties with the EU's case are that it does 2 not say where any such closures should be and why; which 3 bird species the closures should be aimed at protecting 4 and why; how many such closures it would regard as 5 permissible and why; and most importantly of all, what 6 the size of any such closures should be and why, and how 7 that would differ, if at all, from a full closure. 8 These diagrams are based on the data in the Woodward 9 article that was part of the best available scientific 10 advice. The UK simply makes them available to the 11 Tribunal to show that if, for example, taking the EU's 12 case, protecting kittiwakes was the objective, as the EU 13 has accepted, then there is a rational and objective 14 relationship between that accepted objective and a full 15 prohibition. That's not the UK's case, but it is 16 an answer to the EU's case. 17 That brings me, members of the Tribunal to the topic 18 of displacement. 19 A partial closure may tend towards the mere 20 displacement of fishing effort from one area to another. 21 That is a rational and objective basis for preferring 22 a full prohibition to a partial one. 23 I've already taken you to the treatment of 24 displacement in connection with the ICES advice in the 25 English scientific report and the Scottish scientific</p> <p style="text-align: center;">Page 95</p>
<p>14:09 1 without the standard deviation, as it was in figure 29, 2 it would cover the foraging range of the average bird, 3 but not that of a bird needing to go further than that 4 average for food. 5 Now, for kittiwake, the mean maximum foraging range 6 with one standard deviation is 300 kilometres. Others 7 with high sandeel concentrations in their diet are 8 gannet, at over 500 kilometres; and on the next slide 9 (40), from the same table, puffin, at 265 kilometres. 10 Those are the figures used by NatureScot for the 11 different purpose of considering offshore wind 12 developments. 13 When the gannet distances are plotted against the 14 United Kingdom's EEZ, they look as you see in slide 41; 15 and when kittiwake are plotted against the exclusive 16 economic zone, they look as you see in slide 42. 17 The EU was strident yesterday that these diagrams do 18 not form part of the best available scientific advice 19 because they were created by the United Kingdom for its 20 Written Submission. The UK entirely accepts that, but 21 it rather misses the point. 22 The EU's case in its Written Submissions, and 23 emphasised repeatedly yesterday, is that partial 24 closures would be justified insofar as they are based on 25 the foraging range of chick-rearing seabirds. Just some</p> <p style="text-align: center;">Page 94</p>	<p>14:13 1 report, and there is no need to return to it. But I'm 2 conscious that your question on displacement asked for 3 reasons, and an additional one is the Strategic 4 Environmental Assessment conducted by the Scottish 5 Government at C-52, where the same point is made at 6 paragraph 2.3.4. 7 Could I ask though that we look at bundle tab 23 8 (C-50). This is the Scottish scientific report. And on 9 bundle page 375, you'll find figure 12, which you know 10 by now very well indeed. 11 The point that I seek to emphasise for present 12 purposes is the location of the Turbot Bank. You'll see 13 that marked in a yellow colour as one of the grounds for 14 sandeel, with the source as the Jensen paper from 2011. 15 I'd ask you to consider the location of the 16 Turbot Bank specifically in connection with the edge of 17 the area that is presently closed. One can see from 18 that relationship how "fishing the line", as the 19 Scottish scientific report referred to it, could occur. 20 Could I then ask you to look just at the facing 21 previous page; it's page 18 of the report. Those 22 diagrams are heat maps for vessels fishing for sandeel. 23 The most recent data available before this report was 24 written was for 2021. And it shows a clear example of 25 fishing the line.</p> <p style="text-align: center;">Page 96</p>

<p>14:15 1 I'd ask the Tribunal to bear in mind in this 2 connection that ICES is now providing zero-catch advice 3 for all of sandeel area 4, in which most of that closed 4 area falls. 5 One can readily see, members of the Tribunal, 6 why the EU had so little to say about displacement 7 yesterday, notwithstanding your question specifically on 8 that topic. 9 The EU further contends -- and it did say much on 10 this yesterday -- that the sandeel fishery is currently 11 exploited in a manner that ensures a healthy level of 12 sandeel stock in the North Sea. You heard that 13 yesterday, and the Written Submissions include it at 14 paragraph 494. 15 Essentially, the EU is arguing that the status quo 16 is appropriate, subject to its point about partial 17 closures for chick-rearing seabirds, which I've already 18 addressed. There are two further answers on whether the 19 status quo is appropriate, and the Tribunal will already 20 have in mind the point of context with which I started 21 about the ICES advice and also the ICES Technical 22 Service response, and the further answers are these. 23 It is not for the European Union to question the 24 UK's policy objective of providing increased levels of 25 protection to sandeel, its predators and the overall</p> <p>Page 97</p>	<p>14:18 1 mortality. The only control that the UK has is in 2 respect of fishing mortality, and that's the aspect that 3 it has controlled. 4 Members of the Tribunal, putting all of those 5 different aspects together, the UK's submission on the 6 last element of 496(2), centring on the word "base", is, 7 first, that as a matter of fact, the UK did base 8 the measures on the scientific advice, as the 9 decision-making papers show; and secondly, that there is 10 a rational and objective relationship between the 11 measures and the advice. 12 Unless I can assist the Tribunal on that point, 13 I'll move to the precautionary approach. 14 The Tribunal has well in mind the context in the 15 treaty for this, which is 494(3)(a), followed by the 16 definition in 495(1)(b), which the Tribunal was looking 17 at earlier this morning. 18 The point that I make now, arising from the 19 definition in 495, is that the precautionary approach 20 does not require the absence of any scientific 21 information before being applicable; it applies where 22 there is an absence of adequate scientific information. 23 And that must be so, because otherwise the presence of 24 any relevant scientific information would negate the 25 application of the precautionary approach.</p> <p>Page 99</p>
<p>14:16 1 ecosystem. Neither the EU nor, with respect, the 2 Tribunal can, under the terms of the TCA, impeach the UK 3 for seeking to pursue a high level of protection for 4 the ecosystem of which sandeel form part. 5 The EU says in general terms that it accepts that 6 the level of protection is for the UK to choose. But 7 then as its argument cascades and reaches the stage of 8 application, the EU is, in essence, seeking to dictate 9 to the UK that it can protect nesting seabirds, but not 10 non-nesting seabirds, not marine mammals, not other 11 fish, and thus not the ecosystem as a whole. 12 It is not, with respect, for the EU to decide for 13 the UK that pursuing benefits for seabirds is 14 reasonable, but pursuing them for whales, seals, haddock 15 and whiting is not, just because those benefits might be 16 of lesser magnitude or have less certainty. 17 The final argument of the EU on this point is that 18 it addresses the idea that the natural mortality of 19 sandeel is high. That's the EU Submission at 20 [paragraph] 496. And it seeks to draw from that that 21 closing the fishery is not necessary because it actually 22 doesn't have as great an impact as natural predation on 23 sandeel. 24 But this, of course, supports the UK's measure. 25 The UK has no direct control over causes of natural</p> <p>Page 98</p>	<p>14:20 1 In this respect, if I could refer the Tribunal to 2 R-96: it's the Scottish approach to the consultation 3 report. There's no need to go to it now, but it's at 4 bundle [tab] 27, page 589 of the bundle. 5 It specifically acknowledged that the evidence base 6 "is not definitive", and that the benefits are 7 "uncertain". But it explained that this is due to the 8 variability in the system, not lack of information or 9 data, and in that context it specifically adopted 10 a precautionary approach, as it was entitled to do, 11 consistently with Article 494(3)(a). 12 Ecosystems are of course complicated, and 13 decision-makers need to proceed on the best information 14 available in an area. That will always involve 15 uncertainty because the variables are so great. And 16 that lack of full scientific certainty does not prevent 17 the UK from adopting measures to protect the 18 environment. 19 The UK's submission on the precautionary approach is 20 that if -- contrary to the UK's submission -- if there 21 is any doubt about the relationship between the science 22 and the measures in this case, then the precautionary 23 approach would be operative and would justify the 24 measures, notwithstanding any uncertainties or 25 inadequacies in the science.</p> <p>Page 100</p>

<p>14:22 1 Members of the Tribunal, those are the different 2 elements of Article 496(2). It would follow 3 ineluctably, if the UK is right on 496(2), that there is 4 also no breach of 496(1), read together with 494(3)(c). 5 That's the provision of 494(3) that refers to best 6 available science. So the UK won't address that 7 separately. 8 I have covered all of the points that you actually 9 need to decide for claim 1 brought by the European 10 Union. But for completeness, unless I can assist the 11 Tribunal further -- which I'm of course happy to do -- 12 I would now ask the Tribunal to call on Ms Boileau to 13 turn to the specific criticisms on the modelling. 14 THE CHAIRPERSON: Thank you. 15 Professor Ruiz Fabri has a question for you. 16 PROFESSOR RUIZ FABRI: Yes, thank you. 17 It's more or less the same question I put yesterday 18 to the EU, maybe with other words. And it's also 19 triggered by what you've just said about the 20 precautionary approach. 21 So just to clarify, is it the UK's position that 22 except for the modelling -- which Ms Boileau will be 23 back with, if I understand well -- even if we accept the 24 modelling, do you consider that all the other pieces of 25 scientific advice are enough to justify the full</p> <p>Page 101</p>	<p>14:25 1 operative if the Tribunal were to conclude that there 2 was not adequate scientific information; and if that 3 were the conclusion, the measures would still be 4 justified by reference to 494(3) and its reference to 5 the precautionary approach, even with that inadequacy. 6 That's the UK's position. 7 PROFESSOR RUIZ FABRI: Yes, I understand. But what I fail 8 to understand is why it would be necessary to go for the 9 first step, and show there is enough scientific advice, 10 if in any case the precautionary approach would cover 11 the measures. 12 MR JURATOWITCH: It wouldn't logically be necessary. But 13 it's nonetheless the UK's position, both in this case 14 and over time since the measure was justified and 15 implemented, that the science is sufficient, that there 16 is adequate science, and that's enough for the measure. 17 And consistently with the approach that's been taken in 18 real time, that remains the UK's approach now. 19 If the Tribunal finds that the UK is wrong about 20 that, then the UK's submission is that the precautionary 21 approach applies. But in principle, the UK's position 22 is that the precautionary approach is not needed in this 23 case. 24 PROFESSOR RUIZ FABRI: Yes, okay. 25 And just a complementary question to make sure that</p> <p>Page 103</p>
<p>14:23 1 geographical scope of the measure? 2 MR JURATOWITCH: Yes. 3 PROFESSOR RUIZ FABRI: Yes. 4 MR JURATOWITCH: That is the UK's position: that the 5 precautionary approach is not needed, and that the 6 evidence through which I have taken you today is enough 7 to justify the full extent of the geographical scope of 8 the measure; and that if the Tribunal is against me on 9 that, then the UK would have recourse to the 10 precautionary approach, for the reason that I've 11 identified. 12 PROFESSOR RUIZ FABRI: Yes, but you consider that the 13 precautionary approach can be a kind of backup position, 14 which means that if the first approach doesn't work, if 15 the Tribunal were to consider that there is not enough 16 "best available scientific advice" to support the UK's 17 measures, then the precautionary approach would in any 18 case apply? 19 MR JURATOWITCH: Yes, that is the UK's submission. 20 PROFESSOR RUIZ FABRI: Okay. So you do not have the 21 assumption that the precautionary approach is usable 22 only in the case that there is from the start the fact 23 that there is not enough scientific advice? 24 MR JURATOWITCH: The UK's position is that the precautionary 25 approach, on the terms of 495 of the TCA, would be</p> <p>Page 102</p>	<p>14:26 1 I fully grasped your argument. Your argument is also 2 that if the Tribunal were to find that the model part of 3 the scientific advice is, let's say, flawed -- it's 4 hypothetical again -- but were the Tribunal to find that 5 the model is flawed, nevertheless the rest of the 6 scientific advice would be enough to justify the UK 7 measure? 8 MR JURATOWITCH: Yes, and without the precautionary 9 approach. The UK's position in that circumstance would 10 be that the rest of the science -- so the analysis of 11 the literature in the scientific study part of the 12 English scientific report, and all of the Scottish 13 review and the ICES Technical [Service] response -- are 14 enough, without the modelling, to justify the measure. 15 If the Tribunal is against the UK on that, and 16 regards any inadequacy in the model to create 17 an inadequacy in the science, then the precautionary 18 approach would be engaged in that circumstance. 19 PROFESSOR RUIZ FABRI: Okay. For both the Scottish measure 20 and the [English] measure? 21 MR JURATOWITCH: Well, it wouldn't arise -- if the Tribunal 22 is with me that they are two different measures, then 23 it wouldn't arise for the Scottish measure because the 24 modelling is not relevant to the Scottish measure. But 25 for the English measure, then the position that I just</p> <p>Page 104</p>

<p>14:27 1 described would apply. 2 PROFESSOR RUIZ FABRI: So it means that the measures are 3 distinguishable not only because they are two distinct 4 measures, but also through the regime they should 5 receive: one being under the precautionary approach, 6 whereas the other one could be scientifically justified 7 as such? 8 MR JURATOWITCH: Yes, that follows. And that's so whether 9 or not the Tribunal approaches it as two measures or one 10 measure with separable parts, to be analysed separately. 11 The precautionary approach could apply to one but not 12 the other, or to neither, which is the UK's principal 13 position, or to both, which is the UK's alternate 14 position. 15 PROFESSOR RUIZ FABRI: Okay. Thank you very much. 16 JUSTICE UNTERHALTER: I just wanted to ask you about 17 the language of the definition of "precautionary 18 approach" and the meaning of absence of adequate 19 scientific information. 20 If -- again, all hypothetically for the purposes of 21 interpretation -- if the absence arises because there is 22 an inadequacy of the scientific advice where there is, 23 for example, information that was available but not 24 used, can one utilise that as a basis for saying there 25 was an absence of adequate scientific information?</p> <p>Page 105</p>	<p>14:31 1 MR JURATOWITCH: First, the UK would say: you still don't 2 need the precautionary approach in that circumstance 3 because even without the modelling, there's enough to 4 base the measures on in the rest of the science. 5 JUSTICE UNTERHALTER: Understood. 6 MR JURATOWITCH: If the Tribunal were against me on that, 7 and was considering the application of the precautionary 8 approach, then a good faith error in scientific 9 modelling would not preclude the application of 10 the precautionary approach. 11 JUSTICE UNTERHALTER: Yes. I have your submission. Thank 12 you. 13 THE CHAIRPERSON: Thank you very much, Mr Juratowitch. 14 Now I invite Ms Boileau to take the floor. 15 MS BOILEAU: Members of the Tribunal, I will be addressing 16 the EU's argument that the modelling that was undertaken 17 for the English scientific report lacked the necessary 18 scientific and methodological rigour to be considered 19 reputable science, which is the test that the EU asserts 20 has to be met under the TCA. 21 Mr Juratowitch has already explained why the EU's 22 argument fails at an anterior point, and that is 23 because, first, the EU has not identified any superior 24 ecosystem model of the North Sea which was available to 25 the United Kingdom at the time that the English</p> <p>Page 107</p>
<p>14:29 1 In other words, I suppose what I'm asking is: if 2 the difficulty with the science is self-created because 3 there was some data or some other infirmity that could 4 have been cured but wasn't, can one nevertheless say: 5 well, that's an absence that is relevant for the 6 purposes of the application of the precautionary 7 principle? 8 MR JURATOWITCH: No. 9 The first question is whether there's best available 10 science, and I won't go back to the exchanges that we've 11 had on that. 12 If the situation is one in which the absence is 13 caused by an affirmative decision not to seek readily 14 available information, I accept that one could not, in 15 good faith, apply the precautionary principle. That's 16 not anywhere approaching the situation in this case. 17 But for the purposes of testing the limits of the 18 meaning, I accept that the precautionary approach would 19 not save you in that circumstance. 20 JUSTICE UNTERHALTER: Yes. So in other words, your case is 21 that whatever inadequacies -- I mean, you say there 22 aren't any. But assuming there were certain 23 inadequacies in the scientific advice, you say: well, 24 none of those gaps would prevent the application of 25 the precautionary principle, if they were found?</p> <p>Page 106</p>	<p>14:33 1 scientific report was produced, and which could be used 2 for the same purpose; and secondly, because, as 3 Mr Juratowitch has just emphasised, the modelling was 4 only one component of the scientific advice relied upon, 5 yet, as the EU itself accepts at paragraph 478 of its 6 Written Submission, the scientific advice falls to be 7 assessed as a whole. The EU would therefore have to 8 clear multiple hurdles before one even gets to the point 9 of considering the merits of its criticisms of the 10 modelling. 11 In my submissions I will first outline the modelling 12 that was undertaken in the English scientific report and 13 the pedigree of the models that were used. I will then 14 address the four specific criticisms of the modelling 15 that were advanced by the EU. 16 Turning to that first point. 17 Now, the English scientific report utilised two 18 types of models. The first was an Ecopath with Ecosim 19 model, which the EU refers to as the "Ecosim model" and 20 the UK refers to as the "EwE model", but they're exactly 21 the same model. The English scientific report also 22 relied on an ensemble model. 23 (Slide 43) As explained in a recent scientific paper 24 (R-110), EwE models are "the most widely used food web 25 models approach in marine ecosystems", as shown on this</p> <p>Page 108</p>

<p>14:34 1 slide.</p> <p>2 (Slide 44) The EwE model of the North Sea was</p> <p>3 initially developed by scientists Mackinson and</p> <p>4 Daskalov, who published it in a peer-reviewed paper in</p> <p>5 2007 (R-107). As explained --</p> <p>6 THE CHAIRPERSON: Sorry, Ms Boileau, can you go back to that</p> <p>7 slide there, the previous one (43)? Yes.</p> <p>8 You've got highlighted there:</p> <p>9 "Ecopath with Ecosim ... is the most widely used</p> <p>10 food web modelling ...", et cetera.</p> <p>11 But the references there are to a paper from 2004</p> <p>12 and a paper from 2000, both of which are before the</p> <p>13 model was developed, and one even from 1984 and one from</p> <p>14 1987. So the relevant ones would be the ones from 2016</p> <p>15 and 2015. But I just wondered why you put all of those</p> <p>16 additional references in there.</p> <p>17 MS BOILEAU: Madam Chairperson, this, to be clear, is</p> <p>18 a quote from this scientific paper (R-110), which is</p> <p>19 called "It is past time to use ecosystem models</p> <p>20 tactically to support ecosystem-based fisheries</p> <p>21 management".</p> <p>22 Ecopath with Ecosim modelling is a type of</p> <p>23 modelling, but within that, one needs to develop</p> <p>24 a specific EwE model of different oceans and seas. So</p> <p>25 to be clear, this is not saying that the North Sea EwE</p> <p style="text-align: center;">Page 109</p>	<p>14:37 1 And indeed, the next slide (45) shows the long list</p> <p>2 of scientists who contributed to and reviewed aspects of</p> <p>3 the model even before it was published in 2007.</p> <p>4 In very basic terms, the North Sea EwE model</p> <p>5 contains information about the energy flows across the</p> <p>6 entire North Sea ecosystem. So its aim is to represent</p> <p>7 all components of the ecosystem and, importantly, their</p> <p>8 interconnectedness.</p> <p>9 The North Sea EwE model includes 69 functional</p> <p>10 groups, and those include marine mammals, birds, fish</p> <p>11 and so on. The model itself is built using data about</p> <p>12 the biomass of those different groups in the North Sea;</p> <p>13 in other words, how much there is of each species, as</p> <p>14 well as information about how productive they are, so</p> <p>15 their turnover rate, what they eat, and how much of each</p> <p>16 different kind of thing they eat.</p> <p>17 It also includes information about drivers of the</p> <p>18 system, so these are the things that cause the system to</p> <p>19 change over time. One such example is mortality as</p> <p>20 a result of fishing.</p> <p>21 So when all of these components are combined, one</p> <p>22 can simulate, using the model, how the ecosystem and its</p> <p>23 constituent parts may react over time to changes in</p> <p>24 those drivers, such as, for example, an increase or</p> <p>25 a decrease in fishing effort.</p> <p style="text-align: center;">Page 111</p>
<p>14:36 1 model is the most widely used food web modelling</p> <p>2 approach in marine ecosystems; it's saying that EwE</p> <p>3 modelling is the most widely used food web modelling</p> <p>4 approach in marine ecosystems. And the North Sea EwE</p> <p>5 model has been developed specifically to explore the</p> <p>6 ecosystem-wide interactions between different functional</p> <p>7 groups in the North Sea.</p> <p>8 So there are, to be clear, Madam Chairperson, other</p> <p>9 EwE models of different oceans and seas.</p> <p>10 THE CHAIRPERSON: Thank you. That's very helpful, because</p> <p>11 in fact it points to the fact that the EwE modelling</p> <p>12 approach is actually quite of longevity. If I take it</p> <p>13 back to the year 1984, it's a quite lengthy time.</p> <p>14 So thank you for that explanation. Now</p> <p>15 I understand.</p> <p>16 MS BOILEAU: (Slide 44) The EwE model that is specific to</p> <p>17 the North Sea -- that's the one that was developed by</p> <p>18 Mackinson and Daskalov, and they published their paper</p> <p>19 in relation to that in 2007 (R-107) -- explains -- and</p> <p>20 this is an excerpt from that scientific paper -- that</p> <p>21 the development of the model "has taken 6 years". And</p> <p>22 they go on to explain that:</p> <p>23 "A critical step has been to ensure quality control.</p> <p>24 Accordingly, we have invited experts in their field to</p> <p>25 review and contribute to the development of the model."</p> <p style="text-align: center;">Page 110</p>	<p>14:39 1 In 2015, an updated version of the 2007 North Sea</p> <p>2 EwE model was reviewed by the ICES Working Group on</p> <p>3 Multispecies Assessment Methods, and the Working Group</p> <p>4 granted it what is called "key run" status.</p> <p>5 (Slide 46) The ICES Working Group (R-108) describes</p> <p>6 a "key run" as follows:</p> <p>7 "A Key Run refers to a model parameterization and</p> <p>8 output that is agreed and accepted as a standard by</p> <p>9 [the] ICES [Working Group], and thus serves as a quality</p> <p>10 assured source for scientific input to ICES advice. The</p> <p>11 process of accepting a Key Run involves presentation of</p> <p>12 the 'draft' key run in plenary, followed by nominated</p> <p>13 experts engaging with the modelling expert(s) to review</p> <p>14 the specification (inputs), outputs and documentation of</p> <p>15 the Key Run. Any required changes are [thereafter]</p> <p>16 agreed in plenary and documented."</p> <p>17 When the changes are completed, they are then</p> <p>18 further reviewed by experts, and the key run is</p> <p>19 subsequently published by the Working Group on the ICES</p> <p>20 website.</p> <p>21 The North Sea EwE model was approved by the</p> <p>22 Working Group after having gone through this rigorous</p> <p>23 quality assurance process. This means that every aspect</p> <p>24 of the model, all of its input data, all of its</p> <p>25 assumptions, have been critically reviewed and the model</p> <p style="text-align: center;">Page 112</p>

<p>14:40 1 has, in effect, received the ICES stamp of approval. 2 (Slide 48) A recent scientific paper -- indeed, 3 the one that we looked at for the very first slide 4 (R-110), advocating for greater use of ecosystems models 5 in fisheries management -- explains that, in the 6 authors' view, models should be based on best practices 7 and quality-controlled data. In the final sentence of 8 this excerpt, ICES's key runs are listed as an example 9 of such models. They are the gold standard. 10 Now, the North Sea EwE model that was given key run 11 status in 2015 used data up to 2013. But in order for 12 that model to be utilised in the English scientific 13 report, it was necessary to extend it to enable it to be 14 run to 2020. 2020 was the most recent year for which 15 data was available at the time that the English 16 scientific report was produced. 17 (Slide 49) The 2015 report (R-108) in which the ICES 18 Working Group endorsed the North Sea EwE key run states: 19 "... this report also aims to present a quick and 20 easy way to routinely update the Key Run when it is 21 needed." 22 (Slide 50) And how does the report do that? Well, 23 it does that by listing the source of its data for 24 various parameters. Indeed, it links to the databases 25 where that data is to be found, and an example is shown</p> <p>Page 113</p>	<p>14:44 1 and this is a reference to the transcript, page 48, 2 lines 9-10: 3 "To the extent that there is more recent data, 4 a party should therefore rely on that more recent data." 5 Now, using that extended North Sea EwE model, 6 simulations were run exploring various scenarios, and 7 the only variable that was changed in these simulations 8 was the amount of depletion of sandeel in the North Sea 9 as a result of fishing. 10 The modelling simulated a range of scenarios. These 11 included looking at both decreases in sandeel fishing 12 pressure, but also scenarios in which it was increased. 13 That wasn't because anyone was proposing to increase 14 sandeel fishing, but because the purpose of the 15 modelling is to understand and explore how the different 16 components of the ecosystem might be expected to react 17 to changes in sandeel fishing pressure. 18 (Slide 51) Figure 6 from the English scientific 19 report (C-45), which is projected on your screens, shows 20 the results of these simulations. 21 So on the X-axis we have the level of sandeel 22 depletion and on the Y-axis we have relative biomass. 23 The dotted black line shows the level of sandeel 24 depletion in 2020 in the North Sea, so that shows 25 the status quo prior to the prohibition.</p> <p>Page 115</p>
<p>14:42 1 on this slide. 2 Mechanically, the updating process that was 3 undertaken for the purposes of the English scientific 4 report involved looking at those same sources of data 5 indicated in the key run report, and where there was 6 more recent data available for a parameter, that more 7 recent data was input into the model. 8 The specific updates that were made to the model are 9 set out in the English scientific report at page 21, for 10 the Tribunal's reference; I don't propose to take the 11 Tribunal to it. But the important point is that the 12 updates enabled the model to run to 2020, but they in 13 no way altered the model's structure, function, 14 foundational parameter settings or sources of 15 information. 16 So the model was updated to enable it to be used for 17 the purposes of the English scientific report, but it 18 was still the key run model; it was still aligned with 19 the ICES key run that had been approved by the ICES 20 Working Group. And it's simply inaccurate for the EU 21 to assert that by updating the model in a manner 22 contemplated by the ICES Working Group and using the 23 data indicated by the ICES Working Group, it has somehow 24 lost alignment with the key run. 25 We further note that, as the EU stated yesterday --</p> <p>Page 114</p>	<p>14:45 1 (Slide 52) If we look at one example, so seals, for 2 example, to understand this diagram, and moving to the 3 right from the black dotted line -- so the black dotted 4 line shows the status quo. If we move to the right and 5 we increase the level of sandeel depletion -- in other 6 words, we increase the amount of sandeel fishing -- the 7 biomass of seals decreases. In other words, more 8 sandeel fishing is predicted to lead to fewer seals. 9 The blue shading on this diagram represents the 10 confidence interval for the biomass response, and that's 11 based at 95%. The red lines on this figure I'll come 12 back to in a moment. But in short, the red line that 13 has the longer dashes is the reference point for 14 a scenario in which sandeel fishing is prohibited in UK 15 waters, and the red lines on either side of that reflect 16 the confidence interval in that value. 17 THE CHAIRPERSON: Ms Boileau, can I ask a question. 18 So the red line with the longer dashes, that's the 19 reference point for the scenario where sandeel is 20 prohibited in UK waters? 21 MS BOILEAU: Yes. 22 THE CHAIRPERSON: Where does that reference point come from? 23 So in -- thank you. 24 MS BOILEAU: Madam Chairperson, that in fact brings me 25 neatly to my next argument, because indeed the EU's</p> <p>Page 116</p>

<p>14:47 1 first criticism of the English scientific report refers 2 to how that reference point was calculated. In order to 3 answer Madam Chairperson's question, it's necessary to 4 give a little bit of context to this percentage figure 5 and its relevance, how it was calculated. 6 So the first point of context is that, as 7 Mr Juratowitch explained, geographically, the EwE model 8 reflects the whole of the North Sea. So when one runs 9 a simulation, for example, in which one reduces sandeel 10 fishing pressure by 10%, that reduction is applied 11 across the entirety of the North Sea. That's the way 12 that the model was constructed. And as the model 13 existed then and as it exists now, it is not possible 14 within that model to restrict its geographical scope to 15 only the United Kingdom's waters. 16 Of course, the United Kingdom can only control 17 fishing in its waters. And that's why it has been 18 necessary to calculate what I've been calling this 19 "reference point", so that when one looks at the 20 simulation, one can orient oneself to determine: 21 compared to the status quo, what do the simulations 22 predict might be the position if sandeel fishing was 23 prohibited in UK waters? 24 The figure that the English scientific report 25 arrived at was 58%. I will now explain how that was</p> <p>Page 117</p>	<p>14:51 1 So, in short, in order to arrive at this reference 2 point, this 58% figure, what the authors of the English 3 scientific report did was they looked at historical data 4 from 2003 to 2020 that was publicly available and they 5 calculated, out of all the EU/UK sandeel catch in the 6 North Sea, how much of that came from rectangles in the 7 UK's EEZ and how much of that came from rectangles 8 outside the UK's EEZ. 9 Before addressing the -- 10 THE CHAIRPERSON: Can I ask a question on that. 11 In using the data from 2003 to 2020, is the reason 12 for that particular timeframe because the EwE model used 13 data for that timeframe in the aggregate, as for all 14 the other aspects of it? I'm just trying to get 15 an understanding of why -- or the basis for using those 16 particular years. 17 Thank you. 18 MS BOILEAU: The basis, Madam Chairperson, is simply that 19 that is the data that was available on the European 20 Commission's Scientific, Technical and Economic 21 Committee for Fisheries website. So the authors of 22 the English scientific report looked at what data was 23 available, and used all of it. 24 The Tribunal might recall that in its Written 25 Submission, the EU took issue with the fact that the</p> <p>Page 119</p>
<p>14:49 1 calculated. 2 What the English scientific report did was it used 3 publicly available data from 2003 to 2020 to calculate, 4 out of the whole EU/UK sandeel catch in the North Sea, 5 what proportion of sandeel landings came from within 6 the United Kingdom's waters. So it's a question of 7 geography, it's a question of where the fishing 8 occurred, how much fishing occurred in UK waters 9 compared to how much fishing occurred outside the UK's 10 waters. 11 In terms of how the underlying data is obtained, 12 the data is published on the European Commission's 13 Scientific, Technical and Economic Committee for 14 Fisheries webpage. The English scientific report 15 plainly stated as such. 16 The way that that data gives us information about 17 where sandeel fishing has occurred is that the Tribunal 18 might have seen in certain maps of the North Sea, 19 there's a grid overlay. These are called "ICES 20 rectangles". And when fishing vessels fish in the 21 North Sea, they have to report on a daily basis how much 22 they caught, what they caught and which ICES rectangle 23 they caught that within. That information then gets 24 filtered to national monitoring bodies, which then 25 filter it up to the European Commission.</p> <p>Page 118</p>	<p>14:52 1 authors of the English scientific report used data that 2 predated 2011, which is when the escapement strategy was 3 introduced. They said, "No, no, things will have 4 changed after 2011, so you should restrict the data to 5 that date range". 6 The United Kingdom's Written Submission replicated 7 the exact same exercise that was undertaken for purposes 8 of arriving at the 58% figure using the method that was 9 described transparently in the English scientific 10 report, and was able to show that before and after the 11 introduction of the escapement strategy, the average 12 proportion of sandeel landings that came from UK waters 13 was the same: it was still 58%. So it didn't change 14 before and after the introduction of the escapement 15 strategy. 16 But what is ... 17 PROFESSOR RUIZ FABRI: Just to make sure I understand. 18 Because from what you explain, if I understood well, the 19 initial model, the EwE, was validated with data up to 20 2013 and it became a key run or received a key run in 21 2015. So one might guess that it was updated up to 22 2013. 23 So why update it with data from 2003, and not as 24 from 2013? Just to make sure I understand. 25 MS BOILEAU: Madam Arbitrator, we're talking about two</p> <p>Page 120</p>

<p>14:54 1 different components. So one is the EwE model itself, 2 the North Sea EwE model. It was developed and published 3 initially in 2007, and subsequently it received the ICES 4 key run status in 2015. 5 This reference point, this 58% figure, is not 6 a parameter of the model. It's not data that is input 7 into the model; it's not an update that the UK made to 8 the model. As I foreshadowed earlier, the reason why 9 this 58% was calculated is because the EwE model itself 10 looks at the entire North Sea. 11 So when one looks at the simulations that result 12 from that, it would look, for example, like this slide 13 (52) without the red dotted lines. So it would tell you 14 what the status quo is, and it would give you 15 information about what would happen if you increased or 16 decreased the level of sandeel depletion, but it 17 wouldn't tell you what the scenario would look like if 18 the reduction was limited to a prohibition in UK waters 19 in the North Sea. 20 So that, in short, is why there isn't this alignment 21 between the data that was used to calculate the 58% -- 22 that was based on 2003-2020 data. That's unrelated to 23 the development of the North Sea EwE model and the data 24 that's used to update it. 25 What was striking about the EU's oral submissions</p> <p>Page 121</p>	<p>14:58 1 Commission's Scientific, Technical and Economic 2 Committee for Fisheries, shows a lower total amount of 3 sandeel landings compared to ICES's data, and the EU 4 claims that this has led to an overestimation of the 5 amount of sandeel taken from UK waters compared to 6 non-UK waters. 7 The first point is that the English scientific 8 report acknowledged that there was uncertainty 9 associated with this 58% figure. One of the reasons why 10 there was that uncertainty is because Norway does not 11 publicly disclose where its sandeel landings come from 12 in the North Sea. As that Norwegian data was not 13 available, the English scientific report limited its 14 analysis to where the EU/UK catch in the North Sea was 15 taken from. 16 PROFESSOR RUIZ FABRI: Excuse me, sorry. 17 The fact that Norway does not publish that data 18 would explain 20% in difference, between 39% and 58%? 19 MS BOILEAU: Madam Arbitrator, I'll come back to you on that 20 point. But my understanding is: yes, in effect, the 21 difference in total sandeel landings is attributable to 22 Norwegian landings. And there's a known unknown in 23 the sense that it's not known, based on publicly 24 available information, precisely which ICES rectangle 25 those Norwegian landings come from.</p> <p>Page 123</p>
<p>14:56 1 yesterday was that it advanced a completely new argument 2 that was not in its Written Submission. As I mentioned, 3 in its Written Submission, its argument was that the 4 date range used in order to calculate the average 5 proportion of sandeel landings that come from UK waters 6 out of the UK/EU sandeel catch, in their submission, 7 ought to have been restricted from 2011 onwards. But 8 you heard nothing of that yesterday. 9 Instead, what the EU did was that, first, it didn't 10 respond at all to the UK's argument on that point in its 11 Written Submission, which the Tribunal can find at 12 paragraph 282. Instead, the EU advanced a new argument, 13 which it justified on the basis that purportedly 14 it didn't know how the UK calculated the average 15 reduction in catches. That's the transcript at page 72, 16 line 21. As I mentioned earlier, the methodology for 17 how this was calculated and the source of the data is 18 included in the English scientific report at pages 9 19 to 10. 20 Essentially, the EU presented yesterday in its oral 21 submissions a new percentage figure: it said 22 specifically that the percentage figure that it arrived 23 at was 39%, not 58%. In short, the EU's new argument 24 was based on the fact that the data that was used by the 25 United Kingdom, which comes from the European</p> <p>Page 122</p>	<p>14:59 1 Importantly, just as the European Commission's data 2 which was used in the English scientific report, 3 the ICES data also does not disclose or state where 4 Norwegian sandeel landings have come from within the 5 North Sea. So neither the European Commission's data 6 nor ICES's data would have enabled the authors of the 7 English scientific report to determine where Norwegian 8 fishing occurred. 9 THE CHAIRPERSON: Sorry, Ms Boileau. But if that is the 10 case then surely the two sets of data, the ICES data and 11 the data from the European Commission, should have been 12 basically the same. But it seems to me from the 13 different views of the parties that the data is 14 different. 15 So I think we are trying to get a handle on why 16 there's such a big discrepancy in the data between the 17 ICES data and the European Commission data. Is it just 18 simply a matter of discrepancy? Because it seems that 19 the Norwegian landings, if they both don't take into 20 account the Norwegian landings, then they should be 21 fairly similar. 22 But maybe this is something you could come back to, 23 because I know these are very technical, tricky issues 24 that we're dealing with now. 25 MS BOILEAU: To clarify, Madam Chairperson -- and</p> <p>Page 124</p>

<p>15:01 1 I appreciate that this is not easy to work through -- 2 the European Union didn't, for example, when 3 it presented its submissions yesterday, explain any of 4 this, and there's been a degree of reverse-engineering 5 that we have had to do to even understand how it arrived 6 at this 39% figure. But as best the UK understands, or 7 can discern by reverse-engineering the numbers, you have 8 the ICES dataset, which has a higher amount of sandeel 9 landings because it includes the landings that are 10 attributable to Norway. The European Commission's 11 dataset does not include those Norwegian landings. 12 But neither source tells you, even if you wanted to 13 take them into account, where the Norwegian landings 14 took place. There's no information about the ICES 15 rectangles in which those Norwegian landings took place. 16 Which means that the authors of the English scientific 17 report, even if they had used the ICES data, would not 18 have been able to complete the exercise that they did in 19 the English scientific report to actually figure out how 20 that would change things up and down. 21 Importantly, however -- and this is the upshot -- 22 it doesn't really matter, because, as I mentioned 23 earlier, the authors of the English scientific report 24 accounted for uncertainty in this particular reference 25 point, and this can be shown on this slide (52).</p> <p>Page 125</p>	<p>15:05 1 in the English scientific report. So it's quite 2 comparable: there's only a 1% difference between that 3 figure, the EU's figure, and the "Lower landings 4 proportion confidence interval[]", so that first 5 column on the left-hand side. 6 In short, the purported error that the EU has 7 identified doesn't take the analysis beyond the scope of 8 what had already been accounted for, what had already 9 been done in the modelling exercise. And it certainly 10 doesn't, in our submission, impugn the English 11 scientific report as anything other than scientifically 12 rigorous. 13 JUSTICE UNTERHALTER: Does it alter where you would draw 14 that red line? If you just go back one slide (52). 15 Remember, this debate all began with: how does one 16 derive the red dotted line? 17 MS BOILEAU: Yes. 18 JUSTICE UNTERHALTER: The EU's argument was to suggest that 19 on the basis of the ICES data, there was a coincidence 20 between the lower bound and what they say is derived 21 from the ICES data: 38 and 39 they say is very close, so 22 that's why we should be looking. 23 MS BOILEAU: Yes. So that would represent the red line on 24 the right-hand side. 25 JUSTICE UNTERHALTER: Yes, alright. So it would be --</p> <p>Page 127</p>
<p>15:03 1 So the middle line with the thicker lines, the red 2 line, represents 58% figure, the average proportion of 3 sandeel landings in UK waters out of the EU/UK catch. 4 However, the authors of the English scientific report 5 also calculated the 95% confidence intervals for that 6 figure, and on the lower bound that's 38%, and on the 7 upper bound it's 73%. 8 So what the authors of the English scientific report 9 did was that every time they presented an analysis or 10 the results of the simulation, they included the results 11 not only of the 58% figure, but also of the upper bound 12 and the lower bound. 13 One can see this in this slide (53), in fact, which 14 the EU also projected in its oral submissions yesterday. 15 So the column that is in the middle, "Average landings 16 proportion confidence intervals", represents the 58% 17 figure. The left and right columns represent a 38% 18 reduction and a 73% reduction, respectively. 19 So, in short, what this table shows is how the 20 simulated biomass responds at the 58% figure and the 21 lower end of the confidence interval and the higher end 22 of the confidence interval. And what matters is, for 23 present purposes, that the figure that the EU arrived 24 upon, however it arrived upon it, this 39% figure, is 25 within the confidence interval range that was analysed</p> <p>Page 126</p>	<p>15:06 1 you can't tell quite on the scale of percentage. But 2 yes. 3 MS BOILEAU: If one did want to look at the percentages, 4 the breakdown of percentages, that is in the table that 5 was projected a moment ago. 6 JUSTICE UNTERHALTER: Yes. 7 MS BOILEAU: So in fact, if we if go back to that slide 8 (53), one can see the figures that are based on the 58% 9 in the middle column. Let's take seabirds, for example: 10 plus 6%, plus 8%. If one uses the lower figure, the 11 38%, it brings the percentages down by 1 or 2%, so 12 it brings them down to 4% or 5%. 13 PROFESSOR RUIZ FABRI: It's over 10 years, if I remember 14 well, this increase in biomass? 15 MS BOILEAU: The short answer is: for seabirds, it's 16 10 years; and for all the other species, it's roughly 17 10-15 years. The projections, in terms of how they're 18 done mechanically, they're projected long into the 19 future, to see where things settle after the initial 20 change. And for seabirds, as indicated in page i of the 21 English scientific report, that level is projected to be 22 achieved within 10 years. 23 PROFESSOR RUIZ FABRI: 1% over 10 years or over 20 years, 24 the assessment you could make would be different. On 25 rather low figures, like 6% or 8% or 7%, 1% difference</p> <p>Page 128</p>

<p>15:08 1 might be significant. 2 MS BOILEAU: Two points in answer to that. 3 As Mr Juratowitch has explained, what's really 4 valuable about the modelling exercise is not so much 5 the precise figures that one obtains; it's more so the 6 direction of travel and the trends that are indicated. 7 Including because, of course, in the real world, what 8 was not accounted for in the simulation is climate 9 change, for example. So one would expect it likely that 10 the effects of climate change would dampen, in the real 11 world, the anticipated benefits. 12 The second response to that, Madam Arbitrator, is 13 that when one looks at, for example, the impacts of 14 avian flu on some of the protected seabirds of which the 15 UK hosts internationally important colonies, one can 16 see -- and I don't have the figures to hand right now -- 17 but really significant decreases in the seabird 18 populations in the course of just one year, for example. 19 So in that context, what might otherwise seem to be 20 a relatively small or insignificant increase in seabird 21 biomass actually, in the context of a declining 22 population, vulnerable and endangered populations, is 23 truly significant. 24 I'll turn then to the EU's second criticism of the 25 modelling. And here --</p> <p>Page 129</p>	<p>15:11 1 important for present purposes is that that falls within 2 the range of uncertainty that was analysed in the 3 English scientific report. So that criticism doesn't 4 impugn the scientific foundation of the English 5 scientific report. 6 (Slide 54) I'll turn then to the EU's second 7 criticism of the modelling. And here the EU, it will be 8 recalled, relies on two of the caveats to the modelling 9 that were expressly and transparently identified in the 10 English scientific report itself. In particular the EU 11 relies on caveat 2 to the modelling, which is that it is 12 not a size-structured model, and caveat 3 of the 13 modelling, which is that it does not account for the 14 spatial distribution of sandeel. 15 The identification of caveats in a model are not 16 an indicator that the modelling lacks scientific and 17 methodological rigour. To the contrary, the transparent 18 identification of those caveats is a reflection of the 19 objectivity of the English scientific report. 20 If the Tribunal could please take up the English 21 scientific report at tab 15 (C-45), and turn to page 33. 22 Looking at "Caveat 3" -- and this is one of the 23 caveats that the EU relies upon as depriving the model 24 of the necessary scientific and methodological rigour to 25 constitute "best available scientific advice". But even</p> <p>Page 131</p>
<p>15:10 1 JUSTICE UNTERHALTER: I'm sorry, just before you do so, very 2 briefly, are you saying then that even if one is working 3 with the lower bound, given the figures, the percentages 4 in the first column, that the measure would be justified 5 even if you worked only on that lower bound? 6 MS BOILEAU: My answer to that is: the question that we're 7 looking at, or that I'm addressing, is not whether the 8 measure is justified based on a 5% increase, an 8% 9 increase. I'm addressing the Tribunal on whether this 10 modelling exercise was sufficiently scientifically 11 rigorous. 12 Certainly it might be the case that the specific 13 percentage figures, even if one uses the "Lower landings 14 proportion confidence interval[]" in the first column, 15 wouldn't materially alter any weighing exercise, for 16 example, of costs and benefits -- 17 JUSTICE UNTERHALTER: I'm sorry to interrupt. But I think 18 all I'm asking is: assuming best science is at the lower 19 bound rather than at the middle, what difference does 20 that make? 21 MS BOILEAU: And that's precisely my argument. 22 It's precisely my argument. 23 Even if one uses the lower bound, even if the EU is 24 correct in its submission that the actual reference 25 point that should be used is on the lower bound, what's</p> <p>Page 130</p>	<p>15:14 1 if one looks at that caveat, one can see in the second 2 sentence that: 3 "Not accounting for this spatial component could 4 mean we overestimate or underestimate some specific 5 ecosystem impacts of fishing ..." 6 The EU appears to proceed on the assumption that 7 this caveat necessarily leads to an overestimation of 8 benefits. That's not what the caveat itself specifies. 9 The Tribunal will recall that the EU accepts -- and 10 this comes from transcript page 62, starting at 11 line 10 -- that: 12 "... the Tribunal needs to look at the evidence 13 which the [EU] has presented; and in particular, 14 it would need to look if credible evidence has [been] 15 presented that there was available science that could 16 have addressed the caveats and the problems identified 17 in full transparency in the [English] scientific 18 report." 19 So what then is the EU's "credible evidence" that 20 there was available science that could have addressed 21 these caveats? In my submission, it has identified 22 none. The EU has identified no whole ecosystem model of 23 the North Sea which is size-structured, or which does 24 account for the spatial distribution of sandeel and 25 their predators, much less a model that does both of</p> <p>Page 132</p>

<p>15:15 1 those things at the same time. You have heard from no 2 scientist, no modelling expert, and there has been no 3 scientific paper put before you by the EU which states 4 that such a model of the North Sea existed when the 5 English scientific report was being drafted. 6 In short, the English scientific report deployed the 7 best model which was available at the time. And the EU 8 has not explained how the North Sea EwE model -- which 9 likewise is affected by these caveats, because it's not 10 size-structured and it's not spatially explicit in the 11 way that the EU contends the model should be -- the EU 12 has not explained how the North Sea EwE model is 13 suitable for use by ICES, but not by the United Kingdom. 14 One final point on the EU's criticism that the model 15 is not spatially distributed: to develop such a model of 16 the North Sea, both in respect of sandeel but also 17 taking into account its predators, would be an immense 18 undertaking. 19 If one looks at the ICES Technical Service's 20 response, which is at tab 4 of the bundle (C-22), 21 page 1, paragraph 3, the paragraph that starts with the 22 words "What is not conducted in the assessments", going 23 about midway through that paragraph to the sentence that 24 starts: 25 "ICES advice on fishing opportunities is given at</p> <p>Page 133</p>	<p>15:19 1 And if we look at the very next page, page 3, 2 the second paragraph from the top, the final sentence: 3 "Site- and species-specific studies would be 4 required to ascertain what food supply is required in 5 each case." 6 And in the context of the preceding sentence, that's 7 talking about food availability for specific nesting 8 bird colonies. 9 This, in my submission, gives an overall impression 10 of the amount of work that would be required in order to 11 develop such a model. It's a model that, at least in 12 the context of stock assessment models, ICES says would 13 never be feasible for it to provide advice at that fine 14 level of granularity. 15 And as I took the Tribunal to earlier, it took 16 six years to develop the North Sea EwE model which was 17 subsequently granted key run status. So developing 18 a spatially explicit model of the whole of the North Sea 19 which focuses on the ecosystem role of sandeel would be 20 a significant task. 21 But of course it's not for the United Kingdom to 22 establish that; it's for the European Union to 23 demonstrate that such a model was available at the time 24 that the English scientific report undertook its 25 modelling. It adduces no evidence to make good its</p> <p>Page 135</p>
<p>15:17 1 stock level and cannot function at the level of 2 individual feeding grounds, which goes beyond the 3 detailed level of the stock assessment models." 4 If one turns the page -- 5 THE CHAIRPERSON: Sorry, Ms Boileau, but there ICES is 6 talking about stock assessment models; they're not 7 talking about ecosystem models. So I fail to see -- 8 what is it that you're trying to claim by referring us 9 to this sentence? 10 MS BOILEAU: The point is a simple one, and it's this: if 11 the ICES models that are used for stock advice do not 12 contain the level of detail that would be required in 13 order to give advice which accounts for local predator 14 requirements, how can one expect that the North Sea EwE 15 model would likewise be able to do this? 16 The advice that ICES gives now doesn't rely on 17 a spatially distributed model. No such model exists. 18 If we turn the page in the ICES Technical Service's 19 response to page 2 and look at what Reviewer 1 has to 20 say, and here we're looking at the final sentence of the 21 large paragraph in the middle, where the reviewer 22 explains that: 23 "It is never going to be feasible for ICES to 24 provide catch advice at a sufficiently fine scale to 25 account for this local food requirement ..."</p> <p>Page 134</p>	<p>15:20 1 proposition that this caveat could and should have been 2 redressed. 3 Turning then to the EU's third criticism of the EwE 4 model, which is that it groups seabird species together. 5 Again, the EU has not explained how that grouping of 6 seabirds together renders the modelling unscientific, 7 nor has it explained how this grouping would result, as 8 it asserts, in an overestimation of the benefits to 9 seabirds. 10 It's true that for any individual species of 11 seabird, that figure, or the figures that are arrived at 12 in the modelling, may be an overestimation for that 13 particular species, and for another species it may be 14 an underestimation. But for the category of seabirds as 15 a whole, the fact that the data is not disaggregated on 16 a species-by-species basis doesn't indicate that there 17 has been any overestimation of the benefits to seabird 18 as a category. 19 The North Sea EwE model that was used in the English 20 scientific report in 2022 did not have the functionality 21 to disaggregate the results for individual seabird 22 species. The EU states that there were two previous 23 studies in which seabird data has been disaggregated. 24 The first -- and this is, for the record, 25 Exhibit R-0128; it's not necessary to turn it up -- is</p> <p>Page 136</p>

<p>15:22 1 a report produced by Natural England in 2024 concerning 2 sprat in the North Sea, which uses the EwE model. 3 It is true that that model disaggregates seabird 4 data by species. However, what the EU hasn't mentioned, 5 or hasn't drawn to the Tribunal's attention, is that 6 this paper was published in 2024, two years after the 7 English scientific report was produced. It was only 8 after the English scientific report was produced that 9 a model was developed with this capability. And 10 I'm instructed that it took one year for the model to be 11 developed such that it could disaggregate seabird data 12 by specific species. 13 The other report that the EU relies upon is the ICES 14 key run itself, and the reference for that is R-108. 15 But that also does not disaggregate seabirds by 16 individual species. What it does is it breaks seabirds 17 down into two categories: diving seabirds and 18 surface-feeding seabirds. 19 The modelling in the English scientific report 20 followed that ICES key run, meaning that it made no 21 change to the information in how seabird data was 22 calculated. So the output of the scientific modelling 23 did have separate information for diving seabirds and 24 surface-feeding seabirds; it's just that in compiling 25 the report itself, those outputs were added together to</p> <p>Page 137</p>	<p>15:26 1 upon took one year, and that was just disaggregating 2 seabirds as a category into individual species. The 3 work that would be involved in order to address the 4 other caveats, to produce a spatially defined model and 5 a size-structured model, or a model that included all 6 three of those caveats, in my submission would have 7 required significant time, resources and expertise to 8 develop. 9 Of course, it's not for the United Kingdom to 10 establish that; it's for the European Union to establish 11 that such a model was available, or that developing such 12 a model that redressed or rectified the caveats -- in 13 truth, limitations -- of the model could have been done 14 quickly, easily, cheaply. 15 And of course, as Mr Juratowitch explained earlier, 16 it wasn't incumbent upon the United Kingdom to wait for 17 years for a perfect model to be developed before 18 it could take action. 19 THE CHAIRPERSON: May I ask another question just related 20 to -- sorry, we're talking a lot and asking lots of 21 questions -- but related to what you said about the ICES 22 key run model, which did distinguish seabirds between 23 diving and surface-feeding seabirds; but then the 24 English scientific report, when it looked at it, 25 it combined the outputs for both types of seabirds</p> <p>Page 139</p>
<p>15:24 1 present the information for seabirds as a whole. 2 So to be clear, the North Sea EwE model that was 3 used to produce the English scientific report did not 4 have the ability to break seabird data down into 5 individual species. It did produce seabird data in 6 two categories: diving seabirds and surface-feeding 7 seabirds. 8 PROFESSOR RUIZ FABRI: I would have a question, to make sure 9 again that I follow you well. 10 You say that it was not possible when the report was 11 produced in 2022 to disaggregate by species because 12 nobody did that, and you say that the report that the EU 13 cites came two years later. 14 MS BOILEAU: Yes. 15 PROFESSOR RUIZ FABRI: In a way, if Natural England was able 16 to produce this report in 2024, why wasn't it possible 17 to do the same two years earlier, when going for 18 consultation and for this update of the model. I mean, 19 these were only two years, although two years can create 20 an urgency. So I'm just reflecting on the fact that we 21 are not speaking about a span of time of ten years, but 22 only two. 23 MS BOILEAU: Yes. 24 The point is that to even produce a model that 25 addresses just one of the caveats that the EU relies</p> <p>Page 138</p>	<p>15:27 1 together. 2 MS BOILEAU: Yes. 3 THE CHAIRPERSON: Is there any justification for why 4 they took that approach in the report? 5 MS BOILEAU: Yes, Madam Chairperson. 6 The reason why that was done is because the English 7 scientific report, its purpose was to look at the 8 impacts of sandeel depletion on the ecosystem as 9 a whole. There were no preconceived notions going into 10 this modelling exercise about who would benefit the 11 most, necessarily, or which species should receive the 12 most focused attention. 13 So it's perfectly consistent with the objectives of 14 the measure -- which were not limited to restoring the 15 populations of specific seabird species, or even 16 seabirds as a category -- to present information about 17 seabird data in which those two categories were 18 combined. 19 THE CHAIRPERSON: Would you, however, say that if 20 the English scientific report had continued the 21 disaggregation into the different seabird populations, 22 in the sense of having the ones which were deep-diving 23 or foraging ones, if it had followed that key run 24 approach, would that have improved the comparability or 25 improved the model and made it closer to the key run</p> <p>Page 140</p>

<p>15:29 1 model, rather than being different and diverging from 2 the key run model, just as a question? 3 MS BOILEAU: In respect of how seabirds were treated in the 4 model, the United Kingdom did not change the model in 5 any way in respect of seabirds. So the ICES key run 6 model produces or looks at seabirds in two categories, 7 and that's exactly the same thing that the authors of 8 the English scientific report did. 9 It's just that when it came to taking those outputs 10 and plugging them into this report, they weren't 11 particularly concerned with -- to put it that way -- 12 the specific benefits to diving seabirds compared to 13 surface-feeding seabirds. Their objective was to look 14 at how changing sandeel fishing pressure in the 15 North Sea would affect the ecosystem. 16 So they grouped seabirds to present information 17 about seabirds. You could have had the two categories 18 presented differently, but it wouldn't have actually 19 changed anything about the data itself or the percentage 20 increase of seabirds as a category. 21 I think it's clear, therefore -- I hope I've made it 22 clear that, contrary to what the EU has asserted 23 yesterday, it's not the case that the UK changed the 24 model or took it away from the ICES key run in 25 summarising the information or combining those</p> <p>Page 141</p>	<p>15:32 1 The EU's final argument relates to the fact that the 2 modelling used a fixed fishing pressure. It developed 3 that argument at paragraph 485 of its Submission. 4 The UK has explained why that argument is 5 misconceived in its Written Submissions at 6 paragraphs 283 to 285. And the essence of the problem 7 was that the EU had treated a standard modelling 8 convention as if it were a prediction about fisheries 9 management. 10 The EU has seen the UK's Written Submission on this 11 point, and elected yesterday not to address the argument 12 further. 13 In light of time, I don't propose to take the 14 Tribunal through the ensemble model, particularly as 15 the EU has not advanced any criticisms in respect of 16 that model. But for present purposes, I note that the 17 ensemble model was peer-reviewed and published, and 18 it operated essentially as a sense-check on the results 19 of the EwE modelling. 20 THE CHAIRPERSON: Ms Boileau, would this be an appropriate 21 spot for you to take a 15-minute break? Because you've 22 been standing up there for quite a while. So maybe we 23 could take a 15-minute break now, and we'll return at 24 [3].50. 25 MS BOILEAU: Thank you.</p> <p>Page 143</p>
<p>15:30 1 two outputs in the report. 2 THE CHAIRPERSON: Thank you. That's very clear. That 3 wasn't clear to me before. So thank you for that. 4 MS BOILEAU: The final point on this, in respect of the EU's 5 criticism regarding the aggregation of seabirds, is that 6 the EU's criticism illustrates the danger of viewing the 7 modelling in isolation from the rest of the scientific 8 advice. So whilst the model that was used couldn't 9 disaggregate seabirds by specific species, that doesn't 10 mean that the United Kingdom was in the dark as to the 11 seabird species that were most likely to benefit from 12 the measure. 13 (Slide 55) Indeed, the English scientific report 14 (C-45) states at page 13, as shown on the slide, drawing 15 on the literature review: 16 "Of the multiple species of seabirds studied, the 17 links between sandeels and blacklegged kittiwakes 18 appears to be one of the strongest." 19 So the EwE modelling tells us that seabirds are 20 likely to be the biggest beneficiaries of a prohibition 21 on sandeel fishing, and the literature review allows us 22 to reason that, of the seabirds, kittiwake are likely to 23 benefit the most. And that illustrates why it's 24 important to view the scientific advice holistically, 25 a proposition to which both parties agree.</p> <p>Page 142</p>	<p>15:34 1 THE CHAIRPERSON: Thank you very much. 2 (3.34 pm) 3 (A short break) 4 (3.50 pm) 5 THE CHAIRPERSON: Good afternoon. So, Mr Westaway. (Pause) 6 MR WESTAWAY: I'm going to press on with claim 2, and touch 7 on claim 3 a lot more briefly. 8 The structure of my submissions, Madam Chairperson, 9 will be to start with three -- although I'll take one 10 very shortly -- preliminary points relating to, first of 11 all, the context in Heading Five of the key provision, 12 Article 496; second, the interpretation of "having 13 regard to" and the significance of that; third, 14 regulatory autonomy that we've something about already. 15 Then I want to address having regard to proportionate 16 measures, and move on to non-discriminatory measures. 17 Fourth, Madam Chairperson, and a little more 18 briefly, I will show the Tribunal that the measures were 19 proportionate, in case that's the standard, on the EU's 20 invitation, that the Tribunal takes up; and then finally 21 address claim 3. So fifth, there is claim 3. 22 On preliminary matters, I will make reference to the 23 core bundle and ask you to have it to hand. At times, 24 I may just give the Tribunal page references, or ask you 25 to highlight passages without reading them or skimming</p> <p>Page 144</p>

<p>15:52 1 them. We'll see how we go. 2 But I want to start with page 12, which is the 3 "Fisheries" heading. 4 Now, Mr Juratowitch went to these additional 5 provisions. One can see it starts with Chapter 1. Then 6 one goes on to page 17, Chapter 2. And Chapter 2 is 7 formed of two articles, 496 and 497, and is headed 8 "Conservation and Sustainable Exploitation". 9 [Article] 496 is crucial because that's the 10 provision that the UK was exercising. And I draw the 11 Tribunal's attention to the wording: 12 "Each Party shall decide on any measures applicable 13 to its waters in pursuit of the objective[] ..." 14 And then "having regard to" clearly we'll come to, 15 and that's my next preliminary point. 16 But this wording, in my submission, is consistent 17 with an emphasis on regulatory autonomy and the position 18 under UNCLOS that Mr Juratowitch has already referred 19 to. 20 In passing, if one is thinking: what does one need 21 to do here in terms of cooperation, on page 18, 496(3) 22 is the notification provision. So in passing, one can 23 see that there. But there's not, within 496 itself, any 24 requirement to do more than that. Clearly, in this case 25 there were two extensive consultations which the EU and</p> <p>Page 145</p>	<p>15:55 1 any access to waters to fish granted under the TCA. 2 I would just draw the Tribunal's attention to 497 on 3 page 19. So it is within Chapter 2; [that's] why it's 4 of some relevance. And 497(1) refers to the "access to 5 fish". But note 497(2): 6 "Each Party shall take all necessary measures to 7 ensure compliance by its vessels with the rules ...", 8 et cetera. 9 So it's clear that access to waters is subject to -- 10 qualified by, if one prefers -- measures. 11 The next point is if one looks at the structure of 12 Heading Five, page 20, Chapter 3. This is the next 13 chapter, so it's separate from Chapter 2, titled 14 "Arrangements on Access to Waters and Resources". 15 Essentially, what one finds here and in the following 16 articles is a set of administrative provisions providing 17 for consultations on catches. 18 And then where catches are agreed -- so where 19 catches are agreed, if the Tribunal looks at 20 Article 500, page 24 -- I'm looking at 500(1) there: 21 "... [the] Part[ies] shall grant ..." 22 And then at 500(4) on page 25, this: 23 "In particular, the outcome of the annual 24 consultation should normally result in each Party 25 granting: ..."</p> <p>Page 147</p>
<p>15:54 1 Danish authorities and others took part in, and there is 2 no complaint on Article 494(3). 3 So that's the first observation. 4 The second observation is: we can see in Article 496 5 the state, the party, it making conservation measures. 6 There is the ability for there to be agreement on 7 conservation measures as well as part of annual 8 negotiation. 9 And one can see that in two places. First of all, 10 Article 498, which covers the negotiations over fishing 11 opportunities, 498(4)(d) on page 21. And then in 500, 12 similar wording, 500(2) on page 24: 13 "The Parties may agree ..." 14 And at (c): 15 "... technical and conservation measures agreed by 16 the Parties ..." 17 Then there's key wording there: 18 "without prejudice to Article 496." 19 So we have a balance here: the possibility of 20 agreement of fisheries management measures; and then 21 the right of the party to decide on its own measures, 22 presumably if agreement is not possible. And that is 23 this case. 24 Third observation: where conservation measures are 25 agreed or decided upon, the effect of them is to qualify</p> <p>Page 146</p>	<p>15:57 1 So one has this presumptive grant of access to fish 2 the stocks where catches are agreed. That's what 500 is 3 doing. And just observe there, just mark next to (a), 4 (b) and (c) under (4) on page 25, those are effectively 5 the criteria attaching to that access. I've referred to 6 those because they're replicated in Annex 38, which 7 I'll come to next. 8 So the final point on this is Annex 38. The EU 9 emphasised that, I might say, a number of times 10 yesterday on all aspects of its case. 11 If we look at Annex [38], it provides for this 12 adjustment period for four and a half or so years -- 13 five and a half years, I think. It obviously affects 14 the allocation of fishing opportunities, but the 15 overarching submission of the UK is it does not affect 16 decisions or agreement on conservation measures. So 17 decisions or agreement on conservation measures is not 18 affected. And there's no good reason, in my submission, 19 why it should. Access to waters to fish is subject to 20 those kinds of measures. 21 The Tribunal's advance question 4 asked [about] the 22 relationship with Annex 38 and regulatory autonomy, and 23 a number of other questions about derogation. 24 In response to that, one can see on page 59 the very 25 first recital to Annex 38 itself:</p> <p>Page 148</p>

<p>15:59 1 "AFFIRMING ... sovereign rights ..."</p> <p>2 So there can be no question that regulatory autonomy</p> <p>3 is not compromised by Annex 38.</p> <p>4 As far as the derogation point is concerned, the</p> <p>5 answer to that is on page 60, and the derogation is</p> <p>6 spelled out. Article 2(1):</p> <p>7 "By way of derogation ..."</p> <p>8 Because Annex 38 is clearly separate from the core</p> <p>9 provisions, but it applies to this adjustment period:</p> <p>10 "... from Article 500(1), (3), (4), (5), (6) and</p> <p>11 (7) ..."</p> <p>12 But not Article 500(2). That's critical, because</p> <p>13 that's the provision that relates to measures agreed or</p> <p>14 decided by the parties.</p> <p>15 So there is no derogation, is the answer to</p> <p>16 question 4, in measures, no derogation from Annex 38.</p> <p>17 It's a misreading of the TCA to read it in those terms.</p> <p>18 The derogation does not extend to that.</p> <p>19 PROFESSOR RUIZ FABRI: Excuse me. I'm not sure I fully</p> <p>20 followed what you said.</p> <p>21 The question was whether the full prohibition was</p> <p>22 a derogation to Annex 38, if I remember well. And you</p> <p>23 say it's not?</p> <p>24 MR WESTAWAY: Yes, it's not a derogation. And nor would any</p> <p>25 other measure, properly justified under Article 496,</p> <p>Page 149</p>	<p>16:02 1 the meaning of the derogation is a derogation from the</p> <p>2 provisions that are stated, i.e. that grant of access in</p> <p>3 Article 500 currently depends upon agreement of catches,</p> <p>4 and has the adverb "normally" in 500(4). Those</p> <p>5 provisions do not apply in the adjustment period.</p> <p>6 As I've said, it doesn't affect measures. And note</p> <p>7 that this isn't the only measure that's been notified</p> <p>8 under Article 496; this is one of them. But it</p> <p>9 certainly doesn't fall as an exception to Annex 38, and</p> <p>10 nor is it precluded or otherwise limited by Annex 38.</p> <p>11 The last point on this, about the adjustment period,</p> <p>12 is question 17, and it's just a short answer to that.</p> <p>13 The Tribunal asked about urgency involved, given the</p> <p>14 2026 end of the adjustment period.</p> <p>15 I don't think the UK would say that the measure or</p> <p>16 measures were justified as an emergency. They're not</p> <p>17 emergency measures. But I'll just give you a reference:</p> <p>18 core bundle, page 152 -- this is the call for evidence</p> <p>19 (C-43) -- does note the need for "urgent action to</p> <p>20 protect stocks" from "increasing pressures" in the</p> <p>21 changing world, and urgent action was supported by</p> <p>22 advocacy from environmental NGOs such as</p> <p>23 BirdLife International.</p> <p>24 So that's the first preliminary point.</p> <p>25 The second one, if I may move on, is "having regard</p> <p>Page 151</p>
<p>16:00 1 having regard to Article 494, be a derogation. That</p> <p>2 wouldn't be the correct analysis.</p> <p>3 Indeed --</p> <p>4 THE CHAIRPERSON: Excuse me. Can I just -- I believe from</p> <p>5 the transcript that you said that it applies to the</p> <p>6 adjustment period, but not -- during the adjustment</p> <p>7 period, it applies to Articles 500(1), (3), (4), (5),</p> <p>8 (6) and (7), but not Article 502.</p> <p>9 MR WESTAWAY: Yes.</p> <p>10 THE CHAIRPERSON: And you say:</p> <p>11 "That's critical, because that's the provision that</p> <p>12 relates to measures agreed or decided by the parties."</p> <p>13 Am I correct? Because 502 is "Specific access</p> <p>14 arrangements relating to the Bailiwick of Guernsey,</p> <p>15 the Bailiwick of Jersey and the Isle of Man". So could</p> <p>16 you explain, maybe?</p> <p>17 MR WESTAWAY: 500(2) on page 24.</p> <p>18 THE CHAIRPERSON: Okay. So it's 500, paragraph 2?</p> <p>19 MR WESTAWAY: I apologise entirely. I'm going far too</p> <p>20 quickly, and I apologise. Article 500(2).</p> <p>21 THE CHAIRPERSON: Thank you. That's clear now.</p> <p>22 MR WESTAWAY: No, no, no, I'm grateful for the question,</p> <p>23 because there's a number of provisions here.</p> <p>24 In terms of the meaning of the derogation, which was</p> <p>25 a point the EU raised, and it's the last point on this,</p> <p>Page 150</p>	<p>16:03 1 to", and we can stay for the moment in the provisions.</p> <p>2 So 496 contains this, we've seen that; 494(3) contains</p> <p>3 it as well. So it's repeated and, in the UK's case,</p> <p>4 deliberate language.</p> <p>5 The EU wrongly characterises the obligation not as</p> <p>6 a "have regard to" duty, but as a duty to ensure that</p> <p>7 the measures decided upon are proportionate and</p> <p>8 non-discriminatory. That creates a substantive</p> <p>9 obligation and that is not the language of the TCA.</p> <p>10 One can see that in the EU's written case, for</p> <p>11 example, at paragraph 538. The UK's position is set out</p> <p>12 in useful summary at paragraph 330 of the UK's case.</p> <p>13 By reference to that, yesterday the EU made</p> <p>14 an argument in submissions that the UK wants, or seeks</p> <p>15 somehow, through this arbitration, "unfettered</p> <p>16 discretion" or "carte blanche", and argues that would</p> <p>17 jeopardise the objectives in the TCA and Heading Five.</p> <p>18 The UK considers that to be an unhelpful</p> <p>19 exaggeration. The UK seeks only to give deliberate</p> <p>20 wording in the TCA its ordinary meaning. There's no</p> <p>21 reason to think that the UK would or lawfully could, as</p> <p>22 the EU's Agent put it yesterday -- and I'm quoting; this</p> <p>23 word came up a number of times -- "nullify" the EU's</p> <p>24 rights by "prohibiting fishing in UK's waters one stock</p> <p>25 after [an]other" (Day 1/7:20-21).</p> <p>Page 152</p>

<p>16:05 1 If that were what the UK wanted to do, it would have 2 to satisfy the decision-making process in Article 496. 3 One can speculate whether it would or possibly could. 4 The prohibition on sandeel, however, did, for the 5 reasons that are set out in the UK's case, and we've 6 heard from Mr Juratowitch and Ms Boileau the ecosystem 7 justification for that. 8 But we do accept that this question is fundamental, 9 and it's fundamental not just to this case but to the 10 relationship between the parties under the TCA. It 11 affects the question the Tribunal has to ask itself 12 under claim 2, and therefore under Article 496, taken 13 together with 494. Is the question, as we say, whether 14 the EU has demonstrated that the UK failed to have 15 regard; or is the question another one, that the EU has 16 demonstrated that the measures substantively were not 17 disproportionate or non-discriminatory? 18 We set this out in our written case, so I'll take it 19 relatively briefly. We've got three overarching 20 responses to say that the UK's interpretation is 21 correct. 22 The first of these is ordinary meaning. There is 23 simply no need for an elaboration here. The words "have 24 regard to", "taking into account" or "compte tenu" are 25 clear.</p> <p>Page 153</p>	<p>16:08 1 The third point that we make is that the meaning is 2 affirmed by the travaux to the TCA. I won't go to this, 3 but the Tribunal will have seen Exhibit R-120, which 4 refers to the draft TCA that was transmitted to the UK 5 in March 2020. 6 Article FISH.5(2) says, on "Technical measures" -- 7 "Technical measures" meaning restrictions, or including 8 restrictions on access to fishing areas; see 9 Article FISH.2(1). And what was put forward in advance 10 of the negotiations was that such measures: 11 "... shall be based on the best available [science] 12 and shall be proportionate, non-discriminatory and 13 effective ...", et cetera. 14 Now, that clearly was rejected in negotiations, and 15 negotiations will have looked at that wording and 16 deliberately interposed "have regard to", precisely to 17 put more emphasis and more weight in the overall balance 18 on regulatory autonomy. 19 So we do maintain the important submission that 20 the duty is what it appears to be, to "have regard to", 21 rather than something stronger, which is the EU's case. 22 And that has very significant consequences for the EU's 23 claim 2. 24 The third preliminary point, unless there was -- 25 JUSTICE UNTERHALTER: Can I just ask: on your understanding</p> <p>Page 155</p>
<p>16:07 1 And one can, if one needs, draw an analogy with 2 other obligations in international law. Note, the EU 3 does this in part of its case, where it tries to draw 4 a distinction between "based upon" scientific advice and 5 "taking into account" scientific advice in UNCLOS, and 6 it characterises "taking into account" in UNCLOS as 7 an obligation of result. That's paragraph 312 of the 8 EU's case. 9 An obligation of conduct, I apologise. They say 10 it establishes an obligation of conduct. 11 That's correct. But that's also what Article 496 12 and 494 do. And I won't go to it, but we note at 330.1 13 of our Submission a similar conclusion in the Whaling 14 case. It's simply an expression of the ordinary 15 language. 16 The second point here is the context. And two 17 sub-points. 18 First, Article 496 concerns a decision-making 19 process; not surprising to find a procedural obligation, 20 rather than a substantive obligation, in that context. 21 And the second point: it's important to recall 22 a strong emphasis on regulatory autonomy in the TCA. 23 The Tribunal will be well aware that attention is drawn 24 to regulatory autonomy specifically in the context of 25 the provision which the EU relies upon.</p> <p>Page 154</p>	<p>16:10 1 then of these words, how does taking into account 2 constrain the party that wishes to act, the reasons for 3 taking or not taking a measure? In other words, what's 4 the difference between the taking into account and just 5 exercising, as it were, pure regulatory autonomy? 6 MR WESTAWAY: I think we would accept -- and I think we do, 7 in our written submissions -- taking into account must 8 be done in good faith, it must be done with an open 9 mind. Taking into account is not an empty obligation, 10 but it's a procedural one, not a substantive one. 11 The UK's position on this is that taking into 12 account means that one must, in good faith, have regard 13 to the factors that are relevant to applying 14 proportionate measures and non-discriminatory 15 measures -- 16 JUSTICE UNTERHALTER: Just to be clear about it, if, 17 in taking into account, various factors start to stack 18 up against the measure, what does that do to your 19 ability then to take the measure? I'm just trying to 20 get a sense of what discipline is read. 21 Because one wouldn't want to have, I don't think, 22 an empty proceduralism that you nominally go through. 23 It's got to make some difference -- the process of 24 bona fide proceeding in this way has got to make some 25 difference to both how you take the decision and the</p> <p>Page 156</p>

<p>16:12 1 impact of these reasons upon your ultimate decision. 2 Do you agree? 3 MR WESTAWAY: I would agree with that. But the difference 4 is one that binds its sounding in the decision-making 5 process. And it means -- and this is a case we'll come 6 to, where the UK did conclude that the measures -- over 7 a process, concluded that the measures were both 8 proportionate and non-discriminatory. 9 That may be the classic case where one can see 10 the state considered the matters, concluded they were 11 proportionate and non-discriminatory: clearly, the party 12 took into account, for the purposes of 494(3)(f), those 13 points. And that suffices. 14 That goes further, in the UK's submission, than is 15 necessary, because there is a possibility, as the 16 Tribunal noted yesterday, that it may be that in a case 17 there's other factors. A party may -- it's possible -- 18 conclude that there is a level of discrimination, 19 a level of disproportionality in some respects. But 20 some of the other matters that one finds both in 21 494(3) -- the other "principles" as they're expressed -- 22 or indeed other matters of equivalent value would serve 23 properly to enable that state to make a decision that 24 departed from those principles. 25 But the value of "have regard to" would, in</p> <p>Page 157</p>	<p>16:15 1 headings. 2 On interpretation, I think this can be taken 3 relatively briefly. What is a proportionate measure is 4 not defined in the TCA; it must be given its ordinary 5 meaning. And there's a fair amount of agreement as to 6 the constituent elements. There's one difference. 7 As far as the agreement is concerned, what we 8 characterise at paragraph 345 of our case is there are 9 three elements. (1) and (2), relationship between ends 10 and means and the appropriateness to the objective, are 11 not really in dispute in this case. (3), that there 12 must be a consideration of weighing or benefits and 13 adverse impacts in light of that objective, that's where 14 the EU takes issue. So when we come to application 15 I'll focus on that. 16 The Tribunal's advance question 13 asks specifically 17 about whether there's a need under proportionality to 18 consider the least restrictive or a less restrictive 19 alternative measure. And yesterday I noticed that the 20 EU's Agent gave an answer to that question saying: no, 21 so on the one hand agreeing with the UK's answer, which 22 is also, "No, there's no requirement for that", but then 23 adding (Day 1/138:20-22) that the requirement is: 24 "... to consider whether there is a proportionate 25 measure which would have better reflected the balance of</p> <p>Page 159</p>
<p>16:13 1 an ordinary case, mean that a state would be concluding, 2 in its terms, with its consideration of that -- not the 3 Tribunal's, not the European Union's -- but properly 4 concluding that measures are proportionate and 5 non-discriminatory. 6 JUSTICE UNTERHALTER: Yes, thank you. 7 MR WESTAWAY: So this isn't, just to come back to it -- in 8 terms of the notion that the UK is pursuing some extreme 9 submission here, that's just wrong. 10 The last topic I was going to touch on is regulatory 11 autonomy. I think really that's been covered quite 12 a lot. 13 I think the simple point to underscore here is the 14 emphasis to UNCLOS, the Convention on the Law of the 15 Sea, that one finds expressly within Recital 20 and 16 Article 493, at the top of Heading Five. That's been 17 touched on already, but the headline point is that 18 UNCLOS itself don't provide a right of access to fish, 19 but it does underscore the jurisdiction on coastal 20 states to regulate for the protection of the marine 21 environment. 22 So they are the preliminary matters. I want to move 23 on then to looking at "proportionate". And the 24 structure of this has to be to start with interpretation 25 and then application, so I'll deal with those two</p> <p>Page 158</p>	<p>16:16 1 rights and obligations between the parties." 2 So that was new to us as a formulation, and seems 3 rather extraordinary formulation, with no basis in the 4 wording of the TCA or elsewhere, which effectively says 5 that the UK is constrained not only to adopt measures 6 that are proportionate, but ones that best reflect the 7 balance and rights and obligations of the parties, and 8 for that reason discards any deference to regulatory 9 autonomy. It cannot be right. 10 The UK's position on question 13 would be in the 11 negative: no requirement to look at less impactful 12 alternatives. But the alternative measures may be 13 a relevant tool to consider whether or not a measure is 14 proportionate. So they may be a relevant tool, but it's 15 not a requirement that one has regard to them. One can 16 look at the overall decision-making process, and if that 17 tool arose and was done, then that's part of that 18 exercise, but it's not that parties invariably must 19 employ that tool. 20 We address this point about necessity, and the 21 distinction between necessity and proportionality, which 22 is fundamental to this debate, at our case, 23 paragraphs 349 to 350. I just wanted to touch on 24 three points. 25 The first one is to remind the Tribunal of the</p> <p>Page 160</p>

<p>16:18 1 references we make at paragraph 349.3 and footnote 665, 2 which are to the considerable number of references in 3 the TCA in other contexts -- mostly, I should say, the 4 trade context or data protection context -- to measures 5 being "necessary and proportionate". 6 So one example to draw out now -- and I don't think 7 we have this in the core bundle, I apologise -- but is 8 Article 366(1)(b). That's a trade article relating to 9 subsidies, so classic trade fare. And it applies 10 a standard that subsidies must be: 11 "... proportionate and limited to what is necessary 12 to achieve the objective ..." 13 So adding to "proportionate" a necessity test. 14 So within the context of the TCA, the two seem to 15 have a clear different meaning. And had it been 16 intended to include a necessity test, that would have 17 been done. 18 That leads me to my second point on this, and I just 19 want to touch on this, which is: there is, at least in 20 parts of the EU's pleading, some common ground here. 21 And the UK would align itself in particular, if I can 22 give the Tribunal references, to the first clause of 23 paragraph 606, to all of paragraph 612 and to all of 24 paragraph 613. 25 [At] that last reference, the EU says -- we would</p> <p>Page 161</p>	<p>16:21 1 an important part of that context. 2 It's entirely right that within the European Union 3 one finds, I think it's fair to say, some different 4 constructions and ideas for proportionality, on the one 5 hand, a strong articulation of it, where it's Member 6 States' actions going against certain interests within 7 European Union law; on the other hand, a manifest error 8 sort of description of it in other contexts, including 9 in the fisheries context. I think that's something 10 that's referred to within our submission. 11 But we don't accept that European Union law provides 12 a useful analogue for understanding "proportionate 13 measures" in Article 494. 14 PROFESSOR RUIZ FABRI: Not even the Court of Justice case 15 law? 16 MR WESTAWAY: No. I'm referring to the Court of Justice 17 jurisprudence. No. No to that. 18 So I can move on then, I think, to the last point on 19 interpretation, which is simply to recall the 20 underscoring of regulatory autonomy within 21 Article 494(3)(f) itself, and then to application. So 22 unless there were more questions from the Tribunal on 23 interpretation, I'm moving on to application of 24 the proportionality standard. 25 THE CHAIRPERSON: May I ask a question as to whether, in</p> <p>Page 163</p>
<p>16:20 1 say correctly -- that it was a "deliberate choice" to 2 say "proportionate", as opposed to "necessary", to 3 differentiate the legal standard from WTO law. 4 Pause there. That is inconsistent with this 5 retention of a necessity requirement within the EU's 6 pleading. I appreciate there's a number of ways in 7 which it's articulated. But it did seem yesterday that 8 the EU was maintaining a necessity requirement within 9 what they saw as proportionality in Article 494(3)(f). 10 PROFESSOR RUIZ FABRI: If I may ask a question, because 11 we have heard of this argument with regard to WTO, but 12 one may not forget that the TCA is related to the UK 13 leaving the European Union. So the understanding of 14 proportionality or "proportionate measures" -- because 15 it's not written "proportionality of measures" but 16 proportionate and not discriminatory -- might also be 17 more related to the meaning these terms have in European 18 law, no? 19 MR WESTAWAY: We don't accept that. Part of the answer to 20 that is Article 4 of the TCA, which expressly distances 21 interpretation from domestic law. Because EU law, in 22 the context of the TCA, is domestic law. 23 As far as proportionality is concerned, one has to, 24 in the UK's submission, interpret that within the 25 context of the TCA itself. And I've touched upon</p> <p>Page 162</p>	<p>16:23 1 the UK's submission, regulatory autonomy is constrained 2 at all by the terms of Heading Five in respect of 3 "Fisheries"? It seems to me, when I listen to the 4 arguments, that in effect the UK is arguing that 5 regulatory autonomy is completely unrestrained, even by 6 the terms of the Heading Five on "Fisheries". But maybe 7 I have misunderstood your arguments. 8 MR WESTAWAY: The argument doesn't go that far. The 9 argument is specific in the first instance to the role 10 of regulatory autonomy in the context we're looking at, 11 which is deciding on conservation measures relating to 12 the "living resources of the Party", in the words of 13 Article 496. 14 That is constrained by the procedural obligations 15 that are set out. It would not be open to the UK to 16 simply arbitrarily, without consideration, impose 17 measures. It cannot be done. So there is constraint, 18 and material constraint. 19 Clearly there's plenty of other constraints within 20 Article 5 on autonomy, because of the negotiations one 21 has to enter into: good faith; again, the agreement on 22 catches, and what flows from that once catches are 23 agreed. So there are clearly constraints on regulatory 24 autonomy. 25 The specific context which concerns the Tribunal</p> <p>Page 164</p>

16:25 1 here -- this is why I referred to Article 194 et cetera
 2 of UNCLOS -- is about measures. And there, regulatory
 3 autonomy finds a particular expression.
 4 PROFESSOR RUIZ FABRI: Yes, but, sorry, just to refer to
 5 what you said before, it might be that the country
 6 doesn't have the same view as ICES or as the European
 7 Union, and could nevertheless consider that it takes
 8 a proportionate measure or non-discriminatory measure,
 9 even if this point of view were not to be shared.
 10 So in your view, it means that whether a measure is
 11 proportionate or non-discriminatory is a self-judging
 12 condition?
 13 MR WESTAWAY: I'm grateful for the reference again to ICES,
 14 because of course a clear constraint to regulatory
 15 autonomy is the "based on best available scientific
 16 advice". That applies: there must be that scientific
 17 foundation. But for the reasons that we've set out at
 18 length, that's satisfied here.
 19 As far as disagreement over what is proportionate,
 20 one can easily see how there might be disagreement over
 21 that. But if the party, in taking the measure, has
 22 properly grappled with the question, and has come to
 23 the conclusion, considering the relevant factors, that
 24 the measure is proportionate, that's, as far as
 25 Article 494(3)(f) is concerned, the end of the analysis.

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16:28 1 the parties, which is that the notion of
 2 a "proportionate measure" is one that looks at the
 3 relationship between means and ends.
 4 I wonder if you could perhaps help us to understand
 5 how narrow or rich that conception might be. One can
 6 conceive of it as a very thin kind of rationality test,
 7 or one can think about whether the relationship between
 8 means and ends is more a sort of reasonableness test, in
 9 which it may be that some consideration of less
 10 restrictive measures is a necessary entailment.
 11 So I'm wondering if you could tell us how expansive
 12 you think the means/ends analysis might be as a central
 13 concept of proportionality.
 14 MR WESTAWAY: As far as the position of the parties, on
 15 which we agree -- it's a relatively traditional concept,
 16 I would say; I wouldn't necessarily want to call it
 17 "thin", because it matters -- is that the means must
 18 contribute to the ends.
 19 JUSTICE UNTERHALTER: Yes.
 20 MR WESTAWAY: But it doesn't require some particularly
 21 detailed scrutiny as to that contribution.
 22 I just recall the EU's case at paragraphs 698 and
 23 699. There's no issue between the parties that those
 24 parts of proportionality consideration are satisfied in
 25 this case. The question arises under the balance or the

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16:26 1 It may well be that the EU takes a different view at
 2 the moment; it may take a different view again next
 3 year. "Proportionate" is not subject to a single
 4 assessment. But as long as the party has properly
 5 grappled with it, that suffices.
 6 PROFESSOR RUIZ FABRI: What you just explained, what is
 7 the impact on what the Tribunal is supposed to do? If
 8 we follow what you say -- or maybe I misunderstood --
 9 once the Tribunal is satisfied that the UK has properly
 10 grappled with scientific advice, it should be satisfied
 11 that the measure is founded and it's okay. So it should
 12 refrain from any control over proportionality?
 13 MR WESTAWAY: The Tribunal is entitled to enquire into
 14 the process, and I'm sure will do. We would invite the
 15 Tribunal to enquire into the process. That's one of the
 16 reasons why we've put a number of decision-making
 17 documents before the Tribunal, so we can help understand
 18 that process. I should say there's plenty in public
 19 domain that explains that process as well, what was done
 20 and what was had regard to.
 21 But "yes" is the answer to the question. It doesn't
 22 go beyond that.
 23 JUSTICE UNTERHALTER: Could I just take you, briefly --
 24 I know you're probably pressed for time -- but just back
 25 to one point of departure which seems to be common to

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16:29 1 consideration of matters, which we accept is part of
 2 proportionality. And as I explained, I accept that as
 3 part of that balance it might be that a tool that's
 4 relevant is to look at alternative measures.
 5 JUSTICE UNTERHALTER: Yes, but I think you've suggested that
 6 it's a heuristic: it might be helpful, you may use it,
 7 you may not use it; it's not intrinsic to the concept.
 8 I understand that the parties have a view about
 9 means and ends, but ultimately we have to do our best to
 10 interpret what the treaty means.
 11 Can this language support what I'm calling
 12 a slightly richer analysis of means and ends?
 13 MR WESTAWAY: Having regard to the ordinary and
 14 well-understood meaning of proportionality, the triple
 15 division, as it were, I think the answer is: no. The
 16 relationship must be between the measure and the ends of
 17 the measure, and the measure must be appropriate to
 18 achieve or contribute to those ends, not another
 19 measure. The existence or otherwise of another measure
 20 is something that might go to a balance, but it doesn't
 21 find its way into the first two limbs.
 22 JUSTICE UNTERHALTER: Thank you. I understand your
 23 position.
 24 MR WESTAWAY: So moving on. I'm in the application section
 25 now, although I welcome any questions about

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<p>16:31 1 interpretation as I go along, because clearly one 2 doesn't need to split them entirely. 3 But I want to spend a little bit of time on this 4 question of weighing and balancing, because this is 5 where the EU aimed its fire, as it were. And I want to 6 do that by reference to the core bundle. I won't read 7 lots of passages, but I will ask the Tribunal to mark up 8 certain passages. Before I do, a couple of preliminary 9 points. 10 It's necessary, for reasons Mr Juratowitch 11 explained, to distinguish between the UK Government and 12 the Scottish Government. We do so in our case, so 13 I will do it here. 14 I think it is helpful to bear in mind that the 15 measure or the measures were developed over a number of 16 years. The call for evidence was in October 2021, 17 asking not about the measure but asking about options, 18 and then in 2022, evidence was developed; and in 2023, 19 we had two separate consultation exercises. 20 But for purposes of my submissions, I want to split 21 into the consultation on the measure and the decision on 22 the measure, and give the Tribunal some references. 23 In doing so, if I may, I will attempt to answer 24 question 14, where the Tribunal asked in advance to be 25 pointed to where the economic and social implications</p> <p>Page 169</p>	<p>16:35 1 that's impacts. And then from page 18 and following, 2 benefits. So it's setting it up in those terms. 3 And importantly, I think the Union Agent took the 4 Tribunal to this, but on core bundle [page] 180, 5 page 22, there is an annex setting out "Non-UK impacts". 6 And note the second paragraph, using "worst-case 7 scenario". So not only is there a grappling with the 8 impacts on EU vessels, or non-UK vessels, but it's done 9 on a worst-case basis. 10 If I can then, on the consultation stage, just give 11 one reference only; I don't want to take the Tribunal to 12 this. It's the associated ministerial submission of 13 15 February 2023, because there were a number of 14 submissions. And within that, that's Exhibit R-74 and 15 paragraph 19. So that's another reference to 16 socioeconomic impacts. 17 Going back to what the EU Agent said yesterday, 18 he criticised the de minimis assessment as being 19 UK-centric by reference to core bundle page 162 and 20 the box at the bottom of the page; the Tribunal may 21 recall that. That's a hollow point. The de minimis 22 assessment is a domestic assessment tool, but this 23 de minimis assessment was deliberately extended, as 24 we've seen, to include impacts on EU vessels and 25 industry. It doesn't go anywhere, that point.</p> <p>Page 171</p>
<p>16:33 1 are considered. So I'll attempt to flag those, but 2 they'll be apparent in any event. 3 But just on that, I'd respectfully remind the 4 Tribunal of the references that are in the Written 5 Submission on that point, and I'll give the UK Written 6 Submission references: paragraphs 372, 379 and 396. So 7 one finds them there as well. 8 So I'll start with the English measure at the 9 consultation stage, and the key document here is tab 13. 10 This is the de minimis assessment, published alongside 11 the consultation. And I'll just flag a few points as 12 we go through it. 13 Internal page 7. 14 I should pause here: I'm not going to spend lots of 15 time on things like the importance of the measure, 16 et cetera, the sensitivity and significance, because 17 I want to get to the weighing exercise. 18 But one can see on page 7 options considered, 19 "Policy options", and then they're considered through to 20 page 10. And the options include -- you see on page 8, 21 core bundle 166 -- closure of smaller areas. 22 The document itself then focuses on impacts; that's 23 page 11 through to page 18. And my first socioeconomic 24 pause is on page 14, the middle of page 14, just to mark 25 the first reference to "vessels in English waters". So</p> <p>Page 170</p>	<p>16:37 1 The same point applies to the equivalent Scottish 2 document, and the reference there is tab 24 of the core 3 bundle (C-51). But he made the same point; it's the 4 same point. 5 So that's consultation, English measure. 6 Moving on to decision and English measure, note core 7 bundle tab 20 (C-75). I won't ask the Tribunal to go to 8 it. That's the consultation responses that inform then 9 what happens. 10 The key document that we've gone to already is the 11 14 September ministerial submission. So this is the one 12 on which the in-principle decision to proceed was taken. 13 Clearly then there was further consideration of the ICES 14 Technical Service report. 15 Within this -- so this is tab 17 (R-77), starts 16 page 269. Paragraph 8, if we can go to that; we don't 17 need the summary. Paragraph 8 is the recommendation. 18 I'd ask the Tribunal to mark that. It raises, even 19 there, EU vessels. 20 Then paragraphs 14 to 16, this is the positive case. 21 14 through to 16. And when the Tribunal gets there, at 22 the end of 16, I draw attention to the last sentence. 23 So setting out those benefits, looking at alternatives. 24 Socioeconomic points and EU considerations are set 25 out at paragraphs 19 to 20, and that really flows</p> <p>Page 172</p>

<p>16:39 1 through to paragraph 27. I think in the interest of 2 time, I'm not going to ask the Tribunal to read all of 3 that. But paragraph 24 is critical. So if I could ask 4 the Tribunal to read paragraph 24. 5 That is critical because it's a conclusion having 6 regard to, as one can see from the first sentence, 7 "a large negative impact on industry", et cetera. 8 Cutting to the end, the view is taken, in light of 9 benefits, that the measure remains -- so the closure 10 remains: 11 "... a proportional measure in terms of the 12 effectiveness ... and delivery of Good Environmental 13 Status for Seabirds and Marine food webs." 14 Rather surprisingly, when the EU Agent took 15 the Tribunal to this document yesterday, he made 16 a submission that it did not disclose any weighing. And 17 he took the Tribunal to paragraph 25 and paragraph 26, 18 which is a consideration of the impact on EU vessels. 19 He ignored paragraph 24, which was the one cited by the 20 UK, in the passage he went to. 21 Paragraphs 25 and 26, however, he also criticised. 22 And he criticised them for making an irrelevant 23 consideration or setting up an irrelevant consideration, 24 because they discuss, at the end of each paragraph, ways 25 in which the economic impacts felt by largely Danish</p> <p>Page 173</p>	<p>16:42 1 reference to the EU sandeel industry, middle of the 2 page. So the economic impacts are recognised. 3 Then core bundle [page] 456 and following -- over 4 the page, 456 and following -- one then gets the setting 5 out of "Options", and the consideration of benefits and 6 impacts against those options. 7 The last reference in this document for now is 8 [bundle page] 461, and it's the main body of text on 9 that page, under the heading (2): again, specific 10 consideration of "EU vessels catching sandeel in 11 Scottish waters". 12 I think I said that was the last reference, but it's 13 not. There is another one, which matters. It's on 14 page 16 (bundle page 464). Tying it together at this 15 consultation stage is the conclusion on page 16, under 16 "Summary and Recommendation". And again, see "[best] 17 able to deliver ... environmental objectives". 18 The other decision-making tool that was employed was 19 strategic environmental assessment, which is 20 an environmental assessment tool and applies to plans or 21 programmes. I think I don't want to take the Tribunal 22 to that, beyond to note a point that we make on 23 page 174, footnote 745 of the UK's submission. So just 24 note that. And the point is: the nature of strategic 25 environmental assessment requires the considering of</p> <p>Page 175</p>
<p>16:41 1 vessels might be lessened because of how they would 2 adapt to the circumstances of the prohibition. He says 3 it's irrelevant. 4 As a matter of public law, or for that part public 5 international law, that argument is again surprising. 6 It's obviously, in the UK's submission, a relevant 7 consideration if the impact may be reduced. And indeed, 8 the discussion there shows careful consideration being 9 given to the impact on EU vessels and industry. 10 So overall, taking the consultation and the decision 11 together, the English measure demonstrates a careful and 12 thorough weighing of benefits against impacts, and 13 a conclusion of proportionality. 14 The Scottish measure, if I may move on to that, 15 unless there's questions on the English measure. 16 I'll employ the same separation, and to avoid too much 17 weariness, I'll take the references without requiring 18 lots of reading, if I may. 19 In Scotland, at the consultation stage, to start 20 with, there were two decision-making tools employed: 21 first of all, the business and regulatory impact 22 assessment, or "BRIA"; that's core bundle tab 24 (C-51). 23 It sets out the objectives on page 2, core bundle 24 [page] 450. 25 Next reference: page 6, core bundle [page] 454,</p> <p>Page 174</p>	<p>16:44 1 "reasonable alternatives", taking into account 2 objectives. 3 So not only in Scotland was this done, a tool was 4 employed -- that's the SEA or strategic environmental 5 assessment process -- that meant that specific focus was 6 given to reasonable alternatives. And that then feeds 7 into the conclusions there. 8 One more socioeconomic reference if I may -- and 9 just a reference -- is Exhibit R-92, paragraph 14, which 10 is a Scottish min sub. 11 So moving on to the decision, the Scottish decision, 12 we can see that clearly: it's core bundle tab 28 (C-66), 13 it starts at 593. And this is the document that's 14 published post the decision: it's the "Final Business 15 and Regulatory Impact Assessment". So it's part of the 16 process; we've got two bits of it. 17 Core bundle [page] 595, bottom of the page, 18 reference to "EU sandeel fishery". 19 And then section 16, core bundle [page] 612. 20 This is important to read -- I'll just ask the Tribunal 21 to mark it -- and particularly the last sentence. So 22 a clear regard to weighing. 23 One finds, I should say, a discussion similarly in 24 the SEA process, but I don't think I need to take 25 the Tribunal to that now.</p> <p>Page 176</p>

<p>16:46 1 I do want to go to the Scottish min sub of 2 26 January. That's tab 26 (R-98), so it's two back. 3 And within that, key references are paragraph 7, which 4 the EU Agent took the Tribunal to -- you see that refers 5 itself to Annex F. -- and then through to 11. So this 6 is "Assessment of Options". 7 And then I'll come back to that, but I just want to 8 go to Annex F, which is where, from bundle page 580, 9 you can see that's "Key Considerations in Assessing 10 Options". And bundle page 583, the end of Annex F, 11 included as a key consideration is the "impact on 12 EU vessels, primarily ... Danish fleet". 13 Then one goes back to the min sub that had regard to 14 those key considerations (R-98). And at paragraph 9, 15 bundle page 569, one finds: 16 "... our analysis is that recommended approach is 17 appropriate and proportionate given the current evidence 18 base and the precautionary principle ..." 19 Again, the EU Agent took you to these documents; 20 again, he declined to draw your attention to 21 paragraph 9, which is the critical weighing paragraph. 22 PROFESSOR RUIZ FABRI: Excuse me, because the EU also led us 23 through these paragraphs yesterday with some comments. 24 So you bring us back to these paragraphs asking that 25 we read them, but you barely comment on them.</p> <p>Page 177</p>	<p>16:50 1 points raised are not responded to, [we can] pick some 2 of them up tomorrow. 3 But first, two extra points on proportionality. The 4 first one I can take very shortly. 5 The EU relies upon a report, Exhibit C-25, which is 6 a July 2024 document, and the short point is: this 7 report only shows that the UK's estimates of financial 8 impact were a worst case estimate. It confirms that the 9 UK was correct in its financial analysis. And indeed, 10 the EU doesn't say otherwise. If anything, it suggests 11 that the impacts will be a fair bit less than the UK 12 considered in its documents. 13 The second point is on the alternative, which you've 14 heard about already, so I'll take it relatively briefly. 15 This is the alternative proportionate measure put 16 forward by the EU of one or more spatially targeted 17 prohibitions relating to chick-rearing seabirds and 18 their foraging areas. 19 The UK notes here that the EU doesn't define such 20 an area, but it does -- and the reference here is EU 21 case, paragraph 754 -- it does accept, or appear to 22 accept, that such a measure, closure in such an area, 23 would be proportionate, despite the fact that it would 24 still entail economic and social impacts. 25 I've got four points on this alternative on</p> <p>Page 179</p>
<p>16:48 1 So it's difficult to see what are your expectations 2 by making us read, just saying, "This is our weighing 3 exercise", but yesterday it was criticised, so we would 4 expect that you would maybe comment a bit. 5 MR WESTAWAY: I think the criticism on this -- and 6 I appreciate the question, because I think I dealt with 7 it very cursorily -- the comment on this from the EU 8 Agent was that it didn't disclose any weighing. The EU 9 Agent took you to page 583 and he said: no weighing. He 10 also made a point that I've already covered about 11 impacts being substituted, and therefore slightly less, 12 which is the last sentence of the middle paragraph on 13 583. So I covered that. 14 But this key point about "no weighing", in my 15 submission, is simply wrong: (1) because the impact is 16 set out in an annex that's called "Key Considerations" 17 to which the minister's attention was drawn; and (2) 18 because one can see the advice that's based upon this, 19 and of course this is part of a bigger picture. At 20 paragraph 9 of the submission that I took the Tribunal 21 to, one can see that. 22 So there is a weighing, and the EU submission on 23 that is not correct. 24 I've got a few additional points, which I'll take 25 relatively briefly. I'm conscious that if some of these</p> <p>Page 178</p>	<p>16:52 1 the facts. 2 First, there's no requirement in the TCA -- 3 we covered this -- for the UK to consider less 4 restrictive measures. So I don't want to return to 5 that, but I do make that point. 6 Second, to the extent that the UK was required to 7 consider less restrictive measures, that requirement is 8 only to consider less restrictive measures that are 9 capable of delivering the benefits sought. Again, the 10 Tribunal has heard on that what the UK sought to achieve 11 and how this mooted alternative wouldn't do it. 12 Third, the mooted alternative is not defined by the 13 EU. And I'd reiterate and draw attention to the UK's 14 case at paragraph 297. The EU has not established 15 before the Tribunal that it would result in anything 16 meaningfully smaller than a full prohibition. 17 And fourth -- and this will just take a tiny bit 18 longer -- but fourth, it's wrong to say that lesser 19 spatial alternatives were not considered. They were, in 20 a number of places. And one can see that if I give core 21 bundle references. 22 To start with, we can go to core bundle [pages] 189 23 to 190. This is the consultation document for the 24 English measure (R-61). It's internal page 9, 25 section 4.</p> <p>Page 180</p>

<p>16:54 1 THE CHAIRPERSON: If I may ask a question here, because 2 you said earlier on that the European Union did not 3 define its area of a possible alternative measure. But 4 I also note from the consultation documents that neither 5 the United Kingdom nor Scotland, when it considered the 6 options of a partial closure, it was not clear from the 7 documents just what precisely was meant by the partial 8 closure in those circumstances. 9 So I think we're actually dealing with a lack of 10 knowledge on both sides, as the Tribunal. 11 MR WESTAWAY: If I can answer that question with the 12 references, because the references I want to take the 13 Tribunal to answer that question, because they explain 14 the way in which alternatives were considered and what 15 was done, and I think they are, hopefully, the key 16 references. If I've missed any, we'll try and pick up 17 a point. 18 But I was at tab 14 (R-61), page 189. So this is 19 the English consultation document. And here, I should 20 say, there were other alternatives considered, technical 21 restrictions and things, but I'm just focusing on the 22 spatial alternatives. 23 The Tribunal can see there, on internal page 9, that 24 there's consideration of spatially lesser alternatives 25 in three ways: first of all, "Closure of English waters</p> <p>Page 181</p>	<p>16:57 1 and this is based upon a submission that went in, 2 I think. But there one finds, about seven lines down, 3 reference to: 4 "... a more extensive closure would have a higher 5 chance of success when prioritising the need for seabird 6 recovery." 7 THE CHAIRPERSON: Yes, Mr Westaway, I think it would be 8 useful in your later written [submission] to point us to 9 the paragraphs where the precise -- which you've just 10 done, so thank you for that, in the previous tab -- the 11 precise partial closure that was looked at. That would 12 be very useful. So thank you for that. 13 MR WESTAWAY: I think it is fair to say that one has both 14 precise consideration and general consideration. So 15 it's not the case that it was just precise 16 consideration, but precise closures were considered. 17 Perhaps slightly in view of the clock, and I don't 18 know how I'm doing on the balance of submissions and 19 questions at the moment, but I may have a little bit 20 longer, but not a lot. But I can give those references. 21 It's probably more efficient to do that -- because they 22 can be found in our case -- when we come back tomorrow, 23 or certainly before the hearing closes. 24 So ultimately, given all of that, tying up on 25 "proportionate", we say there is clear evidence that the</p> <p>Page 183</p>
<p>16:55 1 [just] within SA4 and SA3r", that's option 2; secondly, 2 "Closure of English waters within SA1r"; and then 3 thirdly, discussion of "Partial closures", for example 4 of an area such as Dogger Bank, et cetera. 5 So in specific and general terms, there's 6 consideration of spatially less extensive partial 7 measures. And one can see that that's, in this 8 consultation document, rejected, among other things, 9 because of the displacement issue, which I think was one 10 of the questions the Tribunal asked in advance as well. 11 So one can see that: 12 "... likely to increase fishing activity outside the 13 closed area ..." 14 Then it goes on, over the page, to say that's 15 a recognised issue. And then the second paragraph, over 16 the page on page 10: 17 "Partial closures ... may reduce the ecosystem 18 benefits ..." 19 So that's the first reference. There is 20 consideration of spatially lesser measures. 21 The second, in response to the question, is the 22 ministerial submission that we were just at, so it's the 23 14 September ministerial submission. That's tab 17 24 (R-77), and within that, it's the paragraph -- I ask the 25 Tribunal to read paragraph 24. But there one finds --</p> <p>Page 182</p>	<p>16:58 1 UK did have regard to applying proportionate measures. 2 There was a lengthy process and careful consideration 3 given to the relevant matters. 4 Just for signposting, I've got very little on 5 non-discriminatory measures. I wanted to address the 6 Tribunal shortly, but with a little bit of substance, on 7 the question of whether or not the measure itself is 8 disproportionate, on that question the EU puts before 9 the Tribunal. Then the last point, again very little, 10 on claim 3. 11 So as I say, I'm not entirely sure where I stand in 12 the balance, but hopefully that will work, and if there 13 are points that arise on any of that ... 14 THE CHAIRPERSON: I'm sure the balance lies in your favour, 15 because I understand the questions that we have been 16 taking up [time] as an Arbitration Tribunal. So please 17 go ahead. 18 MR WESTAWAY: I'm conscious that someone is busily clocking 19 up this and that, but I'll carry on. And if for some 20 reason I need to particularly speed up, then I will take 21 a signal from any quarter. 22 So on non-discriminatory measures -- and here again, 23 structurally, although I can take it a lot more briefly, 24 it falls between interpretation and application. 25 On interpretation of non-discriminatory measures,</p> <p>Page 184</p>

<p>17:00 1 again the UK would observe that's not defined. Again 2 the UK would observe that the parties are agreed, at 3 least in large part, that a non-discriminatory measure 4 is a measure that does not discriminate on the basis of 5 nationality; and that would be both in law, de jure, or 6 in facts, de facto. This isn't a de jure case, and the 7 EU doesn't allege that, so we're really looking at how 8 de facto discrimination might apply in this context. 9 And here the key reference I want to go to is the 10 EU's case, because one can see the distinction, fine or 11 otherwise, between the parties: EU's case, 12 paragraph 760. 13 So, 760 starts with reference to 496(1), which we've 14 been to. The parties may: 15 "... take measures ... reflects ... intention ... 16 regulatory autonomy ... EU considers ... [legal] 17 standard for establishing de facto discrimination must 18 accord that reference purpose and meaning." 19 So common ground. 20 The EU then goes on at 761 to say: 21 "For that reason ..." 22 So take regulatory autonomy: 23 "For that reason, the EU does not suggest that the 24 existence of differential impacts of the sandeel fishing 25 prohibition could in itself support a claim that</p> <p>Page 185</p>	<p>17:03 1 "... whether the detrimental impact in trade terms 2 on imports ..." 3 I'm quoting here from paragraph 182: 4 "... stems exclusively from a legitimate regulatory 5 distinction rather than reflecting discrimination 6 against the group of imported products." 7 Clearly that was the flavoured cigarettes case. 8 It just doesn't have any application in the TCA 9 context, where one is looking at non-discriminatory 10 measures in fisheries. And we would, apart from that 11 word "exclusively", say it's common ground, 670-671. 12 If one strikes that out, as one should, one has 13 an articulation of what the Tribunal should find on the 14 interpretation of "non-discriminatory". 15 For that reason, in the UK's submission, the EU has 16 an uphill task on this aspect of its case. And that may 17 be why yesterday the EU did not take on the challenge of 18 arguing this part of the application. The EU did not 19 present an oral case to the Tribunal that the measures 20 are non-discriminatory. That may be why, in the EU's 21 case at paragraph 757, it says that this is a subsidiary 22 point. Subsidiary: it doesn't have independent force. 23 Indeed, if one looks at the substance of the EU's 24 written case, aside from some observations that are made 25 at paragraph 763 -- and they, for the avoidance of</p> <p>Page 187</p>
<p>17:02 1 a measure is de facto discriminatory." 2 So far, common ground. 3 Next sentence: 4 "On that basis, the EU considers that if any 5 differential treatment stems exclusively from 6 a legitimate regulatory objective, there is no 7 'discrimination' ..." 8 And the difference -- I'd say a perfectly fine 9 difference between us -- is this word "exclusively". 10 Common ground apart from the word "exclusively". 11 I want to take that relatively briefly. I'll just 12 give references to our case so that the Tribunal can 13 remind itself of what we say there. In our case, it's 14 [paragraphs] 357.1 and 358 to 359. 15 The simple point is that the derivation of this 16 term, or the adverb "exclusively", is from the trade 17 context; in particular, the Clove Cigarettes case 18 (CLA-53) and the Appellate Body there, where the words 19 are about regulatory distinctions, and the context is 20 free trade rules and exceptions. 21 And for the reason Mr Juratowitch canvassed this 22 morning, the UK does not accept that one can go to WTO 23 to pick out words from a different context, and I'd add: 24 here, a different language. Because one is looking in 25 the Clove Cigarettes case at:</p> <p>Page 186</p>	<p>17:05 1 doubt, are responded to at paragraph 422 of the UK's 2 case -- the EU does not actually make a substantive 3 submission on the measures either being, or the UK not 4 having had proper regard to the measures being, 5 non-discriminatory. 6 So you've got the UK's submissions in writing, but 7 that's what I wanted to say on "non-discriminatory", 8 unless there were questions on that point. 9 So I have two more parts. I am told I have an ample 10 25 minutes left, but I hope I don't need to use all of 11 those. Two more parts. 12 Penultimately, to come back to proportionality -- 13 and this is on claim 2 -- it just leaves the question of 14 whether or not the measures were in substance 15 proportionate. And on the EU's case, that's a matter 16 before the Tribunal; on the UK's case, that is not 17 a matter before the Tribunal. But given the EU's case, 18 it is right that I address it. 19 First, the standard to apply. And I think there's 20 a considerable degree of common ground here, given what 21 the EU said yesterday. The EU's Agent on this point 22 referred to a term "delta" -- the gap between one and 23 the other -- in looking at proportionality, and said 24 (Day 1/188:11-15) the question is: 25 "Is there such a large distinction ..."</p> <p>Page 188</p>

<p>17:06 1 In this presumptive delta: 2 "... that one cannot reasonably conclude that the 3 measure is ... proportionate, that there is an imbalance 4 that is so great ..." 5 And then: 6 "... it's about the magnitude of [that] 7 imbalance ..." 8 That appropriately, albeit in summary terms, 9 describes the standard of review. Effectively, the UK 10 would say the question is: are the costs out of all 11 proportion to the benefits? So on this aspect, if it 12 does arise, that's the question, it seems to be common 13 ground, or a question along those lines, applying a wide 14 margin of discretion, that the Tribunal should be 15 asking. 16 And in the UK's submission, when one looks at 17 the evidence of the costs and the benefits in this case, 18 the answer is: no. 19 I'm tempted simply to remind the Tribunal of the 20 matters in evidence that I've gone to -- in probably 21 a little more of a hurry than I might have, but you've 22 got the references -- to the decision-making process. 23 But on the basis of the matters before the Tribunal, 24 I think I'd want to set out some summary points. And 25 I've got five points on costs and then five points on</p> <p>Page 189</p>	<p>17:09 1 EU's continuing returning to it. 2 And one point that's connected with that -- it's 3 the third point -- is the advance question 15 from the 4 Tribunal. By that question, you asked about the catch, 5 the TAC, for SA4 being set to zero in 2024, and the 6 implications of that for the economic considerations. 7 That in itself the UK wouldn't say affects the 8 economic analysis, because the economic analysis is over 9 a period of time, and there have been catches in sandeel 10 area 4. So we don't say there's zero impact because 11 they wouldn't have been fishing there anyway; there 12 could be an impact, and we had regard to that. 13 But it is relevant in that it demonstrates the 14 precarious nature of the social and economic benefits 15 that the EU relies upon, involved here in fishing for 16 marine living resources such as sandeel. And it is 17 a reason, if the Tribunal is appraised of this, to give 18 less weight to the economic impacts, such as they are. 19 Fourth point: it's also appropriate, notwithstanding 20 the EU's arguments, to note that those affected are able 21 to find substitute sources of social and economic 22 benefits. And I remind the Tribunal of paragraphs 25 23 and 26 of the document at core bundle [tab] 17, the 24 ministerial submission (R-77). 25 Finally, insofar as the Tribunal considers it</p> <p>Page 191</p>
<p>17:08 1 benefits. 2 So starting with costs, the first point is: the 3 financial impacts of the lost value of the landed catch 4 to EU -- largely Danish -- vessels and industry is 5 relatively modest. You've got the document at 6 Exhibit C-25. And in addition, it was calculated by the 7 UK on a worst-case basis, but we're talking in the tens 8 of millions of euros. 9 Secondly, the impairment -- sorry, if I can go back 10 to that point, because I don't think I made this point 11 earlier. 12 One can see how a decision-maker such as the 13 United Kingdom might think that that kind of financial 14 value might be outweighed by important ecological 15 considerations. It's not out of all proportion. 16 Second point, on impacts: the impairment of the 17 right of full access under Annex 38, which was very 18 heavily emphasised by the EU, it's there, but it doesn't 19 add significantly here. As explained already, 20 fundamentally the socioeconomic benefits that arise 21 under the TCA are pursuant to an administrative 22 arrangement, and they are subject, importantly, to 23 fisheries management measures. They are subject to 24 those measures. So if the UK's analysis is right on 25 that, that point doesn't materially add, despite the</p> <p>Page 190</p>	<p>17:11 1 relevant to look at alternative measures in this 2 context, if this exercise arises, a spatially lesser 3 measure would not achieve either the ambition or the 4 effect that was sought by the United Kingdom through its 5 legitimate regulatory objective. And I defer really to 6 all the evidence on the science on that point. 7 So they are the five points on impacts. 8 Five points on benefits. 9 The first point is to go to the importance of the 10 objective: marine conservation. That's fully accepted 11 in a number of places by the EU, both in their oral and 12 their written submissions. 13 The second point is the need for protective measures 14 such as the measures at issue in this case. And there's 15 three sub-points I have. 16 First is that the UK is home to an internationally 17 important number of seabird species, and populations are 18 in decline. More generally, the state of the North Sea 19 marine ecosystem has been a cause for concern for some 20 time. 21 Rather than give you references to documents, 22 I think it's easier to give you references in the UK 23 case to these points. So that's the point we make in 24 the UK case at [paragraphs] 392.2 and 392.5. 25 Second, sandeel are one of, if not the most</p> <p>Page 192</p>

<p>17:13 1 important forage fish in the North Sea that play a vital 2 role in the marine food web. That's UK case, 3 [paragraph] 391. 4 And then thirdly, on need, sandeel are subject to 5 a number of pressures. They are heavily dependent on 6 successful annual recruitment and are highly sensitive 7 to environmental variation, including climate change, 8 which is affecting the North Sea. The only variable 9 affecting sandeel that the UK is able to control is 10 fishing pressure; it cannot control climate change or 11 avian flu. So there's a need for the measures. 12 Third, taking conservation measures is consistent 13 with policy goals. So there is a policy basis, indeed 14 a legal policy basis, for this, to take robust action to 15 achieve good environmental status. 16 I would remind the Tribunal of references in the UK 17 case in particular to the Scottish Fisheries Management 18 Strategy -- UK case, [paragraph] 165 -- and to the UK 19 Marine Strategy. 20 Fourth, there is also extensive domestic support for 21 the measure; this is UK Submission, paragraph 394. Over 22 95% of respondents to the English consultation were in 23 favour, and 97% of respondents to the Scottish 24 consultation. And this is not just uninformed opinion. 25 Respondents included environmental NGOs. And</p> <p>Page 193</p>	<p>17:16 1 context, which militates against an adoption of a rigid 2 weighing exercise, prioritising absolute positions on 3 the one side against absolute positions on the other. 4 In short, one may not be able to monetise 5 environmental benefits, but it doesn't mean that one 6 should not be valuing them. And insofar as the EU was 7 making an argument to the Tribunal of commensurability 8 in some kind of monetary terms, that, in my submission, 9 is misconceived. 10 So that's what I had to say, unless there were 11 questions on substantive proportionality. 12 It moves me on to claim 3, which I think I can take 13 fairly shortly. We addressed this at the end of our 14 written case. 15 The EU does not raise in its submissions a separate 16 claim for a breach of Article 2(1)(a) of Annex 38, but 17 instead describes it as "consequential", which the UK 18 understood to be derivative, dependent upon breaches of 19 Article 494 to 496. On that basis it seemed 20 consequential, and therefore inconsequential. 21 The EU Agent yesterday described it at one point as 22 an additional obligation. That would be an argument, if 23 the EU were to seek to maintain it, that the UK would 24 take considerable umbrage at, because apart from 25 anything else, a claim for breach of Article 2(1)(a)</p> <p>Page 195</p>
<p>17:15 1 respondents provided information about the importance of 2 sandeels and seabirds, et cetera, that informed these 3 outcome. 4 Finally -- this is UK Submission, paragraph 395 -- 5 there were additional benefits arising from the 6 closures, including the increase in the biomass of 7 commercially valuable fish and tourism opportunities. 8 So standing back and weighing the benefits and 9 the costs, it cannot be said that the measures are 10 disproportionate. 11 Justice Unterhalter asked yesterday a question about 12 the difficulties of weighing qualitative considerations; 13 the difficulty of commensurability I think was how 14 it was put. Two observations with regard to that. 15 First, to agree with it, and note that it was 16 recognised by the United Kingdom, and one can see that 17 in the de minimis assessment (C-44), core bundle 18 page 175, where it says (paragraph 59): 19 "Benefits associated with the proposed management 20 are difficult to value and are therefore described ... 21 as non-monetised costs." 22 So engaged with, but it's clearly something that 23 needs to be thought about. 24 And secondly, that the consideration aligns with the 25 TCA's emphasis on the precautionary approach in this</p> <p>Page 194</p>	<p>17:18 1 that doesn't effectively rest entirely upon Articles 496 2 and 494 formed no part of the request for the formation 3 of the Arbitration Tribunal. 4 I'd remind the Tribunal on this point that 5 Article 743(1) sets out the terms of references that 6 apply generally, and apply here, which are: 7 "... 'to examine the ... matter[s] referred to in 8 the request for the establishment of the arbitration 9 tribunal ...'" 10 And Article 739 provides for the request for 11 an arbitration tribunal. It says at Article 739(2) that 12 in such a request, the party: 13 "... shall explicitly identify the measuring at 14 issue and explain how that measure constitutes a breach 15 ... in a manner sufficient to present the legal basis 16 ... clearly." 17 So that's not done. If the EU were to seek now to 18 raise an additional argument, that would be both 19 procedurally improper and also, for the reasons 20 I've given, substantively misconceived. 21 I think, however, that's not where we landed. 22 I think where we landed was that the EU Agent confirmed 23 that claim 3 is consequential symmetrically, so it 24 follows inevitably the result of claims 1 or 2. I think 25 that's where we landed.</p> <p>Page 196</p>

17:20 1 There was a point taken by the EU, a sort of softer
2 articulation, that Article 2(1)(a) and Annex 38 are
3 considerations that need to be expressly considered
4 within the proportionality assessment and the
5 decision-making process.
6 I've covered what the UK says is the impact of
7 Annex 38 and the difference between the parties on that,
8 which is, at least as the EU now puts its case, quite
9 fundamental, because we say that it's not a proper
10 reading of Annex 38.
11 But I'd add on that point that were it the case that
12 specific regard had to be given to Annex 38 in that
13 context, it may be said to be surprising that there's no
14 reference to that anywhere in the TCA, given that the
15 TCA does set out principles to which regard should be
16 had.
17 So they were the points I had. I'm sorry it's
18 a little later than 5 o'clock, but I hope I stayed
19 within my time. So unless there are any questions.
20 THE CHAIRPERSON: Thank you very much, Mr Westaway. And
21 thank you very much for keeping to your time.
22 That concludes our oral hearing for the United
23 Kingdom's submissions. So we will meet again tomorrow
24 morning at 9.30, where we will commence with the
25 European Union's reply, for two hours. We will then

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17:22 1 have a two-and-a-half-hour break, and we will then
2 commence again with the United Kingdom's counter-reply.
3 And following that, there will be an opportunity for the
4 Tribunal to ask even further questions of both
5 delegations.
6 So thank you very much to Agents and counsel and
7 your delegations, and I wish you a very nice evening.
8 And I'm sure you'll be working extremely hard, so thank
9 you very much.
10 (5.22 pm)
11 (The hearing adjourned until 9.30 am the following day)
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