

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 3

Thursday, 30 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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Rebuttal statement on behalf of1

the European Union

 By Ms Norris1

 By Mr Dawes11

 By Ms Norris24

 By Mr Dawes29

Rebuttal statement on behalf of35

the United Kingdom

 By Mr Juratowitch35

 By Ms Boileau42

 By Mr Juratowitch52

 Tribunal questions74

 By Mr Westaway75

 Tribunal questions88

Questions from THE TRIBUNAL101

<p>09:13 1 Thursday, 30 January 2025 2 (9.31 am) 3 THE CHAIRPERSON: Good morning, ladies and gentlemen. 4 This morning we commence with the European Union's 5 reply. The European Union has two hours for its reply. 6 And I wanted to let you know that the Tribunal will 7 exercise restraint in its questions to allow you the 8 two hours, and then also to allow the United Kingdom 9 the two and a half hours for its preparation before it 10 presents its counter-reply at 2.00 pm. 11 So, Agent for the European Union Ms Norris, you have 12 the floor. 13 Rebuttal statement on behalf of the European Union 14 MS NORRIS: Madam Chair, members of the Tribunal, 15 environmental protection is an important and legitimate 16 regulatory objective recognised under international law 17 and in the TCA. 18 A coastal state has sovereign rights in its 19 territorial sea and exclusive economic zone, and it has 20 jurisdiction with regard to the protection and 21 preservation of the marine environment in those areas. 22 This is recognised under international law and confirmed 23 in the TCA. 24 This dispute does not require this Tribunal to 25 adjudicate on those issues. To paraphrase counsel for</p> <p>Page 1</p>	<p>09:34 1 "an administrative arrangement" (Day 2/190:20-21) or 2 "administrative provisions" (Day 2/147:15). That 3 characterisation is wrong in law, and shows a complete 4 disregard to the commitments which the United Kingdom 5 negotiated and agreed to with the European Union when 6 entering into the TCA. 7 Let's now look at Annex 38 one more time. I would 8 ask the Tribunal to turn to core bundle page 59. 9 The United Kingdom started with the first recital to 10 Annex 38, which reads: 11 "AFFIRMING the sovereign rights and obligations of 12 independent coastal States exercised by the Parties ..." 13 This recital shows that the parties were alive to 14 their regulatory autonomy. This is the context referred 15 to in the preamble. The parties then agreed how they 16 would limit the exercise of that autonomy through the 17 grant of specific rights to each other. 18 I would now ask the Tribunal to turn to page 60 and 19 to look again at the terms of Article 2(1). This reads: 20 "... each Party shall grant to vessels of the other 21 Party full access to its waters to fish: ..." 22 And under subparagraph (a), we read: 23 "... stocks listed in Annex 35 ... at a level that 24 is reasonably commensurate with the Parties' ... shares 25 of the fishing opportunities ..."</p> <p>Page 3</p>
<p>09:32 1 the United Kingdom, the European Union is not seeking to 2 impeach the UK for seeking to pursue a high level of 3 protection for the ecosystem of which sandeel form part. 4 It is not inviting this Tribunal to do so either. 5 The UK argued yesterday that this is "a case about 6 catching fish in waters that are not yours" 7 (Day 2/23:16-17). Counsel for the United Kingdom also 8 told the Tribunal (Day 2/23:19-22) that: 9 "The starting point [for your analysis] is that 10 there is no right to go into another state's waters and 11 take its living ... resources unless granted, and then 12 only on the terms granted." 13 The legal context in which this dispute has arisen 14 is precisely one in which rights were granted by the 15 United Kingdom to the European Union to go into the UK's 16 waters to fish sandeel. What separates the parties, and 17 what you must now determine, is the extent to which 18 regulatory autonomy can be relied upon to justify 19 an impairment or, in this instance, nullification of 20 the right to access to waters to fish set down in 21 Heading Five of the TCA, read together with Annex 38 of 22 the TCA. 23 Yesterday afternoon, Mr Westaway took you to 24 Annex 38 TCA, describing the provisions of that protocol 25 to a binding international agreement as setting down</p> <p>Page 2</p>	<p>09:35 1 Members of the Tribunal, this is not 2 an administrative arrangement; this is binding language. 3 Sandeel in the North Sea is listed in Annex 35. There 4 is an agreed EU share of the fishing opportunities in 5 relation to sandeel in the North Sea. 6 The right to access UK waters of the North Sea to 7 fish sandeel is associated with economic and social 8 benefits. That right may be impaired in a manner which 9 is justified, and hence which does not give rise to 10 a breach of the balance of rights and obligations under 11 the TCA. The European Union has never argued 12 the contrary. 13 Hence, the European Union accepts that a fisheries 14 management measure adopted in conformity with 15 Article 496, read together with 494, could amount to 16 a justifiable impairment of those rights. But that is 17 precisely why the conditions under those provisions 18 limiting the exercise of regulatory autonomy when 19 deciding on such measures are so significant. 20 Once the European Union has established 21 a prima facie case that a measure has not been adopted 22 in conformity with those provisions, the United Kingdom 23 must rebut that case; and if it does not, this would 24 breach not only Article 496, read with Article 494, but 25 it would also give rise to a consequential breach of</p> <p>Page 4</p>

<p>09:37 1 Article 2(1) of Annex 38. That is the relevant starting 2 point for this Tribunal. 3 It is the relevant starting point because, by 4 design, Article 496, read together with Article 494(3), 5 reflect the agreed limitations on the exercise of 6 regulatory autonomy. 7 Madam Chair, members of the Tribunal, the 8 United Kingdom argues that some parts of the TCA are 9 about trade and some parts are about cooperation, and 10 that all of the provisions on fisheries can only be 11 considered to be an aspect of cooperation. 12 Let's be very clear: this is a dispute that requires 13 this Tribunal to balance economic and social rights on 14 the one hand with the pursuit of the legitimate 15 regulatory objective of marine conservation on the 16 other. 17 The European Union has never argued that WTO law has 18 a special status when interpreting the "Fisheries" 19 chapter, but it welcomes the United Kingdom's 20 acknowledgement that international economic law may 21 provide relevant context for the exercise of 22 interpreting those provisions. This is a necessary 23 concession given the explicit terms of Heading Six, 24 Articles 513, 515 and 516. This is not instead of or at 25 the expense of other sources of international law. This</p> <p>Page 5</p>	<p>09:41 1 that because of the primacy of regulatory autonomy, 2 it enjoys a very wide margin of discretion, and that the 3 function of this Tribunal is reduced to checking that 4 the decision-maker has "grappled" with the principles. 5 The European Union disagrees on both counts. 6 The European Union has already addressed this 7 Tribunal on the role of the principles in relation to 8 the interpretation of the obligations in Article 496, 9 both as regards basing measures on the best available 10 scientific advice and applying proportionate and 11 non-discriminatory measures. We maintain those 12 submissions. We use this rebuttal, however, to return 13 to the question of this Tribunal's powers of review. 14 In short, the European Union considers that the 15 intensity with which the Tribunal may and should examine 16 the consistency of the sandeel fishing prohibition with 17 the requirements in Heading Five of the TCA is far 18 greater than the United Kingdom has suggested in its 19 pleadings yesterday. In short, just as the United 20 Kingdom always overstates the role of regulatory 21 autonomy, it consistently understates the role of this 22 Tribunal. 23 Members of the Tribunal, you are empowered to 24 scrutinise the decision-making process. You are also 25 empowered to assess whether the output of that process</p> <p>Page 7</p>
<p>09:39 1 is not a battle of norms between UNCLOS and the WTO 2 agreements. The Tribunal may consider both. 3 As regards proportionality, the European Union 4 maintains that it would not run contrary to Article 4 of 5 the TCA for the Tribunal to also have regard to the 6 meaning accorded to that principle under domestic law as 7 part of the relevant context for interpreting the 8 provisions. Counsel for the United Kingdom has not 9 clearly explained why there can be no analogue with the 10 manner in which the apex court of each of the parties 11 has construed and applied those terms. 12 The role of regulatory autonomy under the TCA is 13 material to this Tribunal's resolution of each of the 14 claims in this dispute. First, it informs the function 15 served by Article 494(3) TCA and the principles set down 16 in that provision. 17 The United Kingdom maintains that because of 18 regulatory autonomy, ultimately a party can decide on 19 a fisheries management measure even if it is 20 inconsistent with certain principles in Article 494(3). 21 This interpretation does not befit an international 22 agreement setting down binding obligations as regards 23 access to waters to fish. 24 Second, the role of regulatory autonomy has a direct 25 bearing on the task for this Tribunal. The UK argues</p> <p>Page 6</p>	<p>09:42 1 is consistent with the requirements in Heading Five and 2 Annex 38 of the TCA. 3 The United Kingdom opened its submissions yesterday 4 by telling this Tribunal that there are "two short ... 5 answers" to the European Union's claims (Day 2/1:23-34). 6 Unsurprisingly, the European Union disagrees. These 7 alleged shortcuts illustrate precisely the different 8 conception not only of the rights and obligations under 9 the TCA, but also the task of this Tribunal in weighing 10 and balancing those rights and obligations. 11 According to counsel for the United Kingdom 12 (Day 2/1:25-2:5), the first short answer to this dispute 13 is that: 14 "... whatever criticism the EU ... make[s] of the 15 science ... [it does not] put[] forward other ... 16 scientific advice, let alone any better scientific 17 advice, concerning [this] issue. [And this] is 18 dispositive of the claim under Article 496(2) ..." 19 It cannot be right that under the TCA a party is 20 precluded from challenging the consistency of a measure 21 on the basis of Article 496(2) unless it adduces another 22 model or alternative piece of scientific advice which it 23 positively asserts is better scientific advice. This is 24 an unreasonable construction of the burden of proof, 25 unsupported by how the burden of proof has been</p> <p>Page 8</p>

<p>09:44 1 understood to fall. It would effectively shield the 2 parties from the scrutiny of their measures. It sets 3 the bar too high. 4 On this logic, even if there were evident flaws in 5 the scientific advice a measure is purportedly based 6 upon, a party would be required to produce its own 7 scientific advice on the same issue simply to be able to 8 claim a breach. 9 On questioning from the Tribunal, counsel for the 10 United Kingdom conceded that, in an extreme case, 11 it might be possible to bring a claim without 12 undertaking this exercise. Yet later, in the afternoon 13 (Day 2/107:23-108:2), counsel for the UK contended that, 14 in this instance, the European Union would have needed 15 to have identified: 16 "... [a] superior ecosystem model of the North Sea 17 which was available to the United Kingdom at the time 18 that the English scientific report was produced, and 19 which could be used for the same purpose ..." 20 The European Union does not accept that it is 21 dispositive of its claim that the European Union did not 22 identify or produce another superior model. It has 23 pointed to flaws in the scientific advice relied upon, 24 and this Tribunal may assess the consistency of the 25 sandeel fishing prohibition with the obligation to base</p> <p>Page 9</p>	<p>09:47 1 a subjective element, implying that it is only if 2 a state decides not to ask for available advice, because 3 it "didn't want to know what the answer was" 4 (Day 2/73:3), that this term has any relevance. This 5 cannot be correct. There must be some objective 6 assessment of whether other science could have 7 reasonably been obtained. 8 And what then is the link to the precautionary 9 approach? Counsel for the United Kingdom argued that 10 if it turns out that the UK was wrong to consider the 11 sandeel fishing prohibition is based on the best 12 available scientific advice, the UK would and could have 13 recourse to the precautionary approach. 14 The precautionary approach is not a fallback. It is 15 a manifestation of the precautionary principle, which 16 allows a party to adopt a measure where there is 17 objectively an absence of adequate scientific 18 information. It does not simply kick in where a party 19 omits to base its measures on reasonably obtainable 20 scientific information. 21 Members of the Tribunal, at this juncture I will 22 pass the floor to my colleague, who will respond further 23 on certain aspects of the model. 24 MR DAWES: Madam Chair, honourable members of the Tribunal, 25 the European Union will respond to five points made by</p> <p>Page 11</p>
<p>09:46 1 measures on the best available scientific advice on 2 the basis of those, we say, valid criticisms. 3 The European Union accepts that it has a prima facie 4 burden, but the TCA does not dictate how this is to be 5 met. Moreover, insofar as the concession made by the 6 United Kingdom was confined to circumstances where there 7 are errors which, in their view, undermine the quality 8 of advice as "science", the European Union also 9 disagrees. 10 And this leads me to respond briefly to the UK's 11 position on the meaning of the term "available". 12 The UK appeared in its submissions to assimilate 13 this to mean "at the disposal of the state" 14 (Day 2/80:16-17). They also linked this term to refer 15 to already-existing advice. The European Union takes 16 issue with this interpretation. 17 Where there is an existing model, the question is 18 whether there was data that could reasonably have been 19 obtained and used to parametrise the model, or if other 20 existing components could have been used to extend that 21 model. 22 When, then, does the term "available" come into play 23 or, as counsel for the United Kingdom put it, "do the 24 work"? Here again the parties disagree. 25 Counsel for the United Kingdom appears to add</p> <p>Page 10</p>	<p>09:49 1 the United Kingdom yesterday regarding the flaws in the 2 model, and in the simulated biomass increases generated 3 based on that model. 4 First, the European Union will explain why the UK 5 was wrong to argue that it could not reasonably have 6 parametrised the model to take into account the age of 7 sandeel consumed by predators. 8 The second point the EU will explain is why the UK 9 was wrong that it could not also have reasonably taken 10 into account in the model the location of predators and 11 of sandeel stocks. 12 The third point that the European Union will address 13 is why the United Kingdom was wrong to argue that 14 it could not reasonably have known that by inputting new 15 data into the existing model, this would deprive the 16 model of its key run status. 17 The fourth point that the European Union will 18 address is why the United Kingdom was wrong to argue 19 that it could not reasonably have known that the 58% 20 reduction -- this figure that you heard a lot about -- 21 in fishing mortality that was used in the model, why the 22 UK could not have known that it was an overestimation of 23 that fishing mortality. 24 And the fifth point that the European Union will 25 address is why the United Kingdom was wrong to argue</p> <p>Page 12</p>

<p>09:51 1 that it could not reasonably have presented separately 2 simulated biomass increases from two distinct groups of 3 seabird species. 4 The European Union will start by addressing the 5 Tribunal on why the United Kingdom is wrong to argue 6 that it could not reasonably have taken into account in 7 its model the age of sandeel consumed by predators. 8 Counsel for the United Kingdom yesterday [said] -- 9 and the European Union refers the Tribunal to page 139 10 of the transcript as of line 1: 11 "The work that would be involved in order to address 12 the other caveats, to produce a spatially defined model 13 and a size-structured model ..." 14 So that's the point about the age of the sandeel: 15 "... or a model that included all three of those 16 caveats, in my submission would have required 17 significant time, resources and expertise to develop." 18 However, this is simply contradicted by the English 19 scientific report itself. If I could ask the Tribunal 20 to turn to the document: it's in tab 15 of the core 21 bundle, which is also Exhibit C-45, and it's page 220 of 22 the core bundle. 23 When one reads that paragraph -- it's the third 24 paragraph on the page, and it's the paragraph that 25 begins "A functional group". So it says:</p> <p style="text-align: center;">Page 13</p>	<p>09:55 1 Now, the question is: what is covered by this 2 dataset? The answer to that question is provided in 3 another exhibit which the Tribunal has on its record: 4 it is Exhibit R-0161, page 94. And if the Tribunal 5 could turn to that document, because it explains what 6 this open-source database includes and how it allows 7 a model to be updated. So it's Exhibit R-0161 and it's 8 page 94. (Pause) 9 If the Tribunal has the document before it, this is 10 this SMS dataset that I referred to. And if one looks 11 at the third line, it explains it is a stock assessment 12 model. And if one scrolls down the page, under 13 "Outputs", which is the fifth heading from the 14 bottom ... Would the Tribunal need ...? 15 And at the bottom of the page under "Outputs", so 16 what does this database provide as an output that can 17 then be plugged into an existing model? There are 18 references to a number of factors, and it is stated: 19 "All outputs are by year, quarter, species and age" 20 And that's the important part. 21 So this is one example, but there are others, of 22 existing datasets that are available, and you can see 23 that they are available as open source. And one can see 24 that in the second row from the bottom, "Model 25 accessibility": it is marked "Open source". So these</p> <p style="text-align: center;">Page 15</p>
<p>09:53 1 "A functional group can be a single species (such as 2 cod), a group of species (such as demersal fish) ..." 3 And there, there is a reference to "an age 4 component". So the English scientific report accepts 5 that age can be a component of a model of this type. 6 Now, the important point is that data on functional 7 groups which is broken down by age, or by size 8 structure, which is the scientific term, that data 9 exists as open-source data. It can be plugged into 10 an existing model, and it can be done with a limited 11 need for adjustment. 12 Now, this is not stated in the English scientific 13 report itself but it can be shown by reference to other 14 documents that the Tribunal has on its record, and if 15 I could take the Tribunal to two of those documents. 16 They are not in the core bundle, but they are in 17 exhibits which the United Kingdom has annexed to 18 its submission. 19 So the first document, if the Tribunal has it, is 20 Exhibit R-108 (page 114). So there the Tribunal will 21 see a list of various datasets, and the second one -- 22 there are several examples, but we'll just take one for 23 present purposes. It's the second row of the table. 24 There is a reference to a dataset which is called "SMS 25 2013 Key run".</p> <p style="text-align: center;">Page 14</p>	<p>09:57 1 datasets are available as open source and can be plugged 2 into an existing model. 3 So the European Union's point is that on this 4 important issue of age, there were datasets available to 5 the United Kingdom that could have been taken into 6 account in order to adjust the model that was used. 7 Now, if the Tribunal could turn to the second point, 8 which is about the United Kingdom's argument that it 9 could not reasonably have taken into account in the 10 model the location of predators and of the sandeel 11 stock. And again I refer the Tribunal to the statement 12 by counsel for the United Kingdom, which is at page 133 13 as of line 14 of the transcript: 14 "One final point on the EU's criticism that this 15 model is not spatially distributed: ..." 16 So that means the location of predators and of 17 sandeel: 18 "... to develop such a model of the North Sea, both 19 in respect of sandeel but also taking into account its 20 predators, would be an immense undertaking." 21 The European Union is surprised by this statement, 22 given that -- and I will take the Tribunal to documents 23 on the file -- the United Kingdom has the necessary data 24 to take into account the spatial distribution, and this 25 includes data compiled by one of the three authors of</p> <p style="text-align: center;">Page 16</p>

<p>09:59 1 the English scientific report itself. 2 If I could take the Tribunal to the relevant 3 document: it is in the same exhibit which you were in, 4 R-161, and it is page 81; 81 of the numbering of the 5 exhibit itself. 6 It's called "Ecopath with Ecosim (EwE) and 7 Ecospace", and it says, first row, "Contact detail". 8 And there it says that the "Contact detail", or the 9 person who has compiled the database, is "Cefas", which, 10 as the Tribunal is aware, is one of the three authors of 11 the English scientific report. 12 And what is relevant here: the Tribunal has already 13 heard about the Ecopath and Ecosim model, but there is 14 this extension here which is referred to as "Ecospace". 15 Now, what is Ecospace? And that is explained if the 16 Tribunal turns two pages on in the exhibit to page 83. 17 It's under the row where it says "Main Purposes". And 18 there it is said: 19 "Ecospace: Evaluation of spatial management 20 strategies and changes in environmental conditions on 21 the distribution of species and fishing activity." 22 And there is a similar reference if the Tribunal 23 returns to page 81. Towards the bottom, it says: 24 "Ecospace -- data for specification of spatial 25 distributions"</p> <p>Page 17</p>	<p>10:03 1 "So the model was updated to enable it to be used 2 for the purpose of the English scientific report, but it 3 was still the key run model; it was still aligned with 4 the ICES key run that had been approved by the ICES 5 Working Group." 6 And it went on: 7 "And it's simply inaccurate for the EU to assert 8 that by [doing so], it has somehow lost alignment with 9 the key run." 10 And on this, there is a very simple answer: any 11 change to input data requires a new model evaluation 12 before ICES can grant it key run status. 13 This the Tribunal will also see by reference to 14 a document which it has on its record, if I could ask 15 the Tribunal to turn to Exhibit R-108. This is 16 a lengthy document, as many on the Tribunal's record, 17 and if I could ask the Tribunal to turn to page 41 of 18 the internal numbering of that document. It's the three 19 lines at the top of page 41 of the internal numbering, 20 which starts "Key runs". It says: 21 "Key runs are typically run every three years, or 22 alternatively, when a substantive change is made to the 23 model parameters ... when sufficient new data becomes 24 available ..." 25 So the simple point was: by inputting this new data</p> <p>Page 19</p>
<p>10:01 1 It's at the bottom of page 81, the last -- there are 2 five bullets at the bottom, and it says, "Ecospace -- 3 data" -- on page 81 of the exhibit. 4 So that explains just the concept of Ecospace. 5 Then further up, if I can take the Tribunal further 6 up on page 81, there is a reference to a study already 7 from 1999 which explains in general that: 8 "Ecospace ... extends Ecosim ..." 9 So it is the third paragraph where it says 10 "Model Type", if the Tribunal has it. It says: 11 "Ecospace ... extends Ecosim capabilities to account 12 for spatial dynamics of species and fishing fleets." 13 And it says, next line, this is "a modular 'plug-in' 14 approach". So this is something which can be taken, 15 which is reasonably available, and can be plugged into 16 a model. 17 I will turn now to the third point made by 18 the United Kingdom yesterday regarding its claim that 19 it could not reasonably have known that by inputting new 20 data into the model, this would deprive the model of its 21 key run status. So the key run, the Tribunal is aware, 22 is what ICES grants a model once it has been approved by 23 the relevant ICES Working Group. 24 There again, to quote counsel for the United 25 Kingdom, page 114 of the transcript as of line 16:</p> <p>Page 18</p>	<p>10:05 1 into the model, the United Kingdom could reasonably have 2 been aware that this would cause the model to lose its 3 key run status. 4 The fourth point on which I would like to address 5 the Tribunal is whether the United Kingdom could 6 reasonably have known that the 58% reduction in fishing 7 mortality that was used in the model was 8 an overestimation. 9 The European Union will not return to the debate 10 about where to place the red line or not that we saw on 11 the slides. But there is one point on which the 12 European Union would like to return, and that was the 13 claim that the United Kingdom -- and it was a subject of 14 questions of the Tribunal -- about whether or not the 15 United Kingdom could have known where the Norwegian 16 catches took place. 17 Counsel for the United Kingdom told the Tribunal 18 yesterday -- and it's at page 125 of the transcript as 19 of line 14: 20 "There's no information about the ICES rectangles in 21 which those Norwegian landings took place. Which means 22 that the authors of the English scientific report, even 23 if they had used the ... data, would not available to 24 complete the exercise ..." 25 And there the simple point is that the authors of</p> <p>Page 20</p>

<p>10:06 1 the English scientific report themselves made statements 2 in their report that indicated that they were aware 3 where these Norwegian catches took place. 4 If I can take the Tribunal back to the English 5 scientific report (C-45), which is at tab 15, and it's 6 at the bottom of page 206. There it is simply the last 7 three lines, which say: 8 "The North Sea sandeel fishery is primarily carried 9 out by 2 countries, Denmark and Norway ..." 10 And there it is said: 11 "... the majority of Norwegian operations [took] 12 place in Norwegian waters ..." 13 So that indicates that there was information that 14 was reasonably available to the United Kingdom regarding 15 where these catches took place. 16 The final point on which I will address the Tribunal 17 concerns the United Kingdom's argument that it could not 18 reasonably have presented separately simulated biomass 19 increases from different groups of seabirds. 20 Again, counsel for the United Kingdom told the 21 Tribunal, and it's at page 141 of the transcript as of 22 line 8: 23 "It's just that when it came to taking [these] 24 outputs and plugging them into [the] report, they 25 weren't particularly concerned with ... the specific</p> <p>Page 21</p>	<p>10:10 1 "Water-column feeders fared well in the Greater 2 North Sea ..." 3 So the European Union's position is: to the extent 4 that this is recognised by OSPAR, or when one looks at 5 the breeding success, which is a relevant consideration, 6 the United Kingdom could and should have presented 7 separately the results in order to assess these issues. 8 But if one takes a step back, why [do] all these 9 points matter and why are they relevant to the 10 Tribunal's determination of this dispute? These points 11 matter because the English and Scottish scientific 12 reports provide an extensive and comprehensive overview 13 of the current scientific understanding regarding 14 sandeel and its role in the ecosystem. This is not in 15 dispute. 16 As the European Union has explained, these 17 scientific reports identify that location of predators 18 and the age of the sandeel that are consumed by 19 predators are important elements in understanding the 20 role of sandeel in the ecosystem. However, the United 21 Kingdom did not properly reflect those elements in the 22 parameters of the model that it chose to use to quantify 23 the ecosystem of risks and benefits of the measure that 24 was adopted. This is despite the fact that such 25 elements were reasonably available to the</p> <p>Page 23</p>
<p>10:08 1 benefits to diving seabirds compared to surface-feeding 2 seabirds." 3 And the European Union's simple point is: 4 the specific benefits to diving seabirds compared to 5 surface-feeding seabirds is and should have been 6 a particular concern to the authors of the report. Why? 7 Because while surface-feeders such as black-legged 8 kittiwakes, of which the Tribunal has heard much, are 9 below the OSPAR threshold, a threshold for breeding 10 success, water-column feeders -- so these diving 11 seabirds -- they are above the relevant threshold for 12 breeding success. 13 The Tribunal can see this by another document which 14 it has on its record, which is Exhibit C-41, page 23, 15 and if the European Union could ask the Tribunal to turn 16 to that particular document. It will be the last one 17 for present purposes. Exhibit C-41, page 23 of the 18 internal numbering. 19 There it's under the heading "Conclusion 20 (extended)", if the Tribunal has the document. (Pause) 21 It's the second line, where it says: 22 "Surface-feeders were also generally in bad 23 status ..." 24 So that includes in the Greater North Sea. But then 25 the next sentence:</p> <p>Page 22</p>	<p>10:12 1 United Kingdom. 2 And these failures, coupled with the other elements 3 that were also reasonably available to the United 4 Kingdom, mean that the scientific advice that the United 5 Kingdom identified as the basis for the sandeel fishing 6 prohibition cannot be considered the "best available 7 scientific advice" within the meaning of Article 496, 8 read together with Article 494 of the TCA. 9 Unless the Tribunal has any questions at this 10 juncture, I will pass the floor to my co-Agent. 11 THE CHAIRPERSON: Please, Ms Norris, go ahead. 12 MS NORRIS: Members of the Tribunal, according to the 13 United Kingdom, there is a second short answer to one of 14 its claims. I'm quoting from page 2 of yesterday's 15 transcript. Counsel for the United Kingdom said: 16 "... Article 496(1), read with the subsection of 17 [Article] 494 concerning proportionality and 18 non-discrimination, requires the [United Kingdom] to 19 have had regard to applying proportionate and 20 non-discriminatory measures in its waters. The UK 21 explicitly considered those matters, and went further 22 and concluded that the measures were proportionate and 23 non-discriminatory, and thus the UK obviously performed 24 that obligation." 25 Once again, the European Union is conscious that it</p> <p>Page 24</p>

<p>10:13 1 spent some time in its own oral submissions explaining 2 its position as to what precisely the obligation under 3 Article 496, read together with Article 494(3)(f), 4 implies. The UK's oral submission confirms that this is 5 a point of significant divergence in interpretation 6 between the parties; in particular, both as to the 7 extent of the obligation and of course also as to 8 whether or not it was performed. 9 This is also not a shortcut. It is not a shortcut 10 because it is not enough for a decision-maker to just 11 consider the need to apply proportionate and 12 non-discriminatory measures, and to stop there. If that 13 were true, regulatory autonomy would empty those 14 provisions of any form of meaningful restraint over the 15 circumstances in which the right to access waters to 16 fish each and every stock for which a TAC is agreed 17 could be nullified. 18 It is not because conservation of the marine 19 environment is recognised to be important, and it is not 20 because a party may set its own high level of regulatory 21 ambition, that it may disregard the requirement to 22 balance rights and obligations to which it has agreed 23 when pursuing that objective. 24 Importantly, and to come back to a point that was 25 made by the United Kingdom yesterday, adherence to</p> <p style="text-align: center;">Page 25</p>	<p>10:17 1 be expanded to reasonableness in the framework of 2 a proportionality assessment. This is not because 3 the European Union takes issue with the term "thin 4 rationality", and nor does it understand "thin 5 rationality" to mean that relationship does not matter 6 as part of the Tribunal's overall assessment. It is 7 because the concept of reasonableness would not add more 8 precision to the test the Tribunal must apply than the 9 term "proportionate" itself. 10 If a measure is proportionate by reference primarily 11 to the relationship with the end it pursues, then 12 a measure could be proportionate whenever it is adequate 13 to achieve its objective, regardless of the level of 14 contribution, of whether there is a less restrictive 15 alternative and of whether it imposes costs that are in 16 no way commensurate to the benefits. There is no 17 textual or contextual basis for construing the term 18 "proportionate" to be even less demanding than the term 19 "necessary" has [been] interpreted to be under the GATT 20 1994. Nor does a lenient reading seem to be justified 21 by the object and purpose of Article 494(3)(f). 22 The relationship to the objective of the measure, 23 which must be one of those specified in Article 496, is 24 already addressed in that provision. Reading 25 proportionality as something to be determined by</p> <p style="text-align: center;">Page 27</p>
<p>10:15 1 the principles cannot be essentially self-judging. This 2 Tribunal has a role in scrutinising closely how the 3 benefit and costs were defined and how they were then 4 weighed and balanced. In other words, both the "what" 5 and the subsequent weighing and balancing is relevant 6 and subject to review. 7 The European Union would like briefly to return at 8 this point to a question raised by the Tribunal, and to 9 the United Kingdom's response. 10 Mr Justice Unterhalter asked counsel for the United 11 Kingdom whether "a 'proportionate measure' is one that 12 looks at the relationship between means and ends", and 13 more specifically, "whether the relationship between 14 ends and means is [a thin rationality or] more a sort of 15 reasonableness test" (Day 2/167:3-9). The United 16 Kingdom replied that they would not necessarily want to 17 call it "thin rationality" because -- and I quote from 18 page 167 of the transcript -- "it matters". 19 The UK appears to agree that there still needs to be 20 a weighing and balancing. Moreover, the United Kingdom 21 stated that -- and again I quote, and this time from 22 page 168 of the transcript (lines 18-19): 23 "... existence or otherwise of [a] measure is 24 something that might go to a balance ..." 25 The European Union considers that rationality cannot</p> <p style="text-align: center;">Page 26</p>	<p>10:18 1 reference primarily to the link to that objective would 2 seem to water down the proportionality obligation. 3 Now, as to the existence or otherwise of another 4 measure, the European Union has advanced one. The UK 5 must rebut the European Union's argument that this would 6 be a proportionate alternative. 7 In response to a question, the European Union 8 acknowledged that it has been recognised by the 9 Appellate Body, in the context of a WTO dispute looking 10 at necessity, that there could be circumstances in which 11 a tribunal might not have to consider an alternative 12 measure. This was considered, for instance, to be 13 the case where there is no restriction on trade. But 14 this does not mean that in this claim it is heuristic 15 for the Tribunal, or indeed the United Kingdom, to 16 consider the EU's claim that an alternative 17 proportionate measure was reasonably available. 18 An alternative measure provides a mechanism to 19 assess the sandeel fishing prohibition. Members of the 20 Tribunal, the United Kingdom has not grappled with the 21 European Union's alternative measure. It should do so. 22 With this in mind, I then pass the floor to my 23 co-Agent to address certain evidential points on the 24 application of the proportionality yesterday. 25 THE CHAIRPERSON: Thank you.</p> <p style="text-align: center;">Page 28</p>

<p>10:20 1 Mr Dawes. 2 MR DAWES: Thank you, Madam Chair. 3 The European Union will respond to three series of 4 points made yesterday by the United Kingdom regarding 5 the application of the legal standard to the facts 6 before the Tribunal. The first group of points will 7 relate to the UK's position that it was correct to 8 maintain that it had not overstated the benefits of the 9 measure; the second group of points will relate to the 10 United Kingdom's claim that it did not underestimate 11 the costs of the measure; and the third group of points 12 relate to whether the United Kingdom was correct to 13 maintain that it had properly weighed the costs and 14 benefits of the measure. 15 So starting with the overstatement of the benefits, 16 and there the European Union will make three points. 17 The first point is, as the European Union has just 18 explained at length to the Tribunal, the updated model 19 and the simulated biomass increases generated by 20 the model, they lack the necessary scientific rigour 21 required in order to be considered the "best available 22 scientific advice". And this is a factor that is 23 relevant for the Tribunal's assessment of the benefits 24 of the measure. 25 The second point regards the benefits of the measure</p> <p>Page 29</p>	<p>10:23 1 The third point that the European Union would make 2 on the benefits of the measure is that the United 3 Kingdom confirmed yesterday to the Tribunal that the 4 measure was not justified as an emergency, and that 5 the Tribunal will find at page 151 of yesterday's 6 transcript. 7 The United Kingdom did refer on two separate 8 occasions during the course of its submissions to 9 a document which the Tribunal has at Exhibit C-43, which 10 was the call for evidence of October 2021. This was the 11 first consultation document released by the United 12 Kingdom. And there was a reference in that document to 13 the need for "urgent action". 14 The European Union on that point simply would note 15 two things. 16 First, there is no reference to urgency in any of 17 the subsequent documents that the Tribunal has on its 18 record, so there is no reference to the need for any 19 urgent action. 20 And the second point that the European Union would 21 stress is that this lack of urgency should be contrasted 22 with the relevant context in which this measure was 23 adopted, which, as my co-Agent has recalled, was during 24 the adjustment period foreseen by Annex 38 of the TCA. 25 So that was why the United Kingdom was wrong to</p> <p>Page 31</p>
<p>10:21 1 specifically for marine mammals and for other fish. 2 During oral submissions yesterday, counsel for 3 the United Kingdom sought to explain what it referred to 4 as the "quite straightforward" proposition -- which is 5 at page 90 of the transcript as of lines 14 and 18 -- 6 that given the dietary requirements of seals and minke 7 whales, they would be more resilient if there was 8 a higher or greater amount of sandeel in the North Sea. 9 However, this proposition is not a straightforward 10 one. Why? Because as the European Union explained, 11 what the scientific evidence on which the United Kingdom 12 bases its measure explains is that in the event of any 13 localised sandeel depletion, marine mammals can and are 14 able to prey on sandeel outside of the locally depleted 15 area because of their ability to forage over a wider 16 area. 17 So one should be alive to the danger of points which 18 may at first sight seem straightforward, but which do 19 not disclose the full reality of the factual record. 20 And as for fish, there the counsel for the United 21 Kingdom made the necessary concession that the benefits 22 were "of a lesser magnitude" and "less certain". That's 23 page 91 (lines 2-3). 24 So those are also elements the Tribunal should bear 25 in mind when assessing the benefits of the measure.</p> <p>Page 30</p>	<p>10:25 1 maintain that it has not overstated the benefits of the 2 measure. 3 Turning now to the understatement of the costs, and 4 there the European Union would make two points. 5 The first point: counsel for the United Kingdom said 6 yesterday (Day 2/152:19-24): 7 "There's no reason to think that the [United 8 Kingdom] would or lawfully could ... 'nullify' the EU's 9 rights by 'prohibiting fishing in [the UK's waters] one 10 stock after [an]other'." 11 Because: 12 "If that were what the [United Kingdom] wanted to 13 do, it would have to satisfy the decision-making process 14 in Article 496." 15 At the same time, the Tribunal will have seen from 16 the ministerial submissions on which the UK took its 17 decision to approve the measure, and which both parties 18 have taken the Tribunal through, the United Kingdom 19 considers that there is no issue under Article 496, read 20 together with Article 494, because the economic and 21 social impacts of the nullification of the EU's full 22 right of access to UK waters of the North Sea to fish 23 sandeel, there is no issue because these impacts can be 24 mitigated either by EU vessels fishing sandeel in EU 25 waters or by EU vessels fishing other stocks in UK</p> <p>Page 32</p>

<p>10:27 1 waters.</p> <p>2 And there the European Union would make the point</p> <p>3 that the inescapable conclusion is that the only moment</p> <p>4 when, on the United Kingdom's own submissions,</p> <p>5 proportionality would prevent the United Kingdom acting</p> <p>6 in such a way would indeed be when there are no other</p> <p>7 rights under Annex 38 left for the United Kingdom to</p> <p>8 nullify, because otherwise there will always be other</p> <p>9 stocks or other waters in which the European Union</p> <p>10 could, on the United Kingdom's own submissions, mitigate</p> <p>11 its losses.</p> <p>12 That was the first point.</p> <p>13 More generally, the second point is that the</p> <p>14 European Union does not accept, on a factual basis, the</p> <p>15 hypothetical possibility for EU vessels to mitigate any</p> <p>16 economic and social impacts of the nullification of the</p> <p>17 EU's rights. That hypothetical possibility is based on</p> <p>18 a number of unsubstantiated assumptions.</p> <p>19 To give the Tribunal one example, this assumes that</p> <p>20 there is a sufficient amount of quota available to EU</p> <p>21 vessels, a sufficient amount of quota left for them to</p> <p>22 fish other stocks. But as the Tribunal will see from</p> <p>23 Annex 35, there are a whole series of stocks, each of</p> <p>24 which is subject to quotas. So this assumption that</p> <p>25 somehow the EU vessels would be able to mitigate their</p> <p>Page 33</p>	<p>10:31 1 further questions that the Tribunal may have.</p> <p>2 THE CHAIRPERSON: Thank you very much, Mr Dawes and</p> <p>3 Ms Norris. You were very efficient in the use of your</p> <p>4 time this morning.</p> <p>5 Can I ask the Tribunal members if you have any</p> <p>6 particular questions at this time? We will wait,</p> <p>7 therefore, until the end of the day.</p> <p>8 So thank you very much. It is now adjourned. Our</p> <p>9 schedule is to adjourn until 2.00 pm. (Pause)</p> <p>10 Because we are leaving our questions on the</p> <p>11 European Union's reply until the end of the day, we will</p> <p>12 take a three-hour break, until 1.30, and return at 1.30.</p> <p>13 Then this will allow further time towards the end of the</p> <p>14 day, so that we can not extend our hearing time too</p> <p>15 late.</p> <p>16 So thank you. We will adjourn then until 1.30.</p> <p>17 Thank you.</p> <p>18 (10.32 pm)</p> <p>19 (Adjourned until 1.30 pm)</p> <p>20 (1.30 pm)</p> <p>21 THE CHAIRPERSON: Good afternoon, ladies and gentlemen.</p> <p>22 I now invite counsel for the United Kingdom.</p> <p>23 Mr Juratowitch, you have the floor.</p> <p>24 Rebuttal statement on behalf of the United Kingdom</p> <p>25 MR JURATOWITCH: Thank you very much, Madam Chairperson.</p> <p>Page 35</p>
<p>10:28 1 loss by fishing other quotas is simply something for the</p> <p>2 United Kingdom to prove, it is an unsubstantiated</p> <p>3 assumption, and one which the Tribunal should not take.</p> <p>4 Finally, to turn to the weighing of the costs and</p> <p>5 benefits, it will not have escaped the Tribunal's</p> <p>6 attention that the United Kingdom considered it</p> <p>7 sufficient yesterday simply to identify various elements</p> <p>8 that formed part of the decision-making process. And</p> <p>9 this also prompted a question by Professor Ruiz Fabri.</p> <p>10 However, as the European Union explained, the</p> <p>11 Tribunal should, and is required to, go further and</p> <p>12 scrutinise not only the elements that the United Kingdom</p> <p>13 has identified, but whether those elements disclose</p> <p>14 a proper weighing of the costs and benefits.</p> <p>15 The European Union already took the Tribunal through</p> <p>16 these elements on Tuesday and explained why those</p> <p>17 elements do not disclose any proper weighing. The</p> <p>18 European Union need therefore only add that nothing in</p> <p>19 the additional paragraphs to which the Tribunal was</p> <p>20 taken yesterday by counsel to the United Kingdom</p> <p>21 disclosed any proper weighing of the costs and benefits.</p> <p>22 So, members of the Tribunal, unless you have any</p> <p>23 further questions at this juncture, the European Union</p> <p>24 would like to thank the Tribunal for hearing its</p> <p>25 submissions, and it looks forward to receiving any</p> <p>Page 34</p>	<p>13:30 1 To give the Tribunal a sense of our structure this</p> <p>2 afternoon, I will first address the question of which</p> <p>3 party has the burden on what. Ms Boileau will then deal</p> <p>4 with specific criticisms related to aspects of the</p> <p>5 English scientific report related to the modelling of</p> <p>6 ecosystem effects. I will then return and deal with the</p> <p>7 balance of claim 1, and Mr Westaway will then deal with</p> <p>8 claim 2.</p> <p>9 So if I could then start with burden. This, of</p> <p>10 course, was the Tribunal's seventh question.</p> <p>11 On the EU's approach, we heard the EU this morning</p> <p>12 and on Tuesday assert, without discernible reference to</p> <p>13 authority, that it, the EU, as the Complainant party,</p> <p>14 has a prima facie burden to establish its claims of</p> <p>15 breach of the TCA. The EU says that once it has met</p> <p>16 that prima facie burden as Complainant, the burden then</p> <p>17 shifts to the United Kingdom, as Respondent, to show</p> <p>18 that the United Kingdom's measures were justified.</p> <p>19 In its Written Submissions, the EU did not make any</p> <p>20 suggestion that there is a prima facie or shifting</p> <p>21 burden that applies under the TCA. The EU's written</p> <p>22 case at paragraphs 392 to 393 states that:</p> <p>23 "... [each] party shall have the burden of proving</p> <p>24 facts relied upon to support its claim or defence."</p> <p>25 And that is of course correct, and it's reflected in</p> <p>Page 36</p>

<p>13:32 1 the procedural order governing this arbitration. 2 The EU, at the Written Submission stage, wasn't 3 seeking to shrink its burden or to shift its burden down 4 to a prima facie one or one that involved shifting the 5 burden to the UK; that happened at the hearing. With 6 respect, the United Kingdom's position is that that is 7 contrary to principle, and I turn now to the correct 8 position. 9 The starting point is that in international law, 10 states are presumed to act in good faith; states are not 11 presumed to have breached their international 12 obligations. It follows that a state that is alleging 13 that another state has breached an international 14 obligation -- in this case, a treaty obligation -- 15 the state making that allegation has the burden of 16 establishing its own claim. As Complainant, the EU 17 therefore has the burden of establishing its own claims. 18 Members of the Tribunal, I would add two nuances to 19 this. The first is that if a respondent relies on 20 an exception to a rule as a defence for breach of that 21 rule, then in those circumstances, if the applicant has 22 established the breach of the rule, it will normally be 23 incumbent on a respondent relying on the exception to 24 establish that exception. 25 If a party's defence to an alleged breach of a rule</p> <p>Page 37</p>	<p>13:36 1 difficulties in discharging its burden of proof on 2 matters of fact because of the particular circumstances 3 of the case. An obvious example would be if one state 4 has the burden of proving a fact to support its claim, 5 but all or a substantial part of the evidence that's 6 necessary to support that claim is located within the 7 territory or possession of the other party, which is 8 refusing to produce it. 9 In that kind of case, the first state may be 10 entitled to have more liberal recourse to inferences of 11 fact. But that is not a shifting of the burden, but 12 an alleviation of what might be required to meet it in 13 quite specific circumstances. 14 I mention that also for completeness, but of course 15 we are not in that situation either: the UK has been 16 entirely transparent as to the evidence. 17 What the EU seems to be doing is to seek to export 18 approaches taken within some World Trade Organization 19 jurisprudence to this different context. And whatever 20 view might be taken as to whether that approach is 21 correct within its own WTO context, it is not something 22 that the Tribunal should follow under the TCA. 23 And that is not least because the treaty frameworks 24 are different. In particular, there is no equivalent in 25 the TCA to Article 20 of the GATT, providing general</p> <p>Page 39</p>
<p>13:34 1 is not just a denial of the breach of the rule but 2 an argument that some other rule permitted it or 3 justified it or excused its otherwise unlawful conduct, 4 in those circumstances, then if the applicant succeeds 5 in discharging its burden of establishing a breach of 6 the first rule, it will be for the respondent to 7 establish that the rule that it, the respondent, relies 8 on provides it with a defence. 9 Now, that does not involve a prima facie burden. 10 It is just that the burden can be on a respondent to 11 make out a particular kind of defence on which 12 a respondent might rely. 13 That, members of the Tribunal, is not this case. 14 The UK is not advancing any such defence. It is simply 15 saying that the EU has not made out its case of breach. 16 The burden of establishing the EU's claim therefore 17 starts with, remains with and ends with the EU; it does 18 not shift. And that burden obviously can't be 19 discharged by resort to a prima facie standard. The 20 position is quite simply that the EU has brought 21 the claims and it is for the EU to establish them. 22 That's the first nuance. 23 The second nuance is that in certain limited 24 circumstances, international courts and tribunals 25 recognise that a party may encounter particular</p> <p>Page 38</p>	<p>13:38 1 exceptions to treaty obligations, on the basis of which 2 the UK is somehow seeking affirmatively to justify its 3 measures. 4 Members of the Tribunal, the UK considers the 5 orthodox approach, which I have outlined, to apply under 6 the TCA. It is that the claimant has the burden of 7 establishing a breach of the TCA, and insofar as any 8 party wishes to establish a fact, then that party has 9 the burden of proving that fact. 10 I move, members of the Tribunal, to outline how that 11 applies in respect of each claim in this case. In the 12 context of claim 1, it means that the EU has the burden 13 to prove that the English scientific report, the 14 Scottish scientific report and the ICES Technical 15 Service response was not the best available scientific 16 advice. The EU equally has the burden to establish that 17 the measures about which it complains were not based on 18 that advice. 19 The UK certainly takes the position that this 20 scientific advice is the best available scientific 21 advice, and that the measures were based on it. But 22 that is not an affirmative defence of any kind; it is 23 a straightforward denial of the EU's claim. 24 That's claim 1. 25 On claim 2, it means that the EU likewise has the</p> <p>Page 40</p>

<p>13:40 1 burden of showing that the UK did not have regard to the 2 principle of applying proportionate and 3 non-discriminatory measures. 4 It was said this morning that the EU has advanced 5 an alternative measure, and it is therefore for the UK 6 to rebut the EU's argument that this would be 7 a proportionate measure. 8 Leaving aside for now whether the possibility of 9 certain alternative measures has any role to play under 10 the applicable legal test, and just focusing on the 11 question of burden, there is no justification in the TCA 12 for the burden-shifting exercise proposed by the EU. 13 What the EU says is that once it raises the possibility 14 of an alternative measure, it is somehow for the UK to 15 show why that measure would not have been appropriate to 16 meet the UK's objective. 17 One can see the difficulty with that particularly 18 clearly on the facts of this case. The EU just says 19 that it could have tolerated one or more partial 20 closures based on the foraging range of chick-rearing 21 seabirds. As I emphasised yesterday, it doesn't say how 22 many closures, of what size, or based on the foraging 23 range of which kinds of seabirds. The EU can't just lob 24 something of that generality over the net and expect the 25 UK to disprove that it would have been enough to satisfy</p> <p>Page 41</p>	<p>13:43 1 it claims, wrongly, that this takes it out of alignment 2 with the ICES key run; yet in the next breath, 3 it suggests that the scientific failing of the English 4 scientific report was in fact that it did not make 5 extensive structural changes to the model, which would 6 have transformed the model into one that has no bearing 7 to the ICES's key run. 8 The second point is this: the EU this morning 9 expressly affirmed -- and this is from the provisional 10 transcript at page 9, starting line 20 -- that it "did 11 not identify or produce another superior model". What 12 this means by reference to the word "available" in 13 Article 496(2) of the TCA is that if "available" means 14 "to hand", as the UK contends, then the EU has not 15 identified any superior model which was actually to 16 hand. 17 To situate then the present debate, we are in the 18 universe of asking whether the scientific advice which 19 the EU suggests the UK ought to have produced, in the 20 form of a superior model, was readily obtainable. What 21 the Tribunal has not seen from the EU is any evidence 22 from any scientist or modeller about how long it would 23 take to develop a model that is free from the 24 limitations of the model that was used in the English 25 scientific report, or any evidence about the resources</p> <p>Page 43</p>
<p>13:42 1 the UK's objective. 2 As it happens, I demonstrated yesterday that the 3 foraging range of chick-rearing seabirds would be enough 4 to justify a full closure, if that were the relevant 5 test, and the EU was noticeably silent on that point 6 this morning. But that goes to the EU not meeting its 7 burden; it is not an acceptance that there is any burden 8 on the UK. 9 The EU has and retains the burden of establishing 10 that the UK did not have regard to applying 11 proportionate and non-discriminatory measures, and 12 it has and retains the burden of establishing any fact 13 on which it seeks to rely for that purpose. 14 Members of the Tribunal, those are my submissions on 15 burden. I'm of course at the Tribunal's disposal if 16 I can assist it on that topic. Otherwise, Ms Boileau 17 will now make submissions concerning the modelling. 18 THE CHAIRPERSON: Please, Ms Boileau, you have the floor. 19 MS BOILEAU: Members of the Tribunal, I will address each of 20 the specific replies made this morning by the EU in 21 respect of the modelling exercise undertaken in the 22 English scientific report. Before I do so, I will 23 advance two overarching points. 24 The first point is that in one breath the EU appears 25 to criticise the UK for updating the model, as</p> <p>Page 42</p>	<p>13:45 1 involved in doing so. 2 The Agent for the EU has implied that it would 3 seemingly be a simple step to develop a model which does 4 not have those limitations. The EU suggests that the 5 data is already available, so why not simply add that 6 data into the model? 7 Even if the data were available -- and the EU has 8 not proven that fact -- the changes that the EU are 9 suggesting are not about adding more or recent data to 10 the existing model. The changes being suggested would 11 fundamentally alter the structure of the model, as 12 I will come to shortly. 13 Turning then to the specific criticisms that the EU 14 rebutted this morning. 15 The first rebuttal by the EU pertained to its 16 assertion that a model that was size-structured for 17 sandeel was available -- or more precisely, readily 18 obtainable -- to the authors of the English scientific 19 report. And in support of this submission, the EU took 20 the Tribunal to a reference in the English scientific 21 report which referred to the fact that cod were divided 22 into different age components: juvenile and mature. 23 What the EU did not take the Tribunal to is the 2015 24 ICES key run. If the Tribunal had been taken to the 25 Working Group's report in respect of that document,</p> <p>Page 44</p>

13:47 1 it would be clear that sandeel are not size-structured
2 in the EwE model. I'll give the Tribunal the reference
3 for that, but in the interests of time, I won't take the
4 Tribunal to those pages.

5 The exhibit is R-108. At page 102, it refers to
6 the fact that there are 69 functional groups in the
7 North Sea EwE model; and then starting at page 106,
8 there's a table with those functional groups listed out.
9 And what one can see from that table is that there are
10 some fish species, such as cod, which are split into
11 different functional groups based on their size; but
12 sandeel, as shown in that table, are not.

13 To come then to the work that would be involved to
14 break sandeel down into different sizes, this would not
15 be as simple an undertaking as the EU suggests. Adding
16 a new functional group to the model -- and indeed,
17 that's what would be required: at least one additional
18 functional group, to break sandeel down into juvenile
19 and mature sandeel -- that would require the entire
20 model to be recalibrated.

21 Making this one change has a domino effect on
22 the model, because if you split sandeel into adults and
23 juvenile, you first have to re-estimate all the
24 parameters relating to sandeel, and then you have to
25 look at all of the other predators of sandeel, and split

Page 45

13:51 1 available were used in the ensemble modelling. And as
2 stated there, that means that to the extent that
3 size-structured models were available, they were in fact
4 deployed in the English scientific report.

5 What we do say is that the North Sea EwE model is
6 not size-structured for sandeel. The North Sea EwE
7 model is the only model of the entire ecosystem of the
8 North Sea which could be used to explore the effects of
9 altering sandeel fishing in the North Sea.

10 Other models, such as the SMS model referred to by
11 the EU, do not have all the species of the North Sea, so
12 they were not suitable for purpose. The SMS model, for
13 example, has only 20 functional groups, which only
14 covers part of the food web, primarily fish. The EwE
15 model, on the other hand, has 69 functional groups,
16 which covers the entire food web.

17 Turning then to the second point addressed by the EU
18 this morning. Here the EU sought to establish that
19 the model could have taken into account a spatial
20 distribution in respect of both sandeel and its
21 predators. The EU made the remarkable suggestion that
22 such a model appears already to exist, and it referred
23 here to an Ecospace model. It does not.

24 There are, members of the Tribunal, different types
25 of modelling software. Ecopath with Ecosim, EwE, is one

Page 47

13:48 1 their diets into the proportions which consume adult
2 sandeel compared to juvenile sandeel.
3 And that's just the start of it. But even that data
4 is unlikely to be easily obtainable for many of the
5 predators that eat sandeel. So we do know, for example,
6 members of the Tribunal, that certain seabird chicks
7 prefer to eat small sandeel, but we don't know that
8 information about all of the predators of sandeel in the
9 ecosystem. That is the kind of information that would
10 need to be known, or in relation to which expert opinion
11 would need to be obtained, in order to update the model.

12 The EU then took the Tribunal to R-108, which is the
13 SMS model. The EU referred to this as a "dataset" or
14 a "database" of size-structured fish. That database is
15 not shown on this slide; I'll come to that in a moment.
16 But R-108, and the page that the EU referred to, shows
17 that the SMS model is a model. It's just that; it's not
18 a database, it's not a dataset.

19 The United Kingdom has never denied that there are
20 other models which exist which are size-structured in
21 respect of certain fish. Indeed, the United Kingdom
22 mentioned as much in its Written Submission at
23 footnote 513, projected on the slide (13). In the final
24 sentence of that footnote, it can be seen that the
25 size-structured models of commercial fish which were

Page 46

13:52 1 kind of modelling software. Having a piece of software
2 is not the same as having a model of a particular
3 ecosystem in that software.

4 As arose yesterday in an interaction, in a question
5 from Madam Chairperson, the EwE software was in
6 existence before the North Sea model was developed in
7 2007. The exhibit that the EU took the Tribunal to --
8 and I won't take the Tribunal to it again -- shows that
9 in 2013, the date of that exhibit, there was modelling
10 software called Ecospace, which can be added to EwE
11 modelling, and when that is done, it would allow for
12 spatially defined modelling.

13 What that exhibit does not show is that there is in
14 existence an Ecospace model of the North Sea that has
15 the spatial distribution of sandeel or its predators,
16 and the dynamics between them. At the time that the
17 English scientific report was produced, there was no
18 Ecospace model of the North Sea which had that spatial
19 distribution.

20 The Tribunal will recall that the ICES 2015 key run
21 of the North Sea, published just two years after the
22 exhibit on which the EU relies, does not have this
23 Ecospace component; it doesn't take into account
24 the spatial distribution of sandeel. But if it already
25 existed or was as readily obtainable as the EU suggests,

Page 48

<p>13:54 1 why wasn't it included in the ICES 2015 key run? 2 The third point raised by the EU this morning was 3 that, according to it, inputting new data into the model 4 would deprive the model of the key run status. And here 5 it was referring to the updates that were made by the 6 authors of the English scientific report. The EU seemed 7 to be suggesting that not only should the model have 8 been updated to enable it to run to 2020, it should have 9 been entirely reworked to allow it to be spatially 10 distributed and size-structured. 11 The key point is this: the EU suggests that the 12 updates made by the authors of the English scientific 13 report to bring the model up to 2020 are somehow 14 comparable to the changes that would be needed to 15 redress the limitations of the model that were 16 identified transparently as "caveats" in the English 17 scientific report. 18 I took the Tribunal yesterday to the slides showing 19 how the 2015 Working Group's report on the ICES key run 20 sets out the sources of data that can be used to update 21 the model in the manner in which the authors of the 22 English scientific report did. None of those changes 23 altered the structure, function or foundational 24 parameters of the model. 25 It is in that sense that the UK refers to the</p> <p>Page 49</p>	<p>13:57 1 at the second sentence, it refers to: 2 "... the majority of Norwegian operations taking 3 place in Norwegian waters ..." 4 There's no percentage breakdown there: 5 "... while the majority of Danish landings come from 6 within the UK EEZ ..." 7 And one can see that specific percentages are then 8 listed. 9 One would have thought, of course, that if the 10 authors of the English scientific report did have the 11 same information for Norway as they had about Denmark, 12 then they would likewise have included that information 13 in the report. 14 The fifth point raised by the EU this morning 15 concerned the fact that the outputs of the model in 16 respect of seabirds were combined, for the purposes of 17 presentation of the data, in the English scientific 18 report. Combining that data, those two categories of 19 seabirds, for the purposes of presentation in the report 20 did not lead to an over- or underestimation of the 21 benefits for seabirds as a category, and the UK does not 22 understand the EU to be suggesting otherwise. 23 (Slide 15) The EU refers to the fact that kittiwake 24 are surface-feeders and are therefore likely to benefit 25 more than diving seabirds, and the United Kingdom does</p> <p>Page 51</p>
<p>13:56 1 updated model that was used in the English scientific 2 report as being aligned with the key run. It isn't 3 actually the key run, because the data for the key run 4 went up to 2013. 5 On the other hand, the changes to the model 6 suggested by the EU are not ones which would bring the 7 model up to date as such, but would alter its structure, 8 its function and its foundational settings. And it 9 follows, of course, that those are not the types of 10 information that one can find in the 2015 report to 11 enable scientists to update the model. 12 The EU's fourth point pertained to the 58% reference 13 point that we've heard so much about. The Tribunal will 14 have noted that the EU this morning mounted no defence 15 at all of the 39% figure that it mooted on Tuesday. We 16 also heard no suggestion today that the authors of the 17 English scientific report should have used the ICES data 18 rather than the European Commission's data. 19 The EU instead seemed to suggest that the authors of 20 the English scientific report did actually know where 21 Norwegian landings came from, in terms of the ICES 22 rectangles, but inexplicably chose not to account for 23 that in their calculation. 24 What the English scientific report (C-45) actually 25 says is projected on this slide (14). And if one looks</p> <p>Page 50</p>	<p>13:59 1 not at all disagree with that. Indeed, that's what the 2 English scientific report says in a passage that I took 3 the Tribunal to yesterday, at page 13 of the English 4 scientific report. 5 The key point, however, is that this criticism about 6 how the data on seabirds was presented in the report has 7 no bearing whatsoever on whether the modelling or 8 the scientific advice itself was sufficiently rigorous 9 to meet the definition of "best available scientific 10 advice", as defined by the EU. The EU has not 11 identified any model that was available at the time the 12 English scientific report was authored that was in fact 13 capable of disaggregating seabirds into specific species 14 of seabirds. 15 Those are my submissions on the modelling, members 16 of the Tribunal. I'll now hand back over to 17 Mr Juratowitch. 18 MR JURATOWITCH: Members of the Tribunal, on the balance of 19 claim 1, I will say something brief about the objective 20 of the measure, first; secondly, I will deal with best 21 available scientific advice; thirdly, I will deal with 22 the UK basing the measures on that advice; and fourthly, 23 I will end on the precautionary approach. 24 Really by way of introduction on the objective, 25 the EU repeatedly accepts, as a general principle, that</p> <p>Page 52</p>

<p>14:01 1 the UK is entitled to set its own objective, and that 2 this includes pursuing a high level of protection of 3 the ecosystem in the North Sea. 4 It must follow from that that the EU accepts that 5 the UK is entitled to pursue benefits for seabirds, 6 marine mammals and fish that prey on sandeel, as well as 7 sandeel themselves, all being participants in the 8 ecosystem of which sandeel populations form such 9 a crucial part. And that crucial part is common ground. 10 In the context of that objective, the question for the 11 Tribunal is whether the EU has established that the UK 12 did not base the measures on best available scientific 13 advice. 14 The reason, members of the Tribunal, I begin with 15 the objective is that although the EU accepts it in 16 these general terms as a matter of principle, once one 17 gets to the application of the terms of the TCA to the 18 facts, one rather swiftly sees at least implicit 19 departures from a real acceptance of the objective. 20 That's why I begin on the objective: to make good on 21 that point later about implicit departures from it in 22 the guise of purported application of the test. 23 That's the first point, on objective. 24 The second is on best available scientific advice. 25 The EU this morning said (page 8:19-23) it cannot be</p> <p>Page 53</p>	<p>14:05 1 The first point on that is that it is quite a long 2 way from the ordinary meaning of "best available 3 scientific advice". 4 The second is that the EU would need to establish 5 the degree of ease or reasonableness to which it refers. 6 And if it was really so easy as they purport to suggest, 7 one might reasonably wonder why they haven't done it. 8 You've heard from Ms Boileau on it in fact not being 9 easy or fast at all, as a matter of fact. 10 The third point -- and in the end, this is a crucial 11 point: the EU would need to show that it would make 12 a difference. It can't just parrot the caveats that the 13 authors of the English scientific reports had already 14 identified and say, on that accepted basis, that more 15 should have been done. It needs to show that it would 16 make a difference. 17 And for the Norwegian data, about which the EU was 18 so excited yesterday, even at the maximum possible 19 assumption in favour of the EU's case, which is that 20 there's no Norwegian fishing of sandeel in UK waters, 21 even on that maximum possible assumption, the number on 22 which they focused, based on that assumption, was within 23 the confidence interval identified in the English 24 scientific report on which the English measure was 25 based.</p> <p>Page 55</p>
<p>14:03 1 right that the EU can only prevail if "it adduces 2 another model or alternative piece of scientific advice 3 [that] it positively asserts is better". 4 The only justification given for why that is said 5 not to be capable of being right is that all the EU has 6 to do is to satisfy some sort of prima facie burden 7 creating some sort of doubt about the science that the 8 other party has relied on, and then the EU says that 9 it is for the other party -- here the UK -- to justify 10 its own science. 11 Now, you've already heard me on the burden of proof. 12 So I continue on now to say that, subject to the extreme 13 cases discussed yesterday, it is quite difficult to see 14 how a party can establish, to the satisfaction of 15 a tribunal of eminent jurists who are not scientists, 16 that the other party's science is not the best available 17 without proffering science of their own in some form, to 18 allow the tribunal to make some sort of comparison. 19 That's true as a practical matter, and it's true as 20 a matter of the words of the TCA, which say "best", that 21 being accepted to be a comparative term. 22 The EU developed this by saying that if there is 23 an existing model, the question -- we were told this 24 morning -- is whether data that could reasonably have 25 been used to extend that model was not in fact used.</p> <p>Page 54</p>	<p>14:07 1 Members of the Tribunal, it's simply not enough just 2 to throw rocks at somebody else's science, without 3 showing that the criticisms, even if valid, would make 4 a meaningful difference to the substance of the advice. 5 It rather begs the question as to how the Tribunal is 6 supposed to make a judgment in that respect. 7 It's agreed that you are not to resolve scientific 8 controversies for yourself or seek to become scientists 9 so as to make judgments on matters of science. 10 I'll seek to deal with what that means for the Tribunal 11 in practical rather than theoretical terms, and it's in 12 this way. 13 The Tribunal can be assisted by the fact that the 14 scientific papers that the EU is relying on are either 15 the same as, or reach the same or similar conclusions 16 to, the papers analysed in the English and Scottish 17 scientific reports. That militates even further against 18 any suggestion that any changes to the modelling 19 parameters, or to the data used to predict the impact of 20 prohibiting sandeel fishing only in the UK part of the 21 North Sea, might have affected the substantial of the 22 overall advice. 23 To make that good by reference to three examples 24 from scientific papers on which the EU relies and 25 submits with its Written Submission.</p> <p>Page 56</p>

<p>14:09 1 The first one is C-40. It is a 2023 scientific 2 paper by Searle and others. It's cited by the EU for 3 the proposition that: 4 "... chick-rearing seabirds [need] sufficient 5 sandeel of the right age to be available within their 6 feeding range." 7 That's the EU's footnote 58 in its 8 Written Submissions. 9 In my respectful submission, that paper is valuable 10 to the Tribunal more generally. The paper came out 11 after the English scientific report, and so of course 12 was not considered in the English scientific report, but 13 it is cited in the Scottish scientific report. And so 14 it's significant that the EU evidently also regards it 15 as sound science by relying on it in its Written 16 Submissions, and it of course has the benefit of being 17 recent. 18 It is a study of effects on seabirds of the sandeel 19 area 4 partial closure from 2000. The first page of the 20 article, which is now on the slide (2), picking up in 21 the second sentence, says: 22 "Marine predators such as seabirds are often used as 23 ocean sentinels ..." 24 And a 2019 Hazen paper is cited: 25 "... because their long lifespan, wide-ranging</p> <p>Page 57</p>	<p>14:13 1 That's especially useful, in my submission, because 2 it shows that even in prevailing conditions of decline 3 generally, which one sees from the control group on 4 the yellow line, even in those prevailing conditions, 5 the fishing prohibition created a positive effect. 6 This, members of the Tribunal, is real-world 7 historical data reflecting what actually happened in 8 this specific area. 9 The other three species studied in this paper all 10 continued their decline notwithstanding the closure of 11 the fishery. But the authors nonetheless noted, as 12 you see now on slide 4: 13 "We are unable to discount the possibility that the 14 fishery closure may actually have benefitted breeding 15 success of these species ([that is], without it the 16 declines would have been even more marked)." 17 That is what the scientific literature generally 18 refers to as a "dampening effect": things may be bad, 19 but they may have been worse without the intervention. 20 Bearing in mind, of course, that this study was of 21 the existing partial closure, and we know from figure 19 22 that the Tribunal has seen from the Scottish scientific 23 report, and also the data with the standard deviation 24 added used by NatureScot for wind power projects, that 25 the foraging range of kittiwakes actually extends well</p> <p>Page 59</p>
<p>14:11 1 habitat use and position at the top of the food chain 2 serves as an integrative measure of the health of lower 3 traffic levels in bottom-up controlled systems ..." 4 Citing another paper, Frederiksen 2006. 5 That, members of the Tribunal, is significant 6 because it regards seabirds as important not just for 7 their inherent value but as an indicator of the broader 8 health of the ecosystem, because of their position at 9 the top of it. 10 On the next slide (3) is a figure from that same 11 article. It's figure 2.B in the article. And it plots 12 breeding success for kittiwake on the Y-axis, and on the 13 X-axis is time, showing the period before the fishery 14 was operational in the area; second is during the 15 operation of the fishery in the area; and then thirdly, 16 after, which is after the fishery was closed in that 17 area, which, as you know, occurred in the year 2000. 18 The yellow line is breeding success for kittiwakes 19 that forage outside the closed area. So that's the 20 control group. As the Tribunal sees, the overall trend 21 was downwards. The blue line is breeding success for 22 kittiwakes that forage inside the closed area. As the 23 Tribunal will appreciate, that shows an improvement in 24 breeding success after the closure of the fishery when 25 compared to the period during the fishery.</p> <p>Page 58</p>	<p>14:14 1 beyond the closed area. 2 Now, there are some other relevant passages from 3 this recent article, but I'll just go straight to the 4 last paragraph, which is at pages 13 and 14, and it's 5 now on the slide (5). It says that: 6 "... our results demonstrate important links between 7 a fishery closure, prey abundance and availability, and 8 seabird diet and breeding success. These findings 9 substantiate previous evidence from marine systems 10 around the world for the potential for forage fisheries 11 to impact upon seabird demography ... However, they also 12 serve to highlight the difficulties and complexities in 13 teasing apart the contributions of different drivers 14 against a backdrop of environmental change, hindering 15 their practical application to strategic seabird 16 conservation via fisheries management." 17 Members of the Tribunal, that is the Searle paper. 18 Although it was published after the English scientific 19 report, it was referred to by the authors of the English 20 scientific report in their response to the opponents of 21 the proposed measure; that's R-76 at page 2. They said 22 that it "aligns with the core advice" of the English 23 scientific report, in particular as to the possibility 24 of adverse environmental conditions dampening potential 25 ecosystem benefits.</p> <p>Page 60</p>

<p>14:16 1 That provides you, members of the Tribunal, with 2 a helpful coinciding of the Scottish scientific report, 3 a recent relevant scientific paper relied on and filed 4 by the EU in this case, and the views of the authors of 5 the English scientific report after they had written 6 that report and then considered the Searle paper. 7 I move then to the second example. I said that 8 there were three; we're now up to the second. And 9 that's C-41. You were taken to it this morning by the 10 EU. It's the OSPAR Commission Marine Bird Abundance 11 2023 report. It's used by the EU to say that kittiwakes 12 are "showing a decline in breeding success and ... not 13 meeting the OSPAR threshold"; that's the EU's Written 14 Submission, footnote 61. 15 You were taken to it this morning for the 16 proposition that the report -- that is the English 17 scientific report -- should have disaggregated 18 column-feeding and surface-feeding birds. That's 19 the purpose for which it was relied on this morning. 20 The significance of the report, fairly viewed, is 21 rather broader than either of those uses of it. On 22 the slide (6) on your screens now, looking at the first 23 highlighting, the report says: 24 "In three out of four of the OSPAR Regions assessed, 25 less than 75% of all species assessed across the</p> <p style="text-align: center;">Page 61</p>	<p>14:20 1 failed the assessment in all Regions where they could be 2 assessed." 3 This report matters, members of the Tribunal, 4 because it shows the low abundance of seabirds overall, 5 indicating that they are species which require 6 significant conservation efforts. 7 The EU is correct that the model does disaggregate 8 surface- and column-feeders, and that the English 9 scientific report doesn't; and Ms Boileau addressed you 10 on that yesterday. My point now is simply to say: if 11 the English scientific report did do so, it seems pretty 12 likely, based on what the Tribunal has seen in evidence 13 before it, that it would show greater impact for 14 surface-feeders than for column-feeders. It's very hard 15 to see how the result would be otherwise. 16 What is much less obvious is quite how that would 17 help the EU's case. Kittiwakes, and a number of other 18 birds the UK was seeking to protect, are 19 surface-feeders. So the numbers in the report, had it 20 done what the EU now says it should have done in 21 a hypothetical world, would have very likely shown 22 greater benefit for surface-feeders than the numbers in 23 the report now show. 24 It's hard to see how that would have any impact at 25 all, in terms of the decision-making or in terms of the</p> <p style="text-align: center;">Page 63</p>
<p>14:18 1 functional groups have achieved threshold values for 2 relative breeding abundance, indicating that the bird 3 communities are not healthy." 4 It goes on in the next highlighted passage to say: 5 "In the Greater North Sea, only water-column feeders 6 and grazing feeders achieved the threshold value in both 7 the breeding and non-breeding season." 8 The next slide (7) is table 3 in that same report. 9 It shows the functional groups for the North Sea. Those 10 marked in red are below the threshold for relative 11 abundance. I won't take the Tribunal to it now, but 12 page 17 of the same report specifies which species are 13 in which functional groups, which may assist the 14 Tribunal in due course. 15 I would move now though to the conclusion of that 16 paper, which is at page 23 of the paper and on the next 17 slide (8), where it says: 18 "The availability of small forage fish species at 19 the surface ([for example] sandeel, herring, sprat, and 20 capelin) is probably limiting the breeding success or 21 the annual survival of some surface-feeding species." 22 Then running on to the next page, which is on the 23 next slide (9): 24 "Within surface-feeders during the breeding season, 25 black-legged kittiwake, Arctic skua and northern fulmar</p> <p style="text-align: center;">Page 62</p>	<p>14:22 1 overall scientific advice. But if it did, it would have 2 even more strongly justified the measures on the basis 3 of higher predicted effects for surface-feeding birds. 4 That's the second example, members of the Tribunal. 5 (Slide 10) The third example is at C-19. It's 6 an article in the ICES journal from 2014, and the 7 Tribunal has heard it referred to previously as the 8 "Engelhard paper". The abstract is now on the screen, 9 which includes the statement: 10 "Sandeel appears to be the most important prey 11 forage fish." 12 That's borne out by the data on table 2 in the 13 paper, which is now on the next slide (11). It is 14 similar, but not the same as, the data in figure 4 of 15 the English scientific report, and that may be because 16 this article distinguishes between different species. 17 So, for example, it lists minke whales at the top of the 18 table, rather than just baleen whales generally, as the 19 English scientific report does, based on what the EwE 20 model does. 21 If I could ask the Tribunal to look at the column 22 for "Sandeel", it will see that 56% of the diet of minke 23 whales is sandeel; 37% for harbour seal; 41% for grey 24 seal; 55% of puffin diet; 42% for guillemots; 37% for 25 razorbill; kittiwake at a comparatively modest 28%; 18%</p> <p style="text-align: center;">Page 64</p>

<p>14:24 1 for gannet; and for predatory fish, none of them exceed 2 18%.</p> <p>3 The synthesis on page 100 of this paper, which is on 4 your next slide (12), at paragraph 3 says:</p> <p>5 "Among the forage fish species, sandeel was most 6 'universally important' as a prey to predators."</p> <p>7 And the Tribunal has seen that borne out in the data 8 in table 2.</p> <p>9 This article is principally used by the EU in this 10 case to support the proposition that sandeel mortality 11 caused by predatory fish is much greater than sandeel 12 mortality caused by humans fishing sandeel. That's the 13 EU's Written Submission at paragraph 82.</p> <p>14 That's accurate, but it's not the point of the 15 article. The point of the article is to consider the 16 relationship between forage fish and their predators in 17 the North Sea. And it's not surprising that it reaches 18 the commonsense conclusion that decreasing fishing 19 mortality for forage fish increases their biomass.</p> <p>20 Those are the three examples, members of the 21 Tribunal, and they matter for four reasons.</p> <p>22 The first is that they explain why no competing 23 science is being proffered.</p> <p>24 The second is that they demonstrate why the EU is 25 not able to show that any of its criticisms of the model</p> <p>Page 65</p>	<p>14:28 1 It follows that it is for the UK to judge what its 2 objective is, how important to it that objective is in 3 the overall circumstances, and thus whether a degree of 4 contribution to that objective -- that may in the end be 5 quite limited, all things considered -- should 6 nonetheless be pursued.</p> <p>7 Those are all judgments for the UK to make. The 8 Tribunal only steps in if, under the TCA, a party is 9 found to have imposed a measure that has no rational or 10 objective connection to the science. That's what you 11 get from the word "bases".</p> <p>12 The EU is saying that the potential benefit was not 13 sufficiently great in all categories except 14 chick-rearing seabirds, or that the science was not 15 sufficiently certain on the benefits spatially, or in 16 terms of the breadth of species or the size of sandeel 17 that would benefit or be needed by predators. But the 18 EU has not established that there was no rational or 19 objective relationship between the science, with the 20 caveats and everything else that it contained -- which, 21 in the UK's respectful submission, was, both for the 22 English report and the Scottish report, gold-standard 23 science -- they have not established that there was no 24 rational or objective relationship between that science 25 and the measures.</p> <p>Page 67</p>
<p>14:26 1 in the English scientific report would make any 2 difference to whether the English scientific report was 3 best available scientific advice. That's the second 4 point.</p> <p>5 The third point is that the Tribunal can be 6 confident about that because the EU has not been able to 7 make any criticism of the Scottish scientific report.</p> <p>8 The fourth point is that the EU accepts that so far 9 as the analysis of the scientific literature is 10 concerned, the English scientific report and the 11 Scottish scientific report are equivalent.</p> <p>12 Members of the Tribunal, that is "best available 13 scientific advice". And subject to any further 14 assistance that I may provide to the Tribunal on that, 15 I'd move now to the UK "basing" the measures on that 16 advice.</p> <p>17 The TCA does not mandate the Tribunal to conduct 18 its own review of whether it considers the extent of the 19 measures justified by the extent of the possible range 20 of benefits identified by the science. The TCA does not 21 go further than asking the Tribunal to consider whether 22 the EU has established that there is not a rational or 23 objective connection between the measures and the 24 science. That is the test that the EU accepts; indeed, 25 proposes.</p> <p>Page 66</p>	<p>14:30 1 The point to which they returned this morning, to 2 seek to answer what the UK had said about "based on" 3 yesterday, was that if there was localised depletion of 4 sandeel, then predatory fish -- that is, fish that prey 5 on sandeel -- can simply forage on sandeel somewhere 6 else. Well, that rather supports the conclusion that 7 it's important to maintain abundance and resilience of 8 sandeel populations generally, not just in specific 9 locations.</p> <p>10 It also starts from the wrong premise, which is that 11 somehow the UK should be required to tolerate localised 12 depletions. This is a specific example of the broader 13 point that at the stage of application, the EU is in 14 fact in substance seeking to challenge the objective. 15 The UK is seeking to avoid depletion anywhere.</p> <p>16 It's fundamental, members of the Tribunal, that the 17 EU does not, and cannot, challenge the fundamental 18 premise that prohibiting fishing for sandeel means 19 greater abundance and resilience of sandeel populations. 20 Nor does it, or could it, challenge the key role of 21 sandeel in the North Sea ecosystem. And in those 22 circumstances, it has not established any absence of 23 a rational or objective connection between a full 24 prohibition and the advice on which it was based.</p> <p>25 The scientific literature justifies full closure.</p> <p>Page 68</p>

<p>14:32 1 For marine mammals and predatory fish, scientific 2 evidence is that they benefit from sandeel abundance. 3 The scientific evidence is also that reducing fishing 4 increases sandeel abundance; after that, it's only 5 a question of degree of benefit. The degree of benefit 6 is not a matter for the EU to criticise or for the 7 Tribunal to form a judgment on. 8 I mention marine mammals and predatory fish because 9 those are the ones for which I accept the evidential 10 position is less clear. The position on seabirds is 11 especially clear. 12 Of course, the Tribunal will be aware that it's 13 always necessary to be careful with numbers. And since 14 the EU is so determined to focus on the modelling, 15 I'll say a few words further about it. 16 The numbers in the modelling were caveated from 17 the beginning. The table of numbers to which the EU was 18 keen to draw your attention, it's important to remember 19 that those numbers represent the predicted percentage 20 effect on biomass for the whole of the North Sea, and 21 that is so even where the closure is only of UK waters. 22 What is not known from the application of that 23 model, and what the English scientific report does not 24 opine on, is the percentage effect on UK waters of 25 a closure only of UK waters to sandeel fishing. Well,</p> <p style="text-align: center;">Page 69</p>	<p>14:37 1 scientific literature, and then the parts at the end on 2 risks, and on it went, but not the modelling exercise in 3 the middle? What would the position have been then 4 for the scientific advice, for the EU's case and for 5 your considerations? 6 So far as I'm addressing the science, the scientific 7 advice would have been the same. And we know that 8 because we have a comparator, which is the Scottish 9 scientific report. And if the Tribunal is looking for 10 further comparators, there's the scientific literature 11 on which the EU's written case relies, three examples of 12 which I've taken you to today. 13 So with or without the modelling, with or without 14 any caveats, and with or without any criticisms that the 15 EU may now make of someone else's science without 16 putting up their own, the science would have remained 17 best available science; and the "basing" for the 18 purposes of 496(2), insofar as an objective or rational 19 connection is required, would also have been the same. 20 Members of the Tribunal, those are my submissions on 21 "based on". If I can assist the Tribunal further, 22 I'm of course happy to; otherwise, I will move to 23 the precautionary approach. 24 THE CHAIRPERSON: Please go ahead. 25 MR JURATOWITCH: On the precautionary approach, what was</p> <p style="text-align: center;">Page 71</p>
<p>14:34 1 that's not the ecosystem. It was the ecosystem that was 2 being modelled. And the 58% debate only arises because 3 after the modelling of the entire ecosystem was done -- 4 that is, of the whole North Sea -- it was necessary to 5 try to ratchet that back to what impact prohibition only 6 in UK waters might have. What was not ratcheted back 7 was the space in which the impact might be experienced: 8 that remained the whole North Sea. 9 So it's pretty clear, members of the Tribunal, that 10 if one looks at those numbers either before the EU 11 mounted its case, when the caveats were already 12 identified by the authors of the scientific report, or 13 after the EU mounted its case, based on those 14 transparently identified caveats, that caution was 15 always necessary with the numbers. 16 In the end, the EU's case rests on the proposition 17 that the benefit must be quantified; and then it rests 18 on the additional plank that, once quantified, that 19 benefit must be large enough quantitatively to satisfy 20 the EU and the Tribunal. Both of those planks are 21 wrong, for the reasons that I've given. 22 And it rather raises the hypothetical thought 23 experiment of: what if there was no model? What if the 24 English scientific report just had the 20 pages at the 25 beginning, which was the analysis of the existing</p> <p style="text-align: center;">Page 70</p>	<p>14:39 1 said by the EU this morning was that the precautionary 2 approach applies if there is an absence of scientific 3 information. The EU is quite stubbornly seeking to 4 erase the word "adequate" from the definition in 5 Article 495. 6 This is again an area where the EU not advancing 7 competing scientific evidence on the same issue is 8 relevant. It's not enough, members of the Tribunal, for 9 the EU to establish that the information on which the UK 10 relied was inadequate measured against some sort of 11 objective standard, because even if that was the test, 12 and even if the EU could make out that it was satisfied, 13 all that would do is engage the precautionary approach. 14 MS NORRIS: Members of the Tribunal, I hesitate to 15 intervene, but on this occasion, counsel for the UK has 16 wrongly represented the European Union's position. And 17 I would like to invite the United Kingdom to re-read the 18 transcript from this morning, where the European Union 19 did explicitly refer to the word "adequate" when 20 referring to the precautionary approach. 21 So, much as I hesitate to intervene, that is simply 22 an inaccurate citation of the European Union's position. 23 THE CHAIRPERSON: Thank you, Ms Norris. 24 So you have heard that, Mr Juratowitch. Please 25 continue.</p> <p style="text-align: center;">Page 72</p>

<p>14:41 1 MR JURATOWITCH: Madam Chairperson, I think it's unlikely 2 to assist the Tribunal if I were to enter into that 3 debate now. No doubt both parties will look at the 4 transcript carefully, and may or may not have something 5 further to say on the matter in written submissions to 6 follow this hearing. 7 Whether this morning the EU said "adequate" or not 8 is not really the point. The point is that their case 9 requires the creation of some sort of objective 10 yardstick against which the science is supposed to be 11 measured. Now, as I was saying, even if the EU made out 12 that that was the case, and even if that was the 13 standard, all it would do would be [to] engage the 14 precautionary approach. 15 The result would be that the precautionary approach 16 would become relevant to assessing the basing of the 17 measure on best available science. It would allow the 18 state to proceed with the measure, seeking a high level 19 of environmental protection, on the basis that the 20 advice contained uncertainty as to the likelihood or 21 magnitude of the measure fulfilling the objective. 22 This is consistent, members of the Tribunal, with 23 the approach adopted by the International Tribunal for 24 the Law of the Sea in the recent Climate Change Advisory 25 Opinion. That's in your record at CLA-[21]. And at</p> <p>Page 73</p>	<p>14:44 1 sentence, when you said: 2 "... I bring this point to the Tribunal's heading 3 under the broader topic of 'precaution', to note that 4 this is an objective that is precautionary, as well as 5 an approach that is precautionary." 6 What is the "this"? 7 MR JURATOWITCH: Thank you, Madam Chairperson. And 8 I apologise for tucking in a point under the 9 precautionary approach which, strictly and logically 10 speaking, doesn't belong there. 11 The "this" is the objective of resilience of not 12 only sandeels, but of the species that prey on sandeel. 13 It's the resilience of those species to which I was 14 referring. 15 THE CHAIRPERSON: Thank you for that clarification. 16 So, Mr Westaway, you have the floor. 17 MR WESTAWAY: Madam Chairperson, members of the Tribunal, 18 I will continue the response to the reply on claim 2, 19 and note at the outset that the EU, in its points of 20 reply to the UK's case, did not address a number of 21 matters. 22 First of all, they did not address that if the 23 question for the Tribunal is adherence to a standard of 24 proportionality, that the standard of review for 25 assessing that is a standard -- I think as we put it --</p> <p>Page 75</p>
<p>14:42 1 paragraph 418, it's said that being "informed by the 2 best available science", there in the context of climate 3 change, included "the application of [both] the 4 precautionary approach and an ecosystem approach". 5 My last point on precaution, members of the 6 Tribunal, is to emphasise the importance of resilience 7 of populations of species as an objective. That is, 8 of course, harder to measure than biomass, but as 9 important to the ability of a population to endure 10 another avian influenza outbreak, in the case of birds, 11 or the negative effects of climate change, in the case 12 of fish and marine mammals as well as birds. 13 In that respect, although not strictly within the 14 precautionary approach as defined in Article 495, 15 I bring this point to the Tribunal's heading under 16 the broader topic of "precaution", to note that this is 17 an objective that is precautionary as well as 18 an approach that is precautionary. 19 Members of the Tribunal, those are the UK's 20 submissions on claim 1. I'm of course at your disposal 21 to assist you if I can; otherwise, I'd ask you to 22 recognise Mr Westaway. 23 THE CHAIRPERSON: Thank you, Mr Juratowitch. 24 I do apologise, I did say that we would reserve 25 questions, but I didn't quite understand your previous</p> <p>Page 74</p>	<p>14:46 1 out of all proportion, or clearly disproportionate. So 2 we don't understand that to be in dispute. 3 I also note that the EU did not address any 4 arguments on the non-discrimination limb of claim 2, and 5 nor did the EU address any of the UK's arguments under 6 claim 3. 7 So the rebuttal or response that I will present 8 I will confine to the points that were raised this 9 morning, and attempt to pick up some of the outstanding 10 points raised by the Tribunal both in your advance 11 written questions -- I think there may be one or two of 12 those -- and also during the hearing itself. 13 Broad structure: start with regulatory autonomy and 14 the objective. Second: deal with proportionality under 15 a number of different headings. Matters of principle: 16 I'll go back to "having regard"; I want to discuss the 17 interpretation of the principle briefly. Role of 18 alternative measures; role of the Tribunal; and then 19 matters of application of proportionality, and I'll end 20 there. 21 So starting with regulatory autonomy, the parties 22 agree that they are each free to set their own level of 23 environmental protection, and that it's not for the 24 Tribunal to review the appropriateness of that level of 25 protection. The parties also agree that the means by</p> <p>Page 76</p>

<p>14:47 1 which that level of protection is pursued, i.e. the 2 exercise of regulatory autonomy when deciding on 3 fisheries management measures, is constrained by the 4 provisions of the Trade and Cooperation Agreement. 5 But thereafter, the European Union, one might say, 6 becomes confused, or one enters into territory of 7 disagreement. The EU Agent said (page 2:17-22) that 8 this case was about: 9 "... the extent to which regulatory autonomy can be 10 relied upon to justify an impairment or, in this 11 instance, nullification of the right to access to waters 12 to fish [contained] in ... Annex 38 of the [Trade and 13 Cooperation Agreement]." 14 That's a misunderstanding of the Trade and 15 Cooperation Agreement. 16 The first main point here: the justification for the 17 measures is not in itself regulatory autonomy. The 18 justification is the right, under Article 496(1), for 19 the UK to take measures that pursue the relevant 20 objectives, having regard to the principles. And 21 clearly regulatory autonomy plays a role in 22 understanding that process, but it's not per se 23 the justification. 24 It is true that the UK agreed that the EU could 25 access its waters to fish sandeel under the provisions</p> <p>Page 77</p>	<p>14:50 1 Article 494(1) to (2). That could be an issue, if one 2 of the parties were to pursue certain measures that 3 aren't here, but that's not an issue in this case. 4 And it's not an insignificant point, members of the 5 Tribunal. The EU accepts that the prohibition in this 6 case is pursued for those objectives, so is pursued with 7 the objective of ensuring that fishing activities for 8 shared stocks in the UK's waters are environmentally 9 sustainable in the long term, and contribute to economic 10 and social benefits. 11 And fourth, finally, a party must comply with 12 the procedural requirement of notification in 13 Article 496(3). 14 So there are these constraints, and it would be 15 wrong -- we don't submit that there's an unfettered 16 discretion or carte blanche, et cetera. As long as the 17 UK complies with the obligations set out in the TCA, 18 that's the end of the matter. There's no additional 19 requirement it needs to satisfy. 20 And -- coming back to the EU's comments this 21 morning -- yet, when the EU reiterated this morning what 22 it said on Tuesday, that the EU cannot, by setting high 23 levels of protection and regulatory ambition, "disregard 24 the requirement to balance rights and obligations to 25 which it has agreed when pursuing that objective"</p> <p>Page 79</p>
<p>14:49 1 of Annex 38, and to that extent, the UK grants certain 2 rights to the EU under the Trade and Cooperation 3 Agreement. But both parties accept -- and the EU Agent 4 was clear about this this morning -- that those Annex 38 5 rights are subject to the right of the parties to take 6 fisheries management measures under 496(1), which really 7 is the critical point for that aspect of the EU's case. 8 So then the next point. The basis for the measure 9 is, as we accept, Article 496(1) of the TCA. And the 10 means by which the UK exercises that right is 11 constrained by the provisions of the TCA; we accept 12 that. 13 It's important, in light in particular of the 14 Tribunal's questions yesterday, just to dwell on that 15 a little bit: the ways in which there are constraints 16 within the Trade and Cooperation Agreement. There are 17 four I want to draw attention to. 18 First and foremost, the measures must be based upon 19 the best available scientific advice. That's clearly 20 a core restraint. 21 Second, there must be -- and this is where we're at 22 in claim 2 -- there must be good faith, meaningful 23 regard to the Article 494(3) principles. I'll come back 24 to that. 25 Third, the measures must pursue the objectives in</p> <p>Page 78</p>	<p>14:52 1 (page 25:21-23), it again falls into error. And that 2 language, "balance rights and obligations", is, in the 3 UK's submission, problematic. 4 The balance of rights and obligations is struck by 5 the terms of the Trade and Cooperation Agreement; it's 6 not an additional obligation that somehow arises. One 7 finds the balance by looking at Article 496 and 8 Article 494. 9 To the extent that, in that regard, the Trade and 10 Cooperation Agreement goes this far -- which, on the 11 UK's case, it does not -- there may be a separate 12 weighing of costs and benefits of a specific measure 13 under consideration in a proportionality assessment. 14 And I'll come back to proportionality. But that 15 weighing of specific costs and benefits is not 16 a balancing of rights and obligations under the TCA, 17 failing which the UK's measures can be held to be 18 a breach of the TCA. 19 In fact, what the EU may be trying to do -- or may 20 be wrongly achieving -- with this "balancing of rights 21 and obligations" gloss is to argue indirectly to the 22 Tribunal that it can review the level of protection or 23 the regulatory objective that the UK sets; and that 24 must, on the EU's case, reduce that level of protection 25 or adversely affect that regulatory objective. That</p> <p>Page 80</p>

<p>14:53 1 simply cannot be correct. It's inconsistent with the 2 EU's pleadings and it's not what the TCA says. 3 So that's the first topic. 4 I'll move on to proportionate measures. It's common 5 ground, I think, that there's points of significant 6 divergence here, and it's important conceptually to 7 split them out into points of scope and then points of 8 application, so points of principle and application. 9 There's a danger, I think, in dividing the two. 10 The scope is key. The EU's Agent this morning 11 (page 25:10-12) said: 12 "... it is not enough for a decision-maker [simply] 13 to ... consider the need to apply proportionate and 14 non-discriminatory measures, and ... stop there." 15 And she said that would "empty [the] provision[] of 16 any form of meaningful restraint" (page 25:13-14). 17 On that formulation, the UK would agree, to the 18 extent that the decision-maker is required to have 19 regard to applying proportionate and non-discriminatory 20 measures. If a party only considered the need to do so, 21 and stopped there, that wouldn't suffice. So that 22 observation doesn't assist. 23 Of more concern is the EU's argument that a party 24 must substantively comply with a test of proportionality 25 or non-discrimination in order to meet the requirement</p> <p>Page 81</p>	<p>14:57 1 principles. 2 So I want to say a bit more on each. And as the 3 Tribunal will appreciate, I'm going to spend a lot more 4 time on the UK's position and try to unpack that 5 a little bit, which is the "good faith regard" position. 6 I'll take them in turn. 7 First, the empty proceduralism or total discretion. 8 Now, the UK would accept that it's not compliant with 9 the TCA for a party to cursorily turn one's mind to 10 a matter and pay no attention to it, without meaningful 11 consideration. That would not be compliant with 12 the TCA; it requires more; not least, as I'll come to, 13 because we do accept that it acts as a meaningful 14 constraint on the party's regulatory autonomy in 15 the decision-making process. 16 So coming on to the second option: good faith 17 regard. That is, the United Kingdom says, meaningfully 18 to consider the relevant factors with an open mind. And 19 we say this appropriately reflects the limits of the 20 constraint, at least as regards the need to consider 21 applying proportionate and non-discriminatory measures. 22 So I'll spend a moment on this. 23 Yesterday Justice Unterhalter suggested that there 24 was a link, and my note puts the point this way: that 25 the process of bona fide proceedings in this way has got</p> <p>Page 83</p>
<p>14:55 1 in Article 493(3)(f), i.e. that there be, as was put 2 this morning, "adherence", and that that is a matter for 3 this Tribunal. And I need to say a little bit more 4 here, so I'll spend a little bit of time on this. 5 As set out yesterday, the ordinary language of the 6 provision is an obligation of conduct: to have regard 7 to/take into account principles. The question arises: 8 how might that be done? And from the discussion [with 9 the] Tribunal, it seems four possible outcomes arise. 10 I'm not saying there may not be others, but there seem 11 to be four headings that arise for the purposes of 12 analysis. 13 Firstly, what one might call "total discretion": 14 effectively a discretion to disregard or, as 15 Justice Unterhalter put the point in discussion 16 yesterday, "empty proceduralism". So, first, total 17 discretion. 18 Second, what might be called "good faith regard". 19 That's the UK's position. 20 Thirdly, application, i.e. that a decision-maker 21 applies and concludes that a measure satisfies 22 the principle. 23 And fourthly, substantive compliance, i.e. -- that's 24 the EU's position -- that the measure, on some objective 25 standard reviewable by the Tribunal, complies with the</p> <p>Page 82</p>	<p>14:58 1 to make some difference to know how you take the 2 decision, and the impact of these reasons on your 3 ultimate decision, so some "must make a difference" 4 point. 5 We would accept as a procedural tool that it must 6 make a difference. Where we would not go so far is to 7 accept that it necessarily, as a matter really of law, 8 must make a difference to the outcome. And that's 9 because fundamentally the "have regard to" obligation is 10 a procedural rather than substantive obligation. 11 Now, I'm not going to repeat points about plain 12 meaning of language, et cetera, but it may help to stand 13 back a bit and think a bit more broadly about this 14 topic. 15 Yesterday I noted in submissions, and we note in our 16 written case, analogies with UNCLOS indeed made by 17 the EU and the Whaling case. There were two other 18 potentially helpful analogous situations I wanted just 19 to raise before the Tribunal in this context. 20 The first one is an analogy with other procedural 21 obligations in international law, and one that one might 22 think about in this context is the obligation to 23 negotiate. Clearly it doesn't have a substantive edge, 24 but it's an obligation to do something procedural. And 25 the core ideas that arise in the context of that</p> <p>Page 84</p>

<p>15:00 1 obligation are similar, and one finds similar language 2 to those which the United Kingdom says the Tribunal 3 should accept in the context of Article 494(3), 4 i.e. meaningful engagement with an open mind. 5 The second conceptual point that may be of some 6 assistance is drawn from the area of environmental law, 7 and it's environmental assessment. I mentioned 8 yesterday the strategic environmental assessment process 9 that was done by the Scottish authorities in this 10 instance, and the Tribunal has, in the legal authorities 11 record at RLA-27, a copy of the underlying Directive on 12 the Assessment of Plans and Programmes in the 13 Environmental Area, so the environmental impact of plans 14 and programmes. 15 Why this may be of some relevance is because the 16 core requirement in environmental assessment -- 17 this applies to both the strategic level of plans and 18 programmes, and project level, for what it's worth -- 19 is to take into account the environmental information 20 that's comprised in the environmental report and 21 the consultation exercise on that. 22 If I can just give the Tribunal references, I think 23 in the SEA Directive the key reference is Article 8 for 24 that core obligation, "tak[ing] into account", under 25 the heading "Decision making"; and Article 1 of that</p> <p>Page 85</p>	<p>15:04 1 to repeat myself too much, but I wanted to recall to 2 the Tribunal the deliberate language in the Trade and 3 Cooperation Agreement -- twice repeated, of course -- 4 "having regard", and that it is not a stronger 5 obligation. 6 I wasn't sure whether, digging through the 7 appendices, you would have got this, but we've put on 8 the slide (16) the extracts that we refer to in the UK 9 case from the travaux effectively showing this earlier 10 version that was tabled for the negotiations, and how 11 this was as presented by the EU (R-120, page 95). 12 But the important point is not that. The important 13 point is that that formulation, i.e. that "New technical 14 measures" -- and as I explained yesterday, that includes 15 spatially restrictive measures -- "shall be 16 proportionate, non-discriminatory", was not taken 17 forward, is not the one found in the TCA. 18 Had that been the measure which either party wanted 19 to hold themselves to, "shall be proportionate", one 20 would have expected it to be articulated in the TCA, and 21 it simply was not. In a way, that should be the start 22 and the end of the point. But I wanted to go back to 23 that. 24 So going back to the four options, we've covered 25 total discretion, we've covered good faith regard.</p> <p>Page 87</p>
<p>15:02 1 directive explains the objective: "a high level of 2 protection of the environment". 3 It is very clear in that context, the 4 decision-making context of environmental assessment, 5 that the duty is one of conduct: to take into account. 6 It does not require, because there may be some 7 particular adverse impact identified in the process, 8 that a decision which would have adverse environmental 9 impacts must not be taken. It's a conduct obligation, 10 not an obligation of result. 11 One reason why it's helpful to think about that 12 conceptually is because the objective, high level of 13 protection, is considered to be materially advanced by 14 taking into account the environmental information. It's 15 not empty; it improves decision-making. It means that 16 the decision-maker is more likely to come to a decision 17 that will not have adverse impacts on the environment; 18 it doesn't preclude that. 19 And that analogy, if one is thinking about the 20 content of the obligation, applies here. The "have 21 regard to" obligation in Article 494(3) serves to ensure 22 that factors are taken into account, and to improve 23 decision-making, but it does not serve to set up 24 a substantive requirement, as the EU argues. 25 Still a little bit more on this topic. I don't want</p> <p>Page 86</p>	<p>15:05 1 Application was the third option for what this might 2 mean. 3 On the UK's submission, if a party takes it upon 4 themselves to consider and apply the principle, that's 5 sufficient but not necessary to discharge the 6 obligation. And it does reflect, of course, what the UK 7 did in this case. But it cannot be necessary, because 8 one goes back to the clear language, which is "hav[ing] 9 regard to ... applying"; not, as it could have been, 10 "applying". 11 The final option -- which is the EU's, as we 12 understand it -- is substantive compliance, and I can 13 take that very briefly. In the UK's submission, that 14 goes well beyond anything agreed in the Trade and 15 Cooperation Agreement, and effectively sets up 16 obligations of result reviewable by the Tribunal, which 17 would not be a proper reading of the TCA and would be 18 fundamentally inconsistent with the important emphasis 19 on regulatory autonomy. 20 So I think I'm coming to an end on this part of 21 the topic. There were two questions from the Tribunal 22 at 9(a) and (b). 23 JUSTICE UNTERHALTER: I'm sorry to interrupt. Can I just be 24 sure that I understand the distinction you're drawing 25 between "hav[ing] regard to ... applying" and the third</p> <p>Page 88</p>

<p>15:07 1 variant that you are positing. How do you mark the 2 difference between "hav[ing] regard to ... applying" and 3 a mandatory requirement to consider application? I just 4 want to be clear I understand what that third variant 5 consists of. 6 MR WESTAWAY: If we take the third variant, it would be 7 inevitable that a party that applied, thought about the 8 principle -- take proportionality, to give a concrete 9 example -- thought about proportionality, would also be 10 "having regard to" it. But as I say, the party doesn't 11 need to go that far. 12 It's not this case, but it would suffice, in my 13 submission, for a party to have regard to the 14 constituent factors that go to proportionality, and 15 think about them in its process, without necessarily 16 applying them. That's not this case. And I submitted 17 yesterday that I think in the vast majority of cases, 18 one might expect in those circumstances that a party 19 would itself come to a conclusion on proportionate or 20 non-discriminatory. 21 I draw the distinction because, as a matter of 22 (1) language and (2) the required exercise, it doesn't 23 go that far. But I would accept, as a matter of 24 practice, that one would expect a party to very often do 25 the exercise of thinking: well, is it proportionate?</p> <p>Page 89</p>	<p>15:10 1 relevant to the decision that they are exercising. 2 On that point of disagreement I did want to touch 3 upon, the UK does dispute a suggestion by the EU in its 4 Written Submission -- and that's EU Written Submission, 5 [paragraphs] 564 to 566 -- that Article 494(3)(e) -- and 6 the Tribunal will recall that that's the one that refers 7 to "minimising harmful impacts of fishing on the marine 8 ecosystem", et cetera -- that that ecosystem 9 consideration needs to be subordinated or reconciled 10 with Article 494(3)(f). 11 We don't accept that. There's not a hierarchy; 12 the EU was right there. And this attempt to diminish 13 the impact of the principle in Article 494(3)(e) is, in 14 my submission, problematic. I can see why the EU might 15 do it, because clearly they don't suggest the UK didn't 16 have regard to that principle; it was an important 17 principle in the UK's consideration. 18 It wasn't this case, so one is in a world of 19 hypothetical here. But it would be possible and lawful 20 in a conceivable case for one of the parties to give 21 greater weight to a measure that minimised ecosystem 22 impacts -- having regard to the principle at (e) -- than 23 to concerns, for example, about discrimination. 24 It would be possible. 25 The next subheading under proportionality I wanted</p> <p>Page 91</p>
<p>15:08 1 Is it non-discriminatory? 2 So I was going to touch on 9(a) and (b) of the 3 Tribunal's advance questions. And this 9(a) was on 4 principles. I don't think I picked this one up 5 yesterday in the questions, about what meaning should be 6 ascribed to the word "principles". 7 In the UK's submission, the word "principles" 8 confirms there's no requirement that the measures must 9 conform to the principles. The language is not of 10 obligations, but principles applying in the 11 decision-making context. So no special meaning. In my 12 submission, they are factors to which regard should be 13 had in coming to a practical result. 14 Question 9(b) was about the relationship of the 15 different principles with each other. On that, I think 16 it's common ground with the EU that there's no 17 hierarchical order and there's no need for a party to 18 favour one principle over the other. Subject to one 19 point I'm going to come to, that may not be entirely 20 common ground, but that's entirely the UK's position. 21 The weight to give to each in the balance is 22 a matter essentially, in the UK's submission, for the 23 parties' discretion. And it may be in some cases that 24 not all of the principles are relevant. So clearly 25 a party only has to have regard to principles that are</p> <p>Page 90</p>	<p>15:11 1 to come to was interpretative principles, and where one 2 goes to to understand proportionality itself. 3 The Agent for the EU said that they are permitted to 4 have recourse to domestic law and EU law to interpret 5 the Trade and Cooperation Agreement as regards 6 proportionality. She said that the UK had not clearly 7 explained why that's not permissible. 8 It is set out in the UK's Submission, and it's our 9 case, paragraphs 340 to 343, but I want just to present 10 those reasons in summary to the Tribunal. Five points. 11 First, Article 31 of the Vienna Convention requires 12 the words to be given their ordinary meaning in context 13 and in light of the object and purpose of the Trade and 14 Cooperation Agreement. 15 Second, other relevant rules of international law 16 applicable in the relations between the parties may be 17 taken into account under Article 31(3)(c) of Vienna, but 18 they must be rules of international law applicable in 19 the relations between the parties. 20 Third, domestic law is neither. And even if one, in 21 one sense, accepts that EU law between the 27 Member 22 States has an international element, that does not make 23 it applicable as between the UK and the EU. 24 Fourth, it makes senses that domestic law would not 25 readily be used to interpret inter-state treaties such</p> <p>Page 92</p>

<p>15:13 1 as the TCA, because the relevant parties might have 2 different domestic law. 3 Fifth, moreover, the context in which it appears in 4 EU law and elsewhere -- and really, with 5 proportionality, one finds proportionality either in EU 6 law or in the human rights context, are the primary 7 ones -- are principally vertical relationships between 8 states and individuals, i.e. public law, human rights. 9 These are situations where the state is obliged to 10 uphold rights unless the restriction is strictly 11 necessary. The same kind of considerations simply do 12 not apply in an inter-state context, where two states or 13 parties are sovereign equals in a horizontal 14 relationship. 15 So that reason makes it additionally inappropriate 16 to take domestic law concepts applicable to individuals 17 or fundamental rights and to try to import them into 18 inter-state relations. 19 So all of that is to say that it's understandable 20 why Article 31 of Vienna does not account for domestic 21 law playing a role in the interpretation of 22 an inter-state treaty. The Tribunal is obliged to apply 23 the customary rules of treaty interpretation, nothing 24 more. 25 Two more points on this principle heading under</p> <p>Page 93</p>	<p>15:16 1 warranted, such as prohibition, for decision rather than 2 a range of possible alternatives?" 3 The answer to this, in simple terms, is: in 4 principle, yes; but in doing so, the decision-maker is 5 constrained by Articles 496 and 494. 6 So the UK can select a single measure, such as 7 prohibition, as a means of meeting its level of 8 protection where that measure is based on best available 9 science, and regard in good faith has been had to the 10 relevant principles. There is no requirement for the UK 11 to pursue that level of protection in any specific way, 12 other than consistently with the terms of the TCA. 13 I'm not going to repeat the points I've made on 14 alternatives already. 15 So the last point on this is the role of the 16 Tribunal. And this arises because the EU's Agent, 17 towards the end of the Union's reply this morning 18 (page 34:6-8), said that: 19 "... the United Kingdom considered it sufficient ... 20 simply to identify various elements that formed part of 21 the decision-making process." 22 However, the EU's case was that the Tribunal should, 23 and is required to, go further, and scrutinise not only 24 the elements that the United Kingdom has identified, but 25 whether those elements disclose a proper weighing of</p> <p>Page 95</p>
<p>15:15 1 proportionality: the role of alternative measures, which 2 I'll take quite briefly, and then the role of the 3 Tribunal, and then I'll briefly come on to application. 4 Alternative measures. We made submissions on this 5 yesterday. The EU argument this morning was that the EU 6 has advanced an alternative proportionate measure that 7 the UK has not grappled with, and the UK should do so. 8 But as explained, the UK does not accept that 9 there's a need for the UK to grapple with an alternative 10 raised by the EU in arbitral proceedings following the 11 measure being decided upon. The requirement is simply 12 that the UK have regard to applying proportionate 13 measures. That does not require a party, in the UK's 14 submission, to look at alternative measures necessarily 15 in considering the factors that are relevant to 16 proportionality, including the weighing of costs and 17 benefits. At most, as I've submitted, it may be 18 a mechanism to assist in undertaking that exercise. 19 If I could take the opportunity, under this topic, 20 to respond to Tribunal advance question 10. That was 21 the question -- I assume sort of an all-seeing, 22 you remember exactly what the questions were, so 23 I'll repeat it. That was the question: 24 "May a Party decide on the level of protection it 25 required and select a singular measure that it considers</p> <p>Page 94</p>	<p>15:18 1 the costs and benefits. 2 That's a mischaracterisation of the UK's position in 3 the first instance. The EU is wrong to say that the 4 UK's case is just that elements have to be identified. 5 And I respond to this under the principle or the 6 approach to proportionality generally, rather than on 7 application, for that reason. The elements need to be 8 considered and weighed: that's key. 9 And a side comment which gets me slightly into 10 application here: if one actually thinks about the 11 documents in this case, it's not clear what the EU wants 12 to see. The documents show a consideration of factors, 13 including, as I showed, for example in the de minimis 14 assessment (C-44), under headings of "Costs" and 15 "Benefits", they make conclusions. 16 Following the mischaracterisation of the UK's 17 position, the Union then went on to say that the 18 Tribunal should go further, and scrutinise not only 19 the elements, but also whether those elements disclose 20 a proper weighing of the costs and benefits. No 21 disagreement on that. 22 If the Tribunal takes the view that "have regard" 23 requires compliance with proportionality, there's issues 24 there. But if one is considering the United Kingdom's 25 test of "have regard", that clearly requires the</p> <p>Page 96</p>

<p>15:19 1 Tribunal to consider the information on the record, 2 including the weighing that was done by the United 3 Kingdom; and we don't shy away from such scrutiny, 4 we invite it. 5 Indeed, if one needed it, it's set out clearly in 6 Article 742(a) of the TCA, which says that: 7 "The arbitration tribunal: 8 "(a) shall make an objective assessment of 9 the matter before it ..." 10 So I don't think that's really a dispute between 11 the parties, and it mischaracterises the [UK]'s case. 12 So that leads me on to the last point, which I can 13 take relatively swiftly: it's the application and 14 proportionate measures. 15 The EU's Agent this morning set out the EU's 16 concerns under three headings: benefits, costs and 17 the weighing exercise. And I've just dealt with that 18 weighing exercise point, so there's just a little to say 19 on benefits and costs. 20 On benefits, that really goes back to the scientific 21 evidence. You've heard from Mr Juratowitch and 22 Ms Boileau on that; I don't repeat those points. But 23 I do want to add, insofar as it's said that uncertainty 24 might make a difference, that uncertainty was expressly 25 recognised by the decision-makers in this case, and</p> <p style="text-align: center;">Page 97</p>	<p>15:23 1 submission -- so tab 17 (R-77), page 269, 2 paragraph 17 -- pointing out that BirdLife International 3 emphasised the "urgent need to build resilience", and 4 then going on to agree with that comment and the need 5 "to take ... action", not least because of avian flu. 6 The simple point is: there was a need for these 7 measures. And really this goes to something the EU 8 doesn't purport to challenge anyway, which is the 9 regulatory objective. 10 If we are talking about balance, this goes to 11 benefits rather than costs in any event. And it's 12 a matter where, at the very least, the United Kingdom 13 was entitled to take the view that it was important that 14 action was taken, with a level of urgency, on sandeels. 15 As I've said, we don't say and I don't argue that 16 this was an emergency measure. Clearly, detailed 17 consideration was given to the measure over a number of 18 years. It wasn't rushed out without consideration, 19 partly because there was accepted a need to consider the 20 impact on, among other things, EU vessels and industry. 21 Finally, on costs, the EU Agent argued 22 (page 32:15-24), by reference to passages in the 23 ministerial submissions that we've seen already, that 24 the UK concluded that there were no issues with regard 25 to socioeconomic impacts on the EU "because [the]</p> <p style="text-align: center;">Page 99</p>
<p>15:21 1 didn't make a difference. 2 Two references to that from the ministerial 3 submissions we saw: the United Kingdom Government 4 ministerial submission -- I'll just give the reference, 5 I think -- is core bundle tab 17 (R-77), page 271, 6 paragraphs 14 to 16; then the Scottish ministerial 7 submission, bundle tab 26 (R-98), page 580, the third 8 paragraph on the page. 9 There was one other point on benefits that was 10 raised by the EU this morning relating to urgency of 11 measures. I'll take this very briefly. The comment was 12 made by the EU Agent that there is only one reference to 13 the word "urgent" in the documents. I don't know where 14 this goes; it's a slightly forensic point, and not 15 strictly true. 16 First of all, it's plain when one looks at the 17 record, and the process that was followed, and the 18 evidence that was inputted into that process, that there 19 was temporal importance to introducing the management 20 measures that were needed to protect sandeel. It speaks 21 for itself, given the importance of sandeels to the 22 marine food web and ecosystem. 23 In addition, if one wants to look for references to 24 the word "urgent" specifically, one can see it 25 additionally in the 14 September ministerial</p> <p style="text-align: center;">Page 98</p>	<p>15:24 1 impacts [could] be mitigated". I simply ask the 2 Tribunal to read those passages, because that misreads 3 them and it misreads the submissions. 4 In discussing the potential to mitigate the 5 socioeconomic impacts on EU fishers, the UK was 6 acknowledging those impacts, but considering that their 7 significance to some extent could be reduced. It's 8 not -- categorically not -- to conclude that there is no 9 issue; it is to engage with the issue. And the 10 submission -- and perhaps this is because the EU has to 11 go here to succeed on "have regard to" -- the submission 12 misreads entirely the process that was carefully 13 undertaken by the United Kingdom. 14 The second point that was raised by the EU Agent 15 this morning, again referring to those same passages -- 16 the key passage here is paragraphs 25-26 in the 17 14 September submission that you have in the bundle 18 (tab 17, R-77). But he said, by reference again to 19 those passages, that the assumptions upon which this 20 idea of mitigation was based were unsubstantiated. 21 He said they were "unsubstantiated assumptions" 22 (page 33:18). 23 I don't want to go to the passages now. But again, 24 when the Tribunal reminds itself of the analysis in 25 those paragraphs, the Tribunal will see that there is</p> <p style="text-align: center;">Page 100</p>

<p>15:26 1 reference to the conclusions being based on evidence 2 from STECF -- that's the Science, Technology and 3 Ecological Committee for Fisheries, I think -- and 4 the Marine Management Organisation. 5 So it wasn't unsubstantiated; it was based upon 6 evidence. In any event, the EU doesn't say it's 7 factually incorrect. 8 Unless there are any questions at this stage, 9 those are my submissions. 10 THE CHAIRPERSON: Thank you, Mr Westaway. 11 So, Mr Juratowitch, you also have the floor now. 12 MR JURATOWITCH: No, I don't. Those are the submissions of 13 the United Kingdom. Thank you, members of the Tribunal. 14 THE CHAIRPERSON: Thank you very much. The microphone was 15 still on, so I thought perhaps you might wish to use up 16 the last five minutes. 17 Thank you very much for those submissions. We will 18 now take a break until 3.45. So, thank you very much. 19 We will see you back then. 20 (3.27 pm) 21 (A short break) 22 (3.46 pm) 23 THE CHAIRPERSON: Thank you very much, ladies and gentlemen. 24 Questions from THE TRIBUNAL 25 THE CHAIRPERSON: The Tribunal has a number of questions.</p> <p>Page 101</p>	<p>15:49 1 So I hope that that is acceptable. I thought 2 I would lay that out first, so that then you are very 3 clear about what the Tribunal proposes. 4 So in terms of -- I just have a question initially, 5 and it's really for both parties. 6 Mr Juratowitch, when you indicated that there was 7 agreement between the parties that the Arbitration 8 Tribunal should not resolve science or make scientific 9 judgments, you then referred us to the Searle paper of 10 2023 and then the Engelhard paper, and in some detail to 11 that. 12 The European Union, your Agent also referred us to 13 the additional modular plug-ins that were available, and 14 you referred us to the various exhibits which 15 demonstrate that. 16 So my question for both parties is: how should the 17 Tribunal take into account these scientific papers, when 18 there is agreement between you that the Tribunal is not 19 to make judgments on the science? So that's my first 20 question, and of course it relates to the standard of 21 review. 22 So can I ask the European Union to respond to that, 23 and of course noting that you can of course respond in 24 writing as well. But I just thought I would ask that 25 question first.</p> <p>Page 103</p>
<p>15:47 1 We restrained ourselves in the reply and counter-reply. 2 We have some questions that we will pose just orally 3 now. We also have prepared some written questions, some 4 of which we will address, but in the interests of time, 5 we're unlikely to be able to get to all of the written 6 questions. So what we propose is that the written 7 questions will be provided to you shortly after the 8 hearing closes. And consistent with the procedural 9 order -- and I will go over this beforehand, just in 10 case you have questions. 11 Procedural Order No. 2, as you know, in 12 paragraph 3.6, does envisage questions from the Tribunal 13 to the parties. It was anticipated at the time of the 14 drafting of the procedural order that those questions 15 would be provided at the end of the Respondent's first 16 submissions. However, we considered that it was better 17 to allow the Tribunal a little bit more time to prepare 18 questions, and so therefore we are providing those 19 written questions at this stage, after the closing of 20 the hearing. 21 That does change the date for which the written 22 responses are due from 4 February to 5 February. And 23 then the replies/responses from the other party to those 24 questions will still remain on 10 February, together 25 with the final written submissions.</p> <p>Page 102</p>	<p>15:51 1 Thank you. 2 MS NORRIS: Madam Chair, thank you. And indeed this would 3 be a preliminary response, and the European Union would 4 welcome the opportunity to come back in writing. 5 But, put simply, the European Union's position is 6 that it is not asking this Tribunal to redo the science 7 or form its own scientific assessment. So it's 8 a question of evidence, which partly segues into the 9 submissions concerning the burden of proof and 10 the evidential standard that a party must meet. 11 So when a party makes a claim, as the European Union 12 does, that a measure is not based on the best available 13 scientific advice, then the European Union is required 14 to adduce facts and evidence to support that claim. And 15 one means through which that evidentiary standard can be 16 met is to, we say, identify flaws in the scientific 17 model, and to do so by reference to other scientific 18 information. 19 In that sense, the Tribunal is asked to look at that 20 as evidence of the claim that is being advanced. It is 21 not being asked itself to determine what the best 22 available scientific advice would be in its opinion, or 23 to redo the modelling itself. 24 Thank you. 25 THE CHAIRPERSON: Thank you, Ms Norris.</p> <p>Page 104</p>

<p>15:52 1 Mr Juratowitch. 2 MR JURATOWITCH: Thank you very much, Madam Chairperson. 3 Could I just begin by saying: the Agent for the 4 European Union was correct that she did use the word 5 "adequate" in respect of the precautionary principle. 6 So I apologise for misquoting her, and retract the 7 suggestion that she had not said it. I'd simply taken 8 a handwritten note that I hadn't had time to check 9 against the transcript, and that handwritten note was 10 wrong. It makes no difference at all to the submission. 11 With that apology made, on the question that's just 12 been asked, the European Union has claimed that the UK 13 has not based its measures on the best available 14 scientific advice. It needs to satisfy a burden to meet 15 that test. It needs to do that by reference to evidence 16 of some kind, and it's natural, where that's the subject 17 matter of the claim, that the evidence will be 18 scientific. 19 The short answer to your question, Madam Chair, 20 is that the Tribunal needs to consider the science so 21 far as necessary to determine whether it's the "best 22 available". That does not mean resolving scientific 23 controversies as such. 24 And to come to the specific part of your question 25 about the scientific papers, those were elements of</p> <p>Page 105</p>	<p>15:56 1 there's nothing of that same packaged nature on the EU 2 side. So the only thing that the UK can refer to in 3 order to assess whether or not the EU has met its burden 4 to seek to assist the Tribunal with that is the evidence 5 that it has put forward. 6 If, in the end, you just can't resolve this 7 scientific controversy, the result will be that the EU 8 has not made out its claim that the UK's measures are 9 not based on the best available scientific advice. 10 Those are my submissions, Madam Chairperson. 11 THE CHAIRPERSON: Thank you very much for that. 12 There's one matter which you will find that there 13 has been quite a lot of discussion about in the oral 14 hearing, and it has engaged the Tribunal as well, which 15 is the whole issue of the modelling. 16 I refer back to the transcript at 14.35 (page 70), 17 where it talks about the ecosystem model of the EwE and 18 how it was being modelled. There's part of this that 19 the Tribunal doesn't really understand and would like to 20 get clarity on, and it's about the 58% debate, and that 21 that 58% debate only arises because the entire ecosystem 22 was being modelled, so the entire North Sea. 23 The understanding of the Tribunal is that the EwE 24 model modelled the entire North Sea. In order to -- and 25 please correct me if I'm wrong on this -- in order to</p> <p>Page 107</p>
<p>15:54 1 science relied on by the European Union in its Written 2 Submissions. The position of the Respondent is that, 3 those having been proffered by the European Union as 4 part of its evidence, the Tribunal can look at those for 5 the purpose of evaluating whether or not the United 6 Kingdom's science is the "best available" or not, and 7 one way it can do so is by seeing that the conclusions 8 and the content relate to each other. 9 Now, I accept that it's a difficult question for the 10 Tribunal, and it's no doubt why you've started with it, 11 because you need to go far enough into the science to 12 answer the question that the treaty poses for you, you 13 need to review the evidence that's been submitted to 14 you, but not resolve scientific controversies yourself 15 as such. 16 Ordinarily, one might expect a party bringing a case 17 that another party has not relied on the best available 18 scientific advice to rely on some science of its own 19 which would then interpret the science for you, in the 20 form of an expert report or an expert witness. And if 21 that were done, the Tribunal would have packaged for it 22 the scientific hinterland behind the positions that the 23 parties are relying on. 24 Here you have that packaged for you on the UK side 25 in the three documents that you're familiar with, but</p> <p>Page 106</p>	<p>15:58 1 examine a scenario of a closure, and I assume it was 2 a full closure of the UK waters, you had to, in effect, 3 extract out the relevant parts of the UK elements from 4 the whole North Sea. So that meant, for example, when 5 you're looking at fishing opportunities, fishing 6 mortality, you had to look at what the fishing mortality 7 for sandeel was in the entire North Sea and then take 8 out the part that was in the UK waters. 9 So that's my first question, whether that was 10 correct. 11 And then, Mr Juratowitch, you said (page 70:5-7): 12 "What was not ratcheted back was the space in which 13 the impact might be experienced: that remained the whole 14 North Sea." 15 That I don't understand, because I thought the whole 16 basis was to look at the scenario of the impact on UK 17 waters. What you seem to be suggesting is that that 18 scenario also looked at the impact on the whole 19 North Sea. 20 So therefore my question is whether the table of 21 the impacts -- in terms of the percentages of additional 22 biomass for seabirds, for example -- whether that 23 related to the entire North Sea or whether that related 24 only to the UK waters. 25 So if you could help us to understand what was done</p> <p>Page 108</p>

15:59 1 in the EwE model, that would help us from a factual
2 perspective.
3 MR JURATOWITCH: Madam Chairperson, on the first part of
4 that, the Tribunal's understanding on the 58% issue is
5 correct. I won't repeat back to you what you've just
6 said. The answer to the question is: yes, that's
7 correct.
8 On the second part, arising from what I said before
9 the break, your understanding is also correct. And the
10 reason for it is this: the model modelled the ecosystem.
11 You're absolutely right to say that in order to
12 determine the impact on that ecosystem of removing the
13 fish caught in EU waters, that's where the 58% debate
14 arose.
15 Once the percentage is removed -- and this is not in
16 the model: the model only models the ecosystem. The 58%
17 debate arises in between the modelling being done and
18 finished, and the report being written to present the
19 information. And the question for the authors of the
20 report is: how do we go from an ecosystem model that
21 models the whole North Sea to working out what we can
22 control?
23 What they could control is a reduction of fishing in
24 the part of the North Sea that is UK waters: that's the
25 58% debate. What they then did, in applying that

Page 109

16:03 1 North Sea, and that is how the 58% figure is reached.
2 Whereas the correct position, according to the EU, is
3 that one needs to take -- as, Madam Chair, your question
4 rightly identified -- the entire North Sea, which
5 includes UK waters, EU waters, but also waters of
6 Norway.
7 By the 58% figure only comparing EU and UK waters,
8 one is overstating the amount of catches in UK waters.
9 And that is the point of disagreement between the
10 parties.
11 THE CHAIRPERSON: Thank you, Mr Dawes.
12 The consequence of that is that given the
13 differential between the 39%, which was the EU's
14 submission was the correct figure, and the 58%, which is
15 the one used in the model, that 19% of sandeel catches
16 come from Norwegian waters? Is that the consequence of
17 that?
18 MR DAWES: I'm not sure as a matter of mathematics that is
19 necessarily correct.
20 I think what we're saying is that if 39% come from
21 UK waters, then the split between EU and Norwegian
22 waters -- it's not a figure I necessarily have at hand.
23 But what is relevant for the Tribunal's assessment is:
24 if one replaces the 58% figure by a lower percentage,
25 it means that the output of the model -- or by feeding

Page 111

16:01 1 percentage, was work out the impact on the ecosystem --
2 so still the whole North Sea -- of a reduction,
3 accounting for the proportion of the fish caught in UK
4 waters.
5 Which is why I said there is not a model for the UK
6 waters. That's not an ecosystem, and so you can't
7 ecosystem-model the UK waters on the basis of currently
8 available models.
9 If I can assist you further, I'm at your disposal,
10 but that's the answer to your question.
11 THE CHAIRPERSON: Thank you. That does assist.
12 If I may also now turn to the EU ... do you have any
13 response to that?
14 MR DAWES: Thank you, Madam Chair.
15 On the first part of the question, the EU is in
16 agreement with the UK.
17 On the second part, I think it is important to
18 understand what the 58% figure represents. And it is,
19 I think, common ground that it supposedly represents the
20 amount of catches of the North Sea that took place in UK
21 waters.
22 The matter of dispute between the parties is: what,
23 in a sense, is it 58% of? The EU's position is that
24 they are only comparing the UK and EU waters of the
25 North Sea. So this 58%, it is EU plus UK waters of the

Page 110

16:05 1 into the model an overestimation of what is being
2 removed from the North Sea, one is then
3 overestimating -- or there is a risk of overestimation,
4 and it's something that is just not possible to know,
5 but there is a risk of overestimating the benefits of
6 the measure, or the benefits of the measure whose
7 effects the model is trying to evaluate.
8 THE CHAIRPERSON: I understand.
9 We have a question on this in writing, so you will
10 have an opportunity to respond in writing to the whole
11 issue of the Norwegian catch. So thank you for that.
12 JUSTICE UNTERHALTER: I'm sorry, could I just follow up.
13 We will ask more detailed questions.
14 But I understand the EU's position is that the total
15 catch must be the catch across the North Sea, not simply
16 the total catch of the EU plus the UK. In answer to
17 some of the first questions posed, I'd understood that
18 that was what the model was meant to do, which was to
19 survey the whole of the North Sea.
20 So is there some parameter in the model that is then
21 sifting out some of the -- why, in other words, isn't
22 the catch that takes place in Norwegian waters then just
23 in the figures? Because isn't that what the model is
24 looking at?
25 But again, if there's a more detailed treatment that

Page 112

<p>16:07 1 would be more usefully done in writing, please, that's 2 also fine. 3 MR DAWES: Again, this is a preliminary response and there 4 may need to be a more detailed position. 5 But simply: indeed that is the purpose of the model. 6 But what the EU is saying is: if that is the purpose of 7 the model, but if being fed into the model is 8 an overestimation of UK catches, then what comes out of 9 the model is likely to be an overestimation. It's not 10 what the model is seeking to test; it's what is being 11 inputted into the model. And then what comes out, in 12 a sense, we say could be an overestimation of the impact 13 of the measure. 14 JUSTICE UNTERHALTER: That's then predicated on the fact 15 that the figures for the catch in Norwegian waters was 16 not fed into the model? 17 MR DAWES: Yes. We say that if you take only EU and UK 18 waters, then the figure that is being fed in is not the 19 correct figure to be fed into the model. 20 THE CHAIRPERSON: Thank you very much. 21 Yes, please, Mr Juratowitch. 22 MR JURATOWITCH: Thank you very much, Madam Chairperson. 23 If I could respond on that. 24 It must be very frustrating for the Tribunal to 25 listen to lawyers talking about science, but it's</p> <p>Page 113</p>	<p>16:10 1 about the seal graph at which you were looking, the 2 diagonal black line is the product of the model. 3 The only thing the Norwegian fishing issue goes to 4 is where the red line is. And if, on the EU's case, all 5 Norwegian sandeels caught in the North Sea are caught 6 outside the UK's waters, the effect of that would be 7 that the solid red line should appear just to the right 8 of the current lower end of the confidence interval 9 marked by the dotted red line. That would be 10 the result. 11 Members of the Tribunal, the only other point 12 I would add -- and this comes back to where this 13 question started -- is that the consequence of having 14 a model for the whole North Sea, only producing 15 predicted biomass increases for the whole North Sea 16 based on a prohibition of fishing in UK waters, the 17 effect of that is very likely to show a diluted impact 18 compared to if one was able to model the ecosystem 19 impact in UK waters of prohibiting sandeel fishing in 20 UK waters. 21 So to the extent the Tribunal is being provided with 22 information that does not perfectly capture questions 23 it may be asking itself, the Tribunal can have a high 24 level of confidence that those figures represent 25 a dilution of the true impact within UK waters.</p> <p>Page 115</p>
<p>16:08 1 necessary to correct a fundamental misunderstanding that 2 was inherent in the exchange that just transpired 3 between Justice Unterhalter and the Agent for the EU, 4 and it arises from the expression "fed into the model". 5 The Norwegian catch, or the "58% issue", if I can 6 characterise it like that, does not relate to the model 7 or anything that is fed into the model. The model is 8 for the whole of the North Sea. The Norwegian catch 9 issue arises as to how people trying to make decisions 10 or issue advice with respect to the part of the 11 North Sea that they can control can understand what 12 impact that might have. That's where the issue of the 13 Norwegian catch arises. 14 If the authors of the English scientific report had 15 information on where Norwegian vessels caught their 16 fish, they would have been able to, in between the stage 17 of having completed the modelling and coming up with 18 the effect over the whole North Sea that they predicted 19 for a prohibition of fishing in English waters, 20 accurately account for the entire catch and where it 21 took place. Because they didn't have that information, 22 they did what they could with the information that they 23 had and they created a confidence interval. Those are 24 the red lines on the graph, if I can put it that way. 25 The model produces the black line. If you think</p> <p>Page 114</p>	<p>16:12 1 Thank you very much. 2 THE CHAIRPERSON: Mr Dawes. 3 MR DAWES: Just one final point, just for the Tribunal's 4 understanding when one talks about confidence levels. 5 If one accepts the EU's position that we are no 6 longer in the world of 58%, but in a world of 39%, that 7 also necessarily means that there is a shift also in 8 terms of the confidence levels. Because the 39% now 9 becomes the reference point, and then the confidence 10 levels -- if one calls them "boundaries", because that's 11 what confidence levels are about: they're about setting 12 a degree of confidence of what is at the lower end and 13 what is at the higher end. 14 So if the 58% figure, the starting point, is no 15 longer that but 38%, that then means that new confidence 16 levels have to be established. And then when one looks 17 at the output of the model and then the simulated 18 biomass increases, not only are those figures, we say, 19 changed, but the confidence level in those figures is 20 also changed. 21 THE CHAIRPERSON: Mr Juratowitch. 22 MR JURATOWITCH: I'm sorry, Madam Chairperson, but that was 23 a new point and it can't be left unresponded to. 24 We are departing very far from science now. 25 The English scientific report, on the basis of the</p> <p>Page 116</p>

<p>16:13 1 information available at that time, predicted results 2 with a confidence interval. It identified and worked on 3 the basis that there were uncertainties, one of which 4 was where the Norwegian landings came from. 5 If the EU's assumption is right that every single 6 one of those fish was caught outside UK waters, which 7 they have not established, but even on that assumption, 8 that means that the true position would be within that 9 confidence interval. That was a matter taken into 10 account in the establishment of that confidence 11 interval. And if, on their maximalist position, they 12 are right, it remains within the confidence interval 13 established at that time. 14 You cannot, once you've identified a risk coming 15 within a confidence interval, say: well, the effect of 16 that is later, once you've identified that risk, to move 17 everything over and create a new confidence interval on 18 that. It creates an obvious problem of time-travel, 19 among other things. 20 So, members of the Tribunal, this is a clear example 21 of why the criticisms of the UK science being made by 22 the EU's legal team are a grossly inadequate way to 23 attack a body of high-level science written by very 24 serious scientists. 25 Thank you, Madam Chairperson.</p> <p>Page 117</p>	<p>16:17 1 the only point that I wish to make at this stage. But 2 I won't myself answer that question now on the basis of 3 that evidence. 4 THE CHAIRPERSON: Thank you. 5 There was one question of clarification that 6 we sought. Ms Boileau, when you talked about the 7 difference between parametrisation in the model and 8 recalibration of the model, it would help the Tribunal 9 to understand the transcript in particular as to what 10 you mean by the distinction between parametrisation and 11 recalibration, just for our own understanding of what 12 this means. 13 Thank you. 14 MS BOILEAU: Madam Chairperson, we might elaborate on this 15 further in our written response. But in simple terms, 16 the parameters, as I understand it, are the inputs into 17 the model. Some of these inputs reflect assumptions, 18 judgments based on expert evidence, about how, for 19 example, predators and prey interact. 20 The parameters in the model are the different 21 components, is my understanding, and the way that they 22 interact gives rise to the predictions about how things 23 would occur in the future. When parameters in the model 24 are altered, the model needs to be recalibrated to make 25 sure that everything still reflects not reality, but</p> <p>Page 119</p>
<p>16:15 1 THE CHAIRPERSON: Thank you, Mr Juratowitch. 2 I have another question on the model, and it relates 3 to the EU's suggestion pointing us to additional modular 4 plug-ins that were available -- and this includes both 5 datasets regarding age and size of sandeel, but also 6 location of predators using Ecospace as a modular 7 plug-in, if I can put it that way -- and the issue of 8 key run status. 9 So it's a very practical question as to: how [long] 10 does it take to establish key run status if the core 11 elements, can I say, the fundamental parameters of a key 12 run model are changed, and new key run status is being 13 sought? Just how long would that normally take, in 14 light of the fact that the initial model, the 2013 15 model, took six years to develop? 16 Again, if you don't have an answer to this 17 immediately, that's also fine. 18 MR DAWES: I think this is something which is best addressed 19 in writing on this particular point. 20 THE CHAIRPERSON: Thank you. 21 You're going to have a stab at it, Mr Juratowitch? 22 MR JURATOWITCH: I'm not going to have a stab at it, 23 Madam Chairperson. I am only going to say that that 24 point is for the EU to prove, and they will need to 25 prove it by reference to evidence in the record. That's</p> <p>Page 118</p>	<p>16:19 1 a realistic scenario. 2 So, for example, that can be done by doing what's 3 called "hindcasting": you run the model looking at how 4 it would hindcast what's happened in the past, and you 5 compare that to the reality of the situation. And if 6 the output looks different, it doesn't align, then you 7 might need to recalibrate the model. It might tell you 8 something about the parameters that need to be adjusted 9 to better reflect real life in the past. 10 Changes to the parameters of the model moving 11 forward mean that the model would need to be 12 recalibrated, or at least its calibration would need to 13 be verified, in order to make sure that it's still 14 essentially a sensible output. And this isn't an easy 15 or a simple thing by any means. That's why, when the 16 model was reviewed by the ICES Working Group, it's 17 initially reviewed by a group of experts, and then the 18 plenary, and then it's further reviewed by the experts. 19 Unless I can assist the Tribunal further on that 20 point. 21 PROFESSOR RUIZ FABRI: Yes, you can probably assist, because 22 I think what the Tribunal might need to understand is: 23 when you speak about the update of the model, there are 24 two things. One is you mentioned the update with data 25 between 2003 and 2020. And also you mentioned, except</p> <p>Page 120</p>

<p>16:21 1 if I misunderstood, that this update involved 2 re-parametrising the model. And now you explain that 3 every time you change the parameters in the model, 4 in fact it has to be recalibrated. 5 So if I understand well, the update which was made 6 in the model involved a recalibration. It's just the 7 shortcut in the reasoning to make sure that 8 we understand. 9 MS BOILEAU: Thank you, Madam Arbitrator. 10 One small point of clarification. You referred to 11 the model being updated by reference to data from 2003 12 to 2020. It was updated by reference to data from 2013 13 to 2020. So the ICES key run essentially used data up 14 till 2013, and it was updated with data up to 2020. 15 The key difference essentially is that there are 16 certain parameters in the model which are critical 17 drivers of the model. They're essentially the 18 foundational pieces of the model, the engine of 19 the model, which heavily influence the output. 20 So I will mention a couple, but one of them is 21 the model's "diet matrix", and the other is called the 22 "vulnerability multiplier matrix". So these two 23 parameters, for example, are driving, in the model, 24 the inter-species interactions. The diet matrix, for 25 example, is constructed by experts using stomach records</p> <p>Page 121</p>	<p>16:24 1 The types of things that were updated in the model 2 are things which are more observational or empirical. 3 There were things like fishing catch, biomass. They 4 didn't require expert judgment: they're not matters of 5 expert judgment. So in that sense, the updates that 6 were made to bring the model to 2020 didn't change how 7 the model predicts that different components of the 8 ecosystem would react to changes in sandeel fishing 9 effort in the North Sea. 10 THE CHAIRPERSON: European Union, you have a right to reply. 11 JUSTICE UNTERHALTER: Sorry, just to be clear, before the EU 12 comes in, the distinction that I understand you to be 13 drawing is that if there's an existing dataset that has 14 been used in the model, you can update that dataset? 15 MS BOILEAU: Yes. 16 JUSTICE UNTERHALTER: But one example that we were given 17 this afternoon was splitting the size of groups between, 18 for example, adult and juvenile sandeel. Now, that was 19 said to be a parameter. 20 Could you just tell us why that's a parameter? And 21 perhaps give us an example -- I think you have 22 already -- of data that you can simply update the 23 series -- I think you said biomass or catches -- but 24 perhaps to be able to distinguish between data fed 25 routinely into the model which can be updated, and why,</p> <p>Page 123</p>
<p>16:23 1 and literature, and the vulnerability multiplier looks 2 at the shape of predator-prey interactions. 3 So these are two parameters that are drivers of the 4 model, they're heavily influential in the model, but 5 they require a degree of -- not necessarily assumption, 6 but they require a degree of expert input and expert 7 review. 8 I said before that they're the engine of the model. 9 So if we think of the model like a car, changing those 10 parameters, or adding something on or breaking something 11 off, would be adding different components to the motor 12 or the car itself. Updating the model to 2020 from 2013 13 is more like adding road to enable the existing car to 14 predict further. It's essentially updating data that 15 already exists in the model to reflect more recent 16 accurate data, and it enables it to run into the future. 17 But importantly, the updates that were made to bring 18 it to the future didn't change those core foundational 19 parameters, let's put it that way. They were 20 intentionally kept the same so that the EwE model used 21 in the English scientific report would align with the 22 ICES key run. Because it is those parameters that are 23 so significant that need to be reviewed by experts, 24 it was thought that best science would be to run the 25 model that aligns with the ICES key run.</p> <p>Page 122</p>	<p>16:26 1 for example, the splitting of size groups would be 2 a parameter rather than a data improvement or 3 progression. 4 MS BOILEAU: So splitting the group of sandeels, to be more 5 technically accurate, I think would be creating a new 6 functional group in the model. Whereas there is right 7 now one functional group for sandeel, it would be 8 splitting those into two. And that's not a matter of 9 assuming, for example, that you could just halve the 10 information that's fed into the model about how much 11 whales feed on sandeel: you would need information about 12 how much whales eat juvenile sandeels, and you would 13 need information about how much mature sandeels are 14 consumed by whales, for example. 15 So this is really a universe of new data that would 16 need to be brought into the model. And then after that 17 is done, the model would need to be, in my submission, 18 recalibrated; or in order to align with the best 19 available scientific advice, one would ideally have 20 an ICES Working Group review of that model, with its new 21 functional group, with the new assumptions built within 22 that about how juvenile sandeels predate on their prey 23 and are predated on by other predators. 24 JUSTICE UNTERHALTER: Thank you. 25 THE CHAIRPERSON: European Union.</p> <p>Page 124</p>

<p>16:28 1 MR DAWES: Thank you, Madam Chair.</p> <p>2 The European Union's position is a simple one. When</p> <p>3 you feed in such new data like this -- and I think that</p> <p>4 was in essence the position, as the European Union has</p> <p>5 understood, of the United Kingdom -- there is a need to</p> <p>6 check whether the model needs to be recalibrated. So,</p> <p>7 yes, when you insert additional data for a new period of</p> <p>8 time, this does require to verify whether or not this</p> <p>9 leads to a need to recalibrate the model.</p> <p>10 THE CHAIRPERSON: Thank you very much.</p> <p>11 You'll be pleased to know that we are moving on from</p> <p>12 the issue of the model. But we have been doing oral</p> <p>13 questions; we have a different written question on</p> <p>14 the model.</p> <p>15 But I just want to pick up on what the United</p> <p>16 Kingdom -- Mr Westaway made a comment regarding the EU,</p> <p>17 in its reply, not saying anything about claim 2 or</p> <p>18 claim 3. I just wanted to clarify with the EU that its</p> <p>19 written submissions and its oral submissions on Tuesday</p> <p>20 stand. So I just thought I would seek that</p> <p>21 clarification, to be absolutely certain.</p> <p>22 MS NORRIS: Madam Chair, I'm grateful for the question</p> <p>23 because had that question not been asked, this would</p> <p>24 have been a point that we would have raised with</p> <p>25 the Tribunal.</p> <p style="text-align: center;">Page 125</p>	<p>16:31 1 against the English measure, does the Scottish measure</p> <p>2 also fail, because it's one measure? Or if claim 1</p> <p>3 prevails against the English measure, is there</p> <p>4 a differentiation between the Scottish measure and</p> <p>5 the English measure in terms of claim 1, in terms of</p> <p>6 the challenge and where it lies?</p> <p>7 MR DAWES: Thank you, Madam Chair. And it's been indicated</p> <p>8 to me that you may not have been able to hear me as</p> <p>9 clearly as possible before, so I have endeavoured to</p> <p>10 raise the microphone.</p> <p>11 I think it is important to remember what it is that</p> <p>12 this Ecosim modelling was seeking to ascertain. It was</p> <p>13 seeking to ascertain, or to simulate or evaluate, what</p> <p>14 would be the impact on biomass in the entirety of UK</p> <p>15 waters of the North Sea.</p> <p>16 So the EU's submission is that to that extent, when</p> <p>17 one looks at that piece of evidence and when one</p> <p>18 evaluates whether it can be considered part of the "best</p> <p>19 available scientific advice", it is relevant both to</p> <p>20 assessing the English and the Scottish measure, because</p> <p>21 it is seeking to evaluate an impact across UK waters of</p> <p>22 the North Sea.</p> <p>23 On, more generally, your question about -- well,</p> <p>24 let's say if one can call it the "remainder" of the</p> <p>25 English scientific report and the Scottish scientific</p> <p style="text-align: center;">Page 127</p>
<p>16:30 1 The European Union maintains its written submissions</p> <p>2 and its submissions from earlier this week. We</p> <p>3 endeavoured to assist the Tribunal by identifying points</p> <p>4 where we can agree with the United Kingdom throughout</p> <p>5 these proceedings. But given that our rebuttal was</p> <p>6 comparatively short, the fact that we may not have</p> <p>7 addressed all points raised by the United Kingdom should</p> <p>8 certainly not be construed as a concession or waiving of</p> <p>9 those points.</p> <p>10 That being said, given that there are further rounds</p> <p>11 of questions and submissions, the European Union will</p> <p>12 continue in its endeavour to really focus on matters</p> <p>13 where there is a disagreement between the parties.</p> <p>14 Thank you.</p> <p>15 THE CHAIRPERSON: Thank you very much for that</p> <p>16 clarification.</p> <p>17 The Tribunal would now like to turn to the issue of</p> <p>18 "best available scientific advice". And we have first</p> <p>19 one question for the EU and then one for the UK.</p> <p>20 To the EU: the challenge on the "best available</p> <p>21 scientific advice" rests primarily on the errors in the</p> <p>22 modelling, and that challenge is directed to the English</p> <p>23 measure. So what remains the basis on which</p> <p>24 the Scottish measure is still impugned?</p> <p>25 And does your claim 1 rest -- if claim 1 prevails</p> <p style="text-align: center;">Page 126</p>	<p>16:33 1 report, I think as the EU has endeavoured to explain</p> <p>2 throughout this hearing, what those -- and the EU</p> <p>3 has not contested the scientific nature, or the</p> <p>4 methodological rigour, I should say, of those pieces of</p> <p>5 advice.</p> <p>6 The EU's position is that that scientific advice</p> <p>7 indicates that to the extent there is this phenomenon of</p> <p>8 local depletion of sandeel -- or there may be, I should</p> <p>9 say, a phenomenon of local depletion -- this may raise</p> <p>10 an issue for predators who are dependent upon sandeel</p> <p>11 and who are unable to attain that sandeel within the</p> <p>12 locally depleted area. And to the extent that there</p> <p>13 either is not this phenomenon of local depletion, or</p> <p>14 that the predators are either not dependent upon sandeel</p> <p>15 in the first place or they are able to obtain sandeel</p> <p>16 from outside the locally depleted area, then that is</p> <p>17 what the EU would submit is what that evidence shows.</p> <p>18 So, yes, it is relevant for both measures in that</p> <p>19 sense.</p> <p>20 JUSTICE UNTERHALTER: Mr Dawes, if I could just ask you</p> <p>21 a follow-up question.</p> <p>22 It does appear that the premise of the EU's</p> <p>23 challenge is that the modelling does constitute "best</p> <p>24 available science". Would you agree with that</p> <p>25 proposition?</p> <p style="text-align: center;">Page 128</p>

<p>16:35 1 MR DAWES: I think the EU -- 2 JUSTICE UNTERHALTER: There may be deficiencies in it, 3 but the idea of modelling along the lines that was 4 undertaken for the purposes of the English measure 5 constitutes part of the body of "best science"? 6 MR DAWES: I think the EU would agree that it can constitute 7 advice of a scientific nature when it has the necessary 8 methodological rigour. So there is no obligation to 9 conduct such modelling; but when it is conducted, it can 10 constitute a piece of scientific advice, and it must 11 meet the constraints in order to be considered reputable 12 science. 13 But in a sense, the EU's position is twofold. Our 14 first position is that results generated based on the 15 model cannot be considered as forming part of the best 16 available scientific advice. But even to the extent 17 that they do, then the body of best available scientific 18 advice is not sufficient -- the measure is not based on 19 that body. 20 So to come back to your question, it is not 21 a necessary premise of the EU's claim. 22 JUSTICE UNTERHALTER: You see, the reason I'm asking 23 the question is that there seems to be a potential -- 24 I won't say "contradiction", but tension in the 25 challenge that the EU is making, which is that the</p> <p>Page 129</p>	<p>16:39 1 parameter of the model? It's because of the underlying 2 scientific literature and evidence which are summarised 3 in the English and Scottish scientific reports, and 4 these are elements which are then included in the model. 5 So we say there is a link between the scientific 6 literature and the model. So when a model -- depending 7 on what the model is trying to test and depending on 8 what is the outcome of that model, we say that this can 9 be taken into account in assessing whether or not 10 a measure is based on the best available scientific 11 advice. 12 So it's not because the decision-maker says, "I am 13 not basing my measure on it", that that piece of advice 14 cannot be taken into account in assessing whether 15 the measure is based on the best available scientific 16 advice. 17 JUSTICE UNTERHALTER: Just a last question. 18 So your reading of the provision of the treaty is to 19 say that there are choices that you can make as to the 20 extent to which certain features of "best science" are 21 used? Because that would cast a slightly different 22 light on how we think about Article 496(2), which is to 23 say: either you have an objective question, and a party 24 must simply do the best science, or rather must get 25 the best available scientific advice, as an objective</p> <p>Page 131</p>
<p>16:37 1 Scottish measure, that didn't do any of the modelling, 2 is not criticised. 3 So if modelling along the lines that was undertaken 4 for the English measure does constitute part of the body 5 of "best science", assuming it's done well -- you say 6 it wasn't -- then how can the entire absence of such 7 modelling go without challenge; but when the modelling 8 is done, with its deficiency, it gives rise to 9 challenge? That would seem to be somewhat structurally 10 in tension with itself. 11 MR DAWES: I think the EU's position would be that from 12 the moment that modelling is done, then it becomes 13 a piece of scientific advice which is, in a sense, then 14 out there in the world and needs to be taken into 15 account in assessing the notion of "best available 16 scientific advice". 17 So while there is no requirement in the first place 18 to do modelling, the fact that modelling may exist -- 19 the fact that modelling exists, then it should be taken 20 into account. 21 And I think it's important -- it was a submission 22 that the EU already made -- that the aim of the model is 23 to -- it is based also on the underlying scientific 24 literature. So when one looks at the model, for 25 example, why is the component of age a relevant</p> <p>Page 130</p>	<p>16:40 1 matter. But I understand you to be saying, "But there 2 are choices that you can make; and to some degree, if 3 you do more, you may be more exposed to challenge", 4 which would seem to be a slightly odd way of looking at 5 this. 6 MR DAWES: I think as a matter of factual record, after 7 the modelling had been done, it was explicitly stated 8 that the results, or the simulations generated based on 9 the model, were taken into account by the decision-maker 10 when it decided to approve the English measure; and that 11 the Tribunal has in Exhibit R-77. 12 And then more generally, as I said, the EU is not 13 suggesting that there is any requirement on a party to 14 undertake any modelling. The EU's simple position is 15 that when modelling has been undertaken, it must be 16 undertaken with the necessary scientific rigour; and 17 then the results of that modelling, or whether it has 18 the necessary scientific rigour, must be taken into 19 account when one looks at what constitutes the "best 20 available scientific advice". 21 THE CHAIRPERSON: Thank you very much. 22 I have a question for both of the parties, and 23 it relates to the identified flaws by the EU in the Ewe 24 ecosystem model. 25 So the question is: is the standard of "best</p> <p>Page 132</p>

16:43 1 available scientific advice" in relation to these
 2 errors, if they are to be established, subject to
 3 a requirement of materiality? If so, do the errors
 4 identified by the EU meet any requirement of
 5 materiality?
 6 Perhaps the EU, since -- I invite the EU initially.
 7 But since you've just been on the floor, are you ready
 8 to answer now? This is a written question, by the way.
 9 MR DAWES: Thank you, Madam Chair. This may indeed be
 10 an issue that the EU will come back to in writing.
 11 There are certain elements which I think the EU --
 12 when one looks at the English scientific report and the
 13 Scottish scientific report, there are two elements which
 14 seem to be materially important when it comes to looking
 15 at sandeel and its role in the ecosystem. We will not
 16 rehearse these elements, but they are the element of age
 17 and the element of space. The aim of a model should be
 18 to reflect -- these elements should be included and
 19 properly taken into account in a model, based on
 20 information that's reasonably available.
 21 Now, in the present case, when one applies this to
 22 the particular model in question, the EU's position is
 23 that these two elements have not been taken into
 24 account, and there are also additional elements that
 25 the EU has identified.

Page 133

16:47 1 Those are the two ways in which a flaw could affect
 2 whether scientific advice was "best available scientific
 3 advice".
 4 The answer is: yes, there would need to be
 5 materiality, and it would need to be materiality to that
 6 very significant extent. Of course, as you know -- and
 7 I won't go into application in response to this
 8 question -- but as the Tribunal is aware, the UK's
 9 position is that all of the scientific advice relied on
 10 does not approach either of those levels of materiality.
 11 There's a third possibility. I say that this
 12 possibility does not arise on a correct interpretation,
 13 but I will nonetheless, to seek to assist the Tribunal
 14 as fully as I can, articulate it.
 15 And it would be this: that the flaw is so material
 16 that it could be said to affect whether or not the
 17 measure was truly based on the best available scientific
 18 advice. I say you don't get there because you'd have to
 19 cross one of those first two thresholds; and if you
 20 crossed one of those first two thresholds, then it
 21 wouldn't be best available scientific advice. If you
 22 don't cross that threshold, then the question is just:
 23 did the decision-maker base itself on that advice, which
 24 has already passed the hurdle of "best available
 25 scientific advice"?

Page 135

16:45 1 Now, whether each and every element meets
 2 a threshold of materiality I would say is a question
 3 that the Tribunal may not -- when one looks at each and
 4 every element, the Tribunal may not need to break them
 5 down individually. But the EU's position is that when
 6 one adds together the various elements here, including
 7 elements which the other scientific advice suggests are
 8 important elements, that this meets any threshold of
 9 materiality, so when one puts together the various
 10 errors.
 11 THE CHAIRPERSON: Thank you, I understand your submissions.
 12 So, United Kingdom.
 13 MR JURATOWITCH: Thank you very much, Madam Chairperson.
 14 The short answer to your question is: yes.
 15 I'll endeavour to give a slightly longer answer in order
 16 to seek to be of assistance.
 17 There are two scenarios in which the requirement of
 18 materiality might arise. One would be that the "flaw",
 19 as the Tribunal put it, would be so great that the
 20 relevant advice would cease to be scientific in the
 21 relevant sense. It could be material in that way. The
 22 second scenario is that it may diminish the quality of
 23 the advice to such an extent that there would then be
 24 some other scientific information or advice that would
 25 be better than the advice that contained the flaw.

Page 134

16:48 1 And if it did base itself on it, factually and in
 2 terms of a rational or objective relationship, then
 3 that's enough. You don't, in my principal submission,
 4 get at that stage to be able to say there's a flaw
 5 that's big enough that we should undo the basing
 6 exercise.
 7 Because all science will be capable of being
 8 improved in one way or another. Once it's "best
 9 available scientific advice", that's the end of the
 10 enquiry for those purposes. And then the "based on"
 11 analysis is just: was it based on it, including rational
 12 or objective relationship?
 13 So I say the issue of a flaw being material doesn't
 14 arise at that third stage; but I accept that, at least
 15 as it was put by the Tribunal at one point during this
 16 hearing, it might credibly be thought to do so. I say
 17 not, for the reasons I've given.
 18 Thank you very much.
 19 THE CHAIRPERSON: Thank you, Mr Juratowitch.
 20 Ms Norris you have the floor.
 21 MS NORRIS: As I said a few moments ago, we wanted to
 22 endeavour to assist this Tribunal in understanding
 23 what's really in dispute. And so with that in mind,
 24 much in terms of the test of what has just been said,
 25 we would agree with. It does have to be a material

Page 136

<p>16:50 1 difference. When we're talking about "Does a measure 2 lack methodological and scientific rigour?", yes, the 3 flaws pointed to, assessed holistically, must in some 4 sense make a difference. We wouldn't suggest otherwise. 5 Of course, then we come to the factual question of 6 whether we're across the thresholds in the different 7 scenarios that counsel for the United Kingdom has 8 identified, and there we would respond to you further in 9 writing. 10 THE CHAIRPERSON: Yes, thank you. 11 Just following up on what Mr Dawes said regarding 12 the two major flaws in the model used in the English 13 scientific report, which was the age/size of sandeel, 14 and also the spatial distribution. 15 Just taking the age/size of sandeel, so that was not 16 in the 2013 key run ecosystem model; correct? 17 MR DAWES: (Nods head) 18 THE CHAIRPERSON: Correct. So surely, if that flaw exists 19 in the original model, according to your submissions 20 that this flaw was in the English scientific report 21 model, it's like comparing apples and oranges? And if 22 the flaw was in the English scientific report, surely 23 that same flaw was also in the ecosystem model from 24 2013? 25 MR DAWES: Thank you, Madam Chair.</p> <p style="text-align: center;">Page 137</p>	<p>16:53 1 The UK, Mr Westaway, argues that the phrase 2 "hav[ing] regard to" in the treaty implies a deferential 3 review by the Tribunal, which can be limited to 4 monitoring of the decision-making process. But to what 5 extent does the wording of Article 494(3)(f), stating 6 that parties must "have regard to ... applying 7 proportionate ... measures" impact on this standard of 8 review? 9 So in other words, it's the measure as applied, and 10 not only the measure as being developed? So that is the 11 question. 12 So I invite the United Kingdom to respond first to 13 that question. 14 MR WESTAWAY: Thank you, Madam Chair. 15 The word "applying" is one of a number of verbs 16 that's found behind the content: we have "minimising" 17 and "ensuring" next to the various principles in 18 Article 494(3). 19 In effect, it's an indication -- and in my 20 submission, another indication -- of the decision-making 21 nature of the principles, a point I made earlier: that 22 these are factors going to decision-making. 23 That one applies the precautionary principle, 24 absent -- if we step back from this context, it's simply 25 how one can use the precautionary principle in</p> <p style="text-align: center;">Page 139</p>
<p>16:52 1 Again, while the EU may come back in writing on this 2 point, the 2013 model was not set up or designed to 3 evaluate whether or not a particular measure -- which in 4 this case is the prohibition of sandeel in all UK waters 5 of the North Sea -- so to that extent, that is the 6 reason why the underlying 2013 model did not take into 7 account, for example, age: because, in a sense, the 8 model's purpose was not to ascertain or to evaluate any 9 particular measure. 10 It is here that, in the English scientific report, 11 the model is being used to evaluate -- as the name of 12 the English scientific report says -- to assess "the 13 ecosystem risks and benefits" of a full closure. And 14 it's to the extent that the model is then being used to 15 ascertain this point that the European Union submits 16 that age becomes something that must be taken into 17 account in the model. When one looks at what the model 18 is being used to ascertain, that's when the age 19 component becomes relevant. 20 THE CHAIRPERSON: Thank you very much. That's a helpful 21 clarification. And my apologies for asking that, but 22 I knew that this was going to be my last opportunity to 23 ask any follow-up questions. So thank you. 24 The Tribunal will now turn to the issue of standard 25 of review for the proportionality of a measure.</p> <p style="text-align: center;">Page 138</p>	<p>16:55 1 decision-making. It doesn't have, in the United 2 Kingdom's submission, any special meaning beyond that. 3 And one cannot ignore "hav[ing] regard to", which 4 governs all of those provisions. So "hav[ing] regard 5 to" sits there and was deliberately put there to govern 6 all of them. 7 Would it make a difference if the wording, instead 8 of being "hav[ing] regard to ... applying proportionate 9 measures", were "hav[ing] regard to ... 10 proportionality"? Not a significant difference, in the 11 United Kingdom's submission. 12 THE CHAIRPERSON: May I ask a follow-up question, because 13 in your statement just now, you have omitted the word 14 "principles". So "having regard to the principles of 15 proportionality and non-discrimination", and "having 16 regard to applying the principles". 17 So what is the relevance of the word "principles" 18 here? 19 MR WESTAWAY: Well, I touched on that earlier. I wasn't 20 attempting to set out a quote, or at least there were 21 some ellipses. But no, it wasn't an intentional 22 omission at all. We fully accept that it's articulated 23 as "principles". 24 That reminds us -- and I made submissions on this 25 earlier today -- that these are decision-making</p> <p style="text-align: center;">Page 140</p>

<p>16:57 1 principles, the factors that go into decision-making. 2 It may be we can add a little more in writing, but 3 I don't have more to add on that at this juncture. 4 THE CHAIRPERSON: Yes, please, that would be helpful, to 5 explain that a bit more in writing. 6 So, European Union. 7 MS NORRIS: Madam Chairperson, we have made a number of 8 submissions going precisely to what we say is the 9 significance of that term "applying", and we say indeed 10 that it does indicate that the output has some 11 relevance. But that is also because of what has to be 12 read into the term "shall decide on" in Article 496(1). 13 And the "decide on", we could also reformulate that, 14 as counsel for the United Kingdom offered a different 15 potential wording: perhaps the parties could have said, 16 "Each Party, when deciding on, shall have regard to". 17 But that's not what they said. They said "shall decide 18 on", and it is that which has to be read together with 19 494(3). And the principle -- and it is a principle -- 20 to which regard should be had is one that goes to the 21 application of proportionality and non-discrimination. 22 THE CHAIRPERSON: Thank you for your submissions. 23 JUSTICE UNTERHALTER: I wonder if I could have a follow-up 24 question to the UK. 25 You gave us a menu of interpretations, four in all,</p> <p>Page 141</p>	<p>17:01 1 be to engage with the application of proportionality in 2 looking at the measures, and that's what happened in 3 this case. 4 I think where the line in the sand needs to be 5 drawn, because one is looking at a treaty for the first 6 time, is that the wording deliberately doesn't go that 7 far. But I do appreciate what may be a fine distinction 8 between those two. 9 JUSTICE UNTERHALTER: What it seems to contemplate is that 10 one has to have regard to how a measure that is being 11 contemplated will be applied in a proportionate manner 12 in order to secure conservation of marine living 13 resources. In other words, it's concerned to know how 14 the measure under contemplation will comport with 15 the principle as to how in application -- in other 16 words, in the real world, as it were -- what it will do 17 for conservation that comports with the idea of 18 proportionality. 19 Is that a fair way of reading this or not? 20 MR WESTAWAY: I wouldn't fundamentally disagree with that 21 characterisation. It's to have regard to the factors 22 that go to proportionality as a matter of application. 23 JUSTICE UNTERHALTER: Yes, thank you. 24 THE CHAIRPERSON: Thank you very much. 25 Just a final couple of questions. I know the time</p> <p>Page 143</p>
<p>16:58 1 and you opted for the second of your four items on the 2 menu. 3 I'm wondering whether that interpretation isn't 4 actually taking out the word "applying". In other 5 words, read the provision as if the word "applying" 6 wasn't there. Because yours is, as it were, 7 a procedural account of this provision, whereas there 8 seems to be a concern here for the question of how 9 you apply the measure to achieve certain ends. 10 So perhaps you could help us to see what work 11 "applying" is doing, and whether that comes closer to 12 the third item on your menu, rather than the second. 13 MR WESTAWAY: The short answer to the point is that 14 "applying" is not doing that work, because one has to 15 read it after "have regard to". And one cannot for this 16 purpose -- it's very important -- ignore "have regard 17 to". Were it the case that the provision required the 18 application of, that could and would have been said. 19 In terms of what "having regard to ... applying" 20 means, I've just made submissions on that. It means, 21 going back to the options, having regard to those 22 constituent factors that go to the application of 23 proportionality. That's how one, I think, makes some 24 sense of this. And as I've submitted, in many cases, 25 the practical approach that the parties will adopt will</p> <p>Page 142</p>	<p>17:02 1 is marching on. So if you don't mind, we will just 2 continue on with a couple of questions. 3 The Tribunal's first question is for the 4 United Kingdom. 5 In the oral submissions today, we were referred to 6 a number of different passages, particularly in the 7 ministerial submissions and the de minimis assessment, 8 in which you referred us to the conclusions that were 9 reached regarding the benefits of the measure 10 outweighing its costs. Perhaps also this could be later 11 answered in writing. But it seemed to us that there was 12 very little reasoning to be found in those passages as 13 to how the weighing exercise was done to arrive at these 14 conclusions. 15 So in other words, we had the factors that were had 16 regard to, and we had the outcome, the conclusion, but 17 there was nothing in between, if I can put it that way, 18 quite colloquially. 19 MR WESTAWAY: I think part of that is the limitations of 20 referring the Tribunal to passages, partly the need to 21 get through submissions relatively swiftly. 22 It goes without saying that the ministerial 23 submissions themselves need to be read as a whole and 24 understood in the context of what they are, which is 25 submissions made in the course of a process where there</p> <p>Page 144</p>

<p>17:04 1 have been prior ministerial submissions. And in the 2 record there are others -- not, perhaps mercifully, all 3 of them -- and there are a number of documents and 4 assessments that would have been appended at various 5 points to those submissions. 6 So I think, Madam Chair, the best way of dealing 7 with the question is to attempt to point the Tribunal to 8 a little more than just those key passages, so the 9 Tribunal can have a sense of where they fit into 10 the bigger picture. What those key passages 11 demonstrate, and why I impressed those upon the 12 Tribunal, is they demonstrate that the 13 weighing/balancing exercise with the factors in mind 14 was done. 15 THE CHAIRPERSON: Thank you. Yes, I appreciated this was 16 likely to be something that you would need to answer in 17 writing. But that would be very helpful, because that 18 gives -- that would be helpful to our assessment. 19 In a similar vein, to the European Union, you have 20 suggested that in undertaking the proper weighing of the 21 benefits and impacts of a measure, the Tribunal has to 22 analyse the "what" that is to be weighed and the "how" 23 that weighing is undertaken. 24 So does this mean that the Tribunal has to look for 25 evidence of how a party weighed and balanced the</p> <p style="text-align: center;">Page 145</p>	<p>17:08 1 part of the measure, or the English measure. For the 2 Scottish measure, we have an act, a law with a preamble. 3 For the English measure, what we have are variations 4 from the MMO, or else ... 5 Where is to be found exactly the full scope of 6 the English measure? 7 MS NORRIS: On a general level, to the extent that that's 8 a question for the European Union, we wouldn't say that 9 that would fall exclusively in the scientific evidence. 10 It's the decision-maker. And the scientific evidence is 11 part of what a decision-maker may take into account when 12 deciding on a fisheries management measure. But 13 certainly we would expect to see other documentation 14 showing how, on the basis of not only that scientific 15 evidence but other factors, a conclusion was reached. 16 So to the extent that I referred to an impact 17 assessment, I was referring more to the type of 18 regulatory impact assessment that regulators may apply 19 or prepare before adopting a legislative measure. 20 Now, I don't want to stray into the intricacies of 21 UK law, but certainly the ministerial statements may be 22 precisely the type of document in which one would expect 23 to see how the decision-maker applied their mind to 24 those different factors, rather than simply 25 an enumeration of them.</p> <p style="text-align: center;">Page 147</p>
<p>17:06 1 benefits and detrimental impacts of a measure, and not 2 simply what, and the outcome? And if so, how do you 3 envisage that such a demonstration of the "how" can be 4 shown? 5 MS NORRIS: This is also a question which we would come back 6 to in more detail. 7 But we do say that there should be some 8 demonstration of the "what", and that is where you see 9 that a factor has been identified. When it comes to 10 looking at the "how" that weighing has been done, 11 a measure itself may provide some evidence of how that 12 weighing has been done. In this case, we rely on the 13 measure itself as showing that there was no real 14 weighing and balancing between the interests. 15 Now, on a more general level, there are impact 16 assessments prepared prior to regulatory measures being 17 adopted, and one might expect to see more than a simple 18 identification of a factor, but some form of reasoning 19 to explain why a factor was considered not to be 20 particularly significant or significant, and how 21 the measure related to those factors. 22 PROFESSOR RUIZ FABRI: Just to follow a bit on that. 23 You referred there -- the weighing exercise should 24 be, in your view, in the scientific report? Because one 25 difficulty we may have is with regard to the English</p> <p style="text-align: center;">Page 146</p>	<p>17:09 1 So we certainly wouldn't be so restrictive as to say 2 it can only be in the scientific evidence itself. 3 PROFESSOR RUIZ FABRI: Thank you. That's helpful. 4 THE CHAIRPERSON: Thank you very much. 5 So thank you to the Agents and counsel of both 6 delegations, the European Union and the United Kingdom. 7 As I mentioned right at the beginning of this 8 session, we have a number of questions which we will 9 provide tonight in writing for you. They range across 10 a number of different areas. But in the interests of 11 time, we felt it was important to give you a sense of 12 our main issues and our main questions that we had for 13 you. But that doesn't mean to say that any of the other 14 questions or the other claims that we have not mentioned 15 in this session are not also important. 16 So I have already indicated that we will provide 17 those questions in writing tonight, with a request that 18 you provide answers on 5 February; and that then by 19 10 February you will have an opportunity to provide your 20 responses to the respective party's answers to those 21 questions, and on 10 February we will anticipate 22 receiving from you your final written submissions. 23 The deadlines are as set out in PO1, just to note those, 24 which is, I think, quite late at night: midnight, 25 my recollection goes.</p> <p style="text-align: center;">Page 148</p>

<p>17:11 1 There was one final issue that I wanted to raise, 2 which is the corrections to the transcripts. Procedural 3 Order No. 2, paragraph 9.2, says that: 4 "... the ... Tribunal shall consult [with] the 5 Parties on the need, scope, and schedule for ... 6 correction ... to the transcripts at the conclusion of 7 the hearing." 8 It also refers to redactions; but since there was no 9 confidential information during the oral hearing, I take 10 it that we're not dealing with redactions, just 11 corrections to the transcripts. 12 So are you ready to agree now on a date for 13 [transcript corrections], noting the fact that I'm sure 14 you will wish to have those corrected transcriptions 15 prior to your final written submissions on the 10th? So 16 we will need to perhaps work back from 10 February as to 17 when you could provide those. 18 MR JURATOWITCH: Madam Chairperson, from the 19 United Kingdom's perspective, given the quite tight 20 deadlines for the answers of questions and written 21 submissions, it may, in the scheme of things, be a more 22 practical -- albeit less pure -- alternative to leave 23 the correction of transcripts until after the written 24 submissions. 25 That of course at least creates a theoretical risk</p> <p>Page 149</p>	<p>17:14 1 a difference to the Tribunal, the United Kingdom would 2 tends towards Friday the 14th, rather than the 12th. If 3 it does make a difference to the Tribunal, we of course 4 wish to assist the Tribunal. 5 But could I take this opportunity to, with respect, 6 echo the Chairperson's gratitude towards Mr McGowan for 7 the transcripts. Thank you. 8 MS NORRIS: The European Union would also be delighted to 9 have until 14 February to review the transcripts. 10 THE CHAIRPERSON: Thank you very much. So 14 February 11 it is. 12 With that, that concludes all our business for the 13 oral hearing. I want to finally express my sincere 14 thanks to my fellow arbitrators, Honourable Justice 15 David Unterhalter and Professor Hélène Ruiz Fabri, for 16 their assistance; and of course to the PCA Secretariat 17 and Registry, who have been of invaluable assistance to 18 the Tribunal. 19 I would also like to formally thank the Agents and 20 counsel for the European Union and the United Kingdom. 21 You have presented your respective positions very 22 eloquently, and you have assisted the Tribunal 23 considerably in undertaking the very difficult task that 24 we have before us. 25 With that, I would like to now close the oral</p> <p>Page 151</p>
<p>17:12 1 that something in the written submissions would need 2 correction based on the transcripts. But it might, in 3 all of the circumstances taken together, be a more 4 proportionate approach. 5 I haven't consulted with my colleagues at the 6 European Union on that; I don't know their view. 7 THE CHAIRPERSON: European Union? 8 MS NORRIS: The European Union is open to that relatively 9 pragmatic solution, not least because we have been 10 reading the transcripts, which we have helpfully been 11 provided with on a rolling basis, and we have not 12 identified any major problem that we think would lead to 13 a significant risk. So we would be open to that. 14 THE CHAIRPERSON: Okay. Thank you very much for that. 15 And it is due to our very excellent court reporter, 16 Mr McGowan, who does such excellent transcripts, that 17 the parties can agree to that. 18 So in that respect, if the submissions are due on 19 10 February, then you will need at least -- perhaps on 20 12 February; would that be appropriate? I'm looking to 21 the PCA Registrar here for guidance. 12 February? 22 DR SABANOGULLARI: Madam Chair, I am entirely in the hands 23 of the parties. Perhaps they can state their positions 24 on whether that would be an appropriate deadline. 25 MR JURATOWITCH: Madam Chair, if it wouldn't make</p> <p>Page 150</p>	<p>17:16 1 hearing. So we are now closed. Thank you. 2 (5.16 pm) 3 (The hearing concluded) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>Page 152</p>

A	accurate 65:14 122:16 124:5	advanced 28:4 41:4 86:13 94:6 104:20	136:25 149:12 150:17	analysis 2:9 66:9 70:25 82:12 100:24 136:11	139:23
ability 30:15 74:9	accurately 114:20	advancing 38:14 72:6	agreed 3:5,15 4:4 5:5	ANNA 2:12	apply 25:11 27:8 40:5
able 9:7 30:14 33:25	achieve 27:13 142:9	adverse 60:24 86:7,8 86:17	25:16,22 56:7 77:24	Annex 2:21,24 3:7,10	81:13 88:4 93:12,22
65:25 66:6 102:5	achieved 62:1,6	adversely 80:25	79:25 88:14	3:23 4:3 5:1 8:2	142:9 147:18
114:16 115:18	achieving 80:20	advice 7:10 8:16,17,22	agreement 1:1 2:25	31:24 33:7,23 77:12	applying 7:10 24:19
123:24 127:8	acknowledged 28:8	8:23 9:5,7,23 10:1,8	6:22 77:4,13,15	78:1,4	41:2 42:10 81:19
128:15 136:4	acknowledgement 5:20	10:15 11:2,12 24:4	78:3,16 80:5,10	annexed 14:17	83:21 88:9,10,25
about 2:5 5:9,9 12:20	acknowledging 100:6	24:7 29:22 40:16,18	87:3 88:15 92:5,14	annual 62:21	89:2,16 90:10 94:12
13:14 16:8 17:13	across 61:25 112:15	40:20,21 43:18 52:8	103:7,18 110:16	another 2:10 8:21	109:25 139:6,15
20:10,14,20 40:17	127:21 137:6 148:9	52:10,21,22 53:13	agreements 6:2	9:22 15:3 22:13	140:8,16 141:9
43:22,25 44:9 46:8	act 37:10 147:2	53:24 54:2 55:3	ahead 24:11 71:24	28:3 37:13 43:11	142:4,5,11,14,19
50:13 51:11 52:5,19	acting 33:5	56:4,22 60:22 64:1	aim 130:22 133:17	54:2 58:4 74:10	appreciate 58:23 83:3
53:21 54:7 55:17	action 31:13,19 99:5	66:3,13,16 68:24	albeit 149:22	106:17 118:2 136:8	143:7
66:6 68:2 69:15	99:14	71:4,7 73:20 78:19	ALEX 2:17	139:20	appreciated 145:15
77:8 78:4 84:11,13	activities 79:7	104:13,22 105:14	align 120:6 122:21	answer 8:12 11:3 15:2	approach 11:9,13,14
84:22 86:11,19 89:7	activity 17:21	106:18 107:9	124:18	19:10 24:13 68:2	18:14 36:11 39:20
89:9,15 90:5,14	acts 83:13	114:10 124:19	aligned 19:3 50:2	95:3 105:19 106:12	40:5 52:23 71:23,25
91:23 96:10 99:10	actually 43:15 50:3,20	126:18,21 127:19	alignment 19:8 43:1	109:6 110:10	72:2,13,20 73:14,15
103:3 105:25	50:24 59:7,14,25	128:5,6 129:7,10,16	aligns 60:22 122:25	112:16 118:16	73:23 74:4,4,14,18
107:13,17,20	96:10 142:4	129:18 130:13,16	alive 3:13 30:17	119:2 133:8 134:14	75:5,9 96:6 135:10
113:25 115:1 116:4	add 10:25 27:7 34:18	131:11,13,16,25	ALLAN 3:2	134:15 135:4	142:25 150:4
116:11,11 119:6,18	37:18 44:5 97:23	132:20 133:1 134:7	allegation 37:15	142:13 145:16	approaches 39:18
119:22 120:8,23	115:12 141:2,3	134:20,23,24,25	alleged 8:7 37:25	answered 144:11	appropriate 41:15
124:10,11,13,22	added 48:10 59:24	135:2,3,9,18,21,23	alleging 37:12	answers 8:5 148:18,20	150:20,24
125:17 127:23	adding 44:9 45:15	135:25 136:9	alleviation 39:12	149:20	appropriately 83:19
131:22 137:1	122:10,11,13	Advisory 73:24	allow 1:7,8 35:13	ANTHONY 2:4	appropriateness 76:24
above 22:11	addition 98:23	affect 80:25 135:1,16	48:11 49:9 54:18	anticipate 148:21	approve 32:17 132:10
absence 11:17 68:22	additional 34:19	affected 56:21	73:17 102:17	anticipated 102:13	approved 18:22 19:4
72:2 130:6	45:17 70:18 79:18	affirmative 40:22	allows 11:16 15:6	anything 88:14 114:7	ARAGÓN 3:7
absent 139:24	80:6 103:13 108:21	affirmatively 40:2	all-seeing 94:21	125:17	arbitrary 94:10
absolutely 109:11	118:3 125:7 133:24	affirmed 43:9	alone 8:16	anyway 99:8	arbitration 1:1,5,20
125:21	additionally 93:15	AFFIRMING 3:11	along 129:3 130:3	anywhere 68:15	3:5 37:1 97:7 103:7
abstract 64:8	98:25	after 32:10 48:21	already 7:6 17:12 18:6	anJother 32:10	Arbitrator 121:9
abundance 60:7 61:10	address 12:12,18,25	57:11 58:16,16,24	27:24 34:15 44:5	apart 60:13	arbitrators 151:14
62:2,11 63:4 68:7	13:11 20:4 21:16	60:18 61:5 69:4	47:22 48:24 54:11	apex 6:10	Arctic 62:25
68:19 69:2,4	28:23 36:2 42:19	70:3,13 102:7,19	55:13 70:11 95:14	apologies 138:21	area 30:15,16 57:19
accept 9:20 33:14 69:9	75:20,22 76:3,5	124:16 132:6	99:23 122:15	apologise 74:24 75:8	58:14,15,17,19,22
78:3,9,11 83:8,13	102:4	142:15 149:23	123:22 130:22	105:6	59:8 60:1 72:6 85:6
84:5,7 85:3 89:23	addressed 7:6 27:24	afternoon 2:23 9:12	already-existing 10:15	apology 105:11	85:13 128:12,16
91:11 94:8 106:9	47:17 63:9 118:18	35:21 36:2 123:17	alter 44:11 50:7	appear 115:7 128:22	areas 1:21 148:10
136:14 140:22	126:7	again 3:19 10:24	altered 49:23 119:24	APPEARANCES 2:1	argue 12:5,13,18,25
acceptable 103:1	addressing 13:4 71:6	16:11 18:24 21:20	altering 47:9	appeared 10:12	13:5 80:21 99:15
acceptance 42:7 53:19	adds 134:6	24:25 26:21 48:8	alternative 8:22 27:15	appears 10:25 26:19	argued 2:5 4:11 5:17
accepted 54:21 55:14	adduce 104:14	72:6 80:1 100:15,18	28:6,11,16,18,21	42:24 47:22 64:10	11:9 99:21
99:19	adduces 8:21 54:1	100:23 112:25	41:5,9,14 54:2	93:3	argues 5:8 6:25 86:24
accepts 4:13 10:3 14:4	adequate 11:17 27:12	113:3 118:16 138:1	76:18 94:1,4,6,9,14	Appellate 28:9	139:1
52:25 53:4,15 66:8	72:4,19 73:7 105:5	against 56:17 60:14	149:22	appended 145:4	argument 16:8 21:17
66:24 79:5 92:21	adherence 25:25	72:10 73:10 105:9	alternatively 19:22	appendices 87:7	28:5 38:2 41:6
116:5	75:23 82:2	127:1,3	alternatives 95:2,14	apples 137:21	81:23 94:5
access 2:20 3:21 4:6	adjourn 35:9,16	age 12:6 13:7,14 14:3	although 53:15 60:18	applicable 41:10	arguments 76:4,5
6:23 25:15 32:22	adjourned 35:8,19	14:5,7 15:19 16:4	74:13	92:16,18,23 93:16	arise 82:9,11 84:25
77:11,25	adjudicate 1:25	23:18 44:22 57:5	always 7:20 33:8	applicant 37:21 38:4	134:18 135:12
accessibility 15:25	adjust 16:6	118:5 130:25	69:13 70:15	application 28:24 29:5	136:14
accorded 6:6	adjusted 120:8	133:16 138:7,16,18	ambition 25:21 79:23	53:17,22 60:15	arisen 2:13
according 8:11 24:12	adjustment 14:11	Agent 2:4,5,6,7,8,17	among 65:5 99:20	68:13 69:22 74:3	arises 70:2 80:6 82:7
49:3 111:2 137:19	31:24	2:18 1:11 44:2 77:7	117:19	76:19 81:8,8 82:20	95:16 107:21
account 12:6,10 13:6	administrative 3:1,2	78:3 81:10 92:3	amount 4:15 30:8	88:1 89:3 94:3 96:7	109:17 114:4,9,13
16:6,9,19,24 18:11	4:2	95:16 97:15 98:12	33:20,21 110:20	96:10 97:13 135:7	arising 109:8
47:19 48:23 50:22	adopt 11:16 142:25	99:21 100:14	111:8	141:21 142:18,22	arose 48:4 109:14
82:7 85:19,24 86:5	adopted 4:14,21 23:24	103:12 105:3 114:3	ANABEL 3:7	143:1,15,22	around 60:10
86:14,22 92:17	31:23 73:23 146:17	Agents 148:5 151:19	analogies 84:16	applied 6:11 89:7	arrangement 3:1 4:2
93:20 103:17	adopting 147:19	age/size 137:13,15	analogous 84:18	139:9 143:11	arrive 144:13
114:20 117:10	adult 46:1 123:18	ago 136:21	analogue 6:9	147:23	article 1:1 3:19 4:15
130:15,20 131:9,14	adults 45:22	agree 26:19 76:22,25	analogy 84:20 86:19	applies 36:21 40:11	4:24,24 5:1,4,4,6,4
132:9,19 133:19,24	advance 42:23 76:10	81:17 99:4 126:4	analyse 145:22	72:2 82:21 85:17	6:15,20 7:8 8:18,21
138:7,17 142:7	90:3 94:20	128:24 129:6	analysed 56:16	86:20 133:21	24:7,8,16,17 25:3,3
147:11					27:21,23 32:14,19
accounting 110:3					

32:20 39:25 43:13 57:20 58:11,11 60:3 64:6,16 65:9,15,15 72:5 74:14 77:18 78:9,23 79:1,13 80:7,8 82:1 85:3,23 85:25 86:21 91:5,10 91:13 92:11,17 93:20 97:6 131:22 139:5,18 141:12 Articles 5:24 95:5 articulate 135:14 articulated 87:20 140:22 ascertain 127:12,13 138:8,15,18 ascribed 90:6 aside 41:8 asked 26:10 104:19,21 105:12 125:23 asking 43:18 66:21 104:6 115:23 129:22 138:21 aspect 5:11 78:7 aspects 11:23 36:4 assert 19:7 36:12 assertion 44:16 asserts 8:23 54:3 assess 7:25 9:24 23:7 28:19 107:3 138:12 assessed 61:24,25 63:2 137:3 assessing 30:25 73:16 75:25 127:20 130:15 131:9,14 assessment 11:6 15:11 27:2,6 29:23 63:1 80:13 85:7,8,12,16 86:4 96:14 97:8 104:7 111:23 144:7 145:18 147:17,18 assessments 145:4 146:16 assimilate 10:12 assist 42:16 62:13 71:21 73:2 74:21 81:22 94:18 107:4 110:9,11 120:19,21 126:3 135:13 136:22 151:4 assistance 66:14 85:6 134:16 151:16,17 assistant 3:8,8,10 assisted 56:13 151:22 associated 4:7 assume 94:21 108:1 assumes 33:19 assuming 124:9 130:5 assumption 33:24 34:3 55:19,21,22 117:5,7 122:5 assumptions 33:18 100:19,21 119:17 124:21 Atomic 1:2 attack 117:23 attain 128:11 attempt 76:9 91:12	145:7 attempting 140:20 attention 34:6 69:18 78:17 83:10 authored 52:12 authorities 85:9,10 authority 36:13 authors 16:25 17:10 20:22,25 22:6 44:18 49:6,12,21 50:16,19 51:10 55:13 59:11 60:19 61:4 70:12 109:19 114:14 autonomy 2:18 3:14 3:16 4:18 5:6 6:12 6:18,24 7:1,21 25:13 76:13,21 77:2 77:9,17,21 83:14 88:19 availability 60:7 62:18 available 7:9 9:17 10:1,11,22 11:2,12 15:22,23 16:1,4 18:15 19:24 20:23 21:14 23:25 24:3,6 28:17 29:21 33:20 40:15,20 43:12,13 44:5,7,17 47:1,3 52:9,11,21 53:12,24 54:16 55:2 57:5 66:3,12 71:17 73:17 74:2 78:19 95:8 103:13 104:12,22 105:13,22 106:6,17 107:9 110:8 117:1 118:4 124:19 126:18,20 127:19 128:24 129:16,17 130:15 131:10,15 131:25 132:20 133:1,20 135:2,17 135:21,24 136:9 avian 74:10 99:5 avoid 68:15 aware 17:10 18:21 20:2 21:2 69:12 135:8 away 97:3 B b 88:22 90:2 back 21:4 23:8 25:24 52:16 70:5,6 76:16 78:23 79:20 80:14 84:13 87:22,24 88:8 97:20 101:19 104:4 107:16 108:12 109:5 115:12 129:20 133:10 138:1 139:24 142:21 146:5 149:16 backdrop 60:14 bad 22:22 59:18 Baker 2:19,19,20 balance 4:10 5:13 25:22 26:24 36:7 52:18 79:24 80:2,4	80:7 90:21 99:10 balanced 26:4 145:25 balancing 8:10 26:5 26:20 80:16,20 146:14 baleen 64:18 bar 9:3 base 9:25 11:19 53:12 135:23 136:1 based 9:5 11:11 12:3 33:17 40:17,21 41:20,22 45:11 55:22,25 63:12 64:19 68:2,24 70:13 71:21 78:18 95:8 100:20 101:1,5 104:12 105:13 107:9 115:16 119:18 129:14,18 130:23 131:10,15 132:8 133:19 135:17 136:10,11 150:2 bases 30:12 67:11 basing 7:9 52:22 66:15 71:17 73:16 131:13 136:5 basis 8:21 10:2 24:5 27:17 33:14 40:1 55:14 64:2 73:19 78:8 108:16 110:7 116:25 117:3 119:2 126:23 147:14 150:11 battle 6:1 bear 30:24 bearing 6:25 43:6 52:7 59:20 become 56:8 73:16 becomes 19:23 77:6 116:9 130:12 138:16,19 beft 6:21 before 1:10 1:9 15:9 19:12 29:6 42:22 48:6 58:13 63:13 70:10 84:19 97:9 109:8 122:8 123:11 127:9 147:19 151:24 beforehand 102:9 begin 53:14,20 105:3 beginning 69:17 70:25 148:7 begins 13:25 begs 56:5 behalf 4:1,7 1:13 35:24 behind 106:22 139:16 being 44:10 50:2 53:7 54:5,21 55:8 57:16 65:23 70:2 74:1 94:11 101:1 104:20 104:21 107:18,22 109:17,18 112:1 113:7,10,18 115:21 117:21 118:12 121:11 126:10	136:7,13 138:11,14 138:18 139:10 140:8 143:10 146:16 BELL 3:1 belong 75:10 below 22:9 62:10 BEN 2:16 benefit 26:3 51:24 57:16 63:22 67:12 67:17 69:2,5,5 70:17,19 benefits 4:8 22:1,4 23:23 27:16 29:8,14 29:15,23,25 30:21 30:25 31:2 32:1 34:5,14,21 51:21 53:5 60:25 66:20 67:15 79:10 80:12 80:15 94:17 96:1,15 96:20 97:16,19,20 98:9 99:11 112:5,6 138:13 144:9 145:21 146:1 benefitted 59:14 BENTES 2:19 BENTLEY 3:2 BERNHARD 2:6 best 7:9 10:1 11:11 24:6 29:21 40:15,20 52:9,20 53:12,24 54:16,20 55:2 66:3 66:12 71:17 73:17 74:2 78:19 95:8 104:12,21 105:13 105:21 106:6,17 107:9 118:18 122:24 124:18 126:18,20 127:18 128:23 129:5,15,17 130:5,15 131:10,15 131:20,24,25 132:19,25 135:2,17 135:21,24 136:8 145:6 better 8:16,23 54:3 102:16 120:9 134:25 between 1:2 6:1 25:6 26:12,13 48:16 60:6 64:16 65:16 66:23 67:19,24 68:23 88:25 89:2 92:16,19 92:21,23 93:7 97:10 103:7,18 109:17 110:22 111:9,13,21 114:3,16 119:7,10 120:25 123:17,24 126:13 127:4 131:5 143:8 144:17 146:14 beyond 60:1 88:14 140:2 big 136:5 bigger 145:10 binding 2:25 4:2 6:22 biomass 12:2 13:2 21:18 29:19 65:19	69:20 74:8 108:22 115:15 116:18 123:3,23 127:14 bird 61:10 62:2 BirdLife 99:2 birds 61:18 63:18 64:3 74:10,12 bit 78:15 82:3,4 83:2,5 84:13,13 86:25 102:17 141:5 146:22 black 114:25 115:2 black-legged 22:7 62:25 blanche 79:16 BLANCO 3:7 blue 58:21 body 28:9 117:23 129:5,17,19 130:4 Boileau 2:16 4:10 36:3 42:16,18,19 55:8 63:9 97:22 119:6,14 121:9 123:15 124:4 bona 83:25 borne 64:12 65:7 both 6:2 7:5,9 16:18 25:6 26:4 32:17 47:20 62:6 67:21 70:20 73:3 74:3 76:10 78:3 85:17 103:5,16 118:4 127:19 128:18 132:22 148:5 bottom 15:14,15,24 17:23 18:1,2 21:6 bottom-up 58:3 boundaries 116:10 breach 4:10,24,25 9:8 36:15 37:20,22,25 38:1,5,15 40:7 80:18 breached 37:11,13 breadth 67:16 break 35:12 45:14,18 101:18,21 109:9 134:4 breakdown 51:4 breaking 122:10 breath 42:24 43:2 breeding 22:9,12 23:5 58:12,18,21,24 59:14 60:8 61:12 62:2,7,20,24 brief 52:19 briefly 10:10 26:7 76:17 88:13 94:2,3 98:11 bring 9:11 49:13 50:6 74:15 75:2 122:17 123:6 bringing 106:16 Britain 1:3,17 Broad 76:13 broaden 58:7 61:21 68:12 74:16 75:3 broadly 84:13 broken 14:7 brought 38:20 124:16	build 99:3 Buildings 2:18 built 124:21 bullets 18:2 bundle 3:8 13:21,22 14:16 98:5,7 100:17 burden 8:24,25 10:4 36:3,9,14,16,16,21 36:23 37:3,3,5,15 37:17 38:5,9,10,16 38:18 39:1,4,11 40:6,9,12,16 41:1 41:11 42:7,7,9,12 42:15 54:6,11 104:9 105:14 107:3 burden-shifting 41:12 BURROWS 2:20 business 151:12 C calculation 50:23 calibration 120:12 call 26:17 31:10 82:13 127:24 called 14:24 17:6 48:10 82:18 120:3 121:21 calls 116:10 came 21:23 50:21 57:10 117:4 CAMILLE 2:9,16 capabilities 18:11 capable 52:13 54:5 136:7 capelin 62:20 capture 115:22 car 122:9,12,13 CARBALLEIRA 2:11 CARDIEL 3:7 careful 69:13 carefully 73:4 100:12 carried 21:8 carte 79:16 case 1:4 3:9 2:5 4:21 4:23 9:10 28:13 36:22 37:14 38:13 38:15 39:3,9 40:11 41:18 55:19 61:4 63:17 65:10 70:11 70:13,16 71:4,11 73:8,12 74:10,11 75:20 77:8 78:7 79:3,6 80:11,24 84:16,17 87:9 88:7 89:12,16 91:18,20 92:9 95:22 96:4,11 97:11,25 102:10 106:16 115:4 133:21 138:4 142:17 143:3 146:12 cases 54:13 89:17 90:23 142:24 cast 131:21 CASTRO-SPOKES 2:25 catch 112:11,15,15,16
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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112:22 113:15 114:5,8,13,20 123:3 catches 20:16 21:3,15 110:20 111:8,15 113:8 123:23 catching 2:6 categorically 100:8 categories 51:18 67:13 category 51:21 CATHERINE 2:18 2:23 caught 109:13 110:3 114:15 115:5,5 117:6 cause 20:2 caused 65:11,12 caution 70:14 caveated 69:16 caveats 13:12,16 49:16 55:12 67:20 70:11,14 71:14 CBE 3:2 cease 134:20 Cefas 17:9 certain 6:20 11:23 28:23 30:22 38:23 41:9 46:6,21 67:15 78:1 79:2 121:16 125:21 131:20 133:11 142:9 certainly 40:19 126:8 147:13,21 148:1 CESSFORD 3:1 cetera 79:16 84:12 91:8 chain 58:1 Chair 1:14 5:7 11:24 29:2 104:2 105:19 110:14 111:3 125:1 125:22 127:7 133:9 137:25 139:14 145:6 150:22,25 Chairperson 1:3 24:11 28:25 35:2,21 35:25 42:18 48:5 71:24 72:23 73:1 74:23 75:7,15,17 101:10,14,23,25 104:25 105:2 107:10,11 109:3 110:11 111:11 112:8 113:20,22 116:2,21,22 117:25 118:1,20,23 119:4 119:14 123:10 124:25 125:10 126:15 132:21 134:11,13 136:19 137:10,18 138:20 140:12 141:4,7,22 143:24 145:15 148:4 149:18 150:7 150:14 151:10 Chairperson's 151:6 challenge 68:14,17,20 99:8 126:20,22 127:6 128:23 129:25 130:7,9	132:3 challenging 8:20 Chambers 2:16,16,17 3:3 change 19:11,22 45:21 60:14 73:24 74:3,11 102:21 121:3 122:18 123:6 changed 116:19,20 118:12 changes 17:20 43:5 44:8,10 49:14,22 50:5 56:18 120:10 123:8 changing 122:9 chapter 5:19 characterisation 3:3 143:21 characterise 114:6 CHASE 2:19 check 105:8 125:6 checking 7:3 checks 46:6 chick-rearing 41:20 42:3 57:4 67:14 choices 131:19 132:2 chose 23:22 50:22 circumstances 10:6 25:15 28:10 37:21 38:4,24 39:2,13 67:3 68:22 89:18 150:3 citation 72:22 cited 57:2,13,24 Citing 58:4 CLA 73:25 claim 8:18 9:8,11,21 18:18 20:13 28:14 28:16 29:10 36:7,8 36:24 37:16 38:16 39:4,6 40:11,12,23 40:24,25 52:19 74:20 75:18 76:4,6 78:22 104:11,14,20 105:17 107:8 125:17,18 126:25 126:25 127:2,5 129:21 claimant 40:6 claimed 105:12 claims 6:14 8:5 24:14 36:14 37:17 38:21 43:1 148:14 clarification 75:15 119:5 121:10 125:21 126:16 138:21 clarify 125:18 clarity 107:20 CLAUDE 2:19 clear 5:12 45:1 69:10 69:11 70:9 78:4 86:3 88:8 89:4 96:11 103:3 117:20 123:11 clearly 6:9 41:18 76:1 77:21 78:19 84:23 90:24 91:15 92:6	96:25 97:5 99:16 127:9 climate 73:24 74:2,11 close 151:25 closed 58:16,19,22 60:1 152:1 closely 26:2 closer 142:11 closes 102:8 closing 102:19 closure 42:4 57:19 58:24 59:10,14,21 60:7 68:25 69:21,25 108:1,2 138:13 closures 41:20,22 coastal 1:18 3:12 cod 14:2 44:21 45:10 coinciding 61:2 colleague 11:22 colleagues 150:5 colloquially 144:18 column 64:21 column-feeders 63:8 63:14 column-feeding 61:18 combined 51:16 Combining 51:18 come 10:22 25:24 44:12 45:13 46:15 51:5 78:23 80:14 83:12 86:16 89:19 90:19 92:1 94:3 104:4 105:24 111:16,20 129:20 133:10 137:5 138:1 146:5 comes 113:8,11 115:12 123:12 133:14 142:11 146:9 coming 79:20 83:16 88:20 90:13 114:17 117:14 commence 1:4 commensurate 3:24 27:16 comment 96:9 98:11 99:4 125:16 comments 79:20 commercial 46:25 Commission 2:4,5,6,7 2:8,9,9,10,10,11,12 61:10 Commission's 50:18 commitments 3:4 Committee 101:3 common 53:9 81:4 90:16,20 110:19 commonsense 65:18 communities 62:3 Community 1:2 comparable 49:14 comparative 54:21 comparatively 64:25 126:6 comparator 71:8 comparators 71:10 compare 120:5	compared 22:1,4 46:2 58:25 115:18 comparing 110:24 111:7 137:21 comparison 54:18 competing 65:22 72:7 compiled 16:25 17:9 Complainant 1:15 36:13,16 37:16 complains 40:17 complete 3:3 20:24 completed 114:17 completeness 39:14 complexities 60:12 compliance 82:23 88:12 96:23 compliant 83:8,11 complies 79:17 82:25 comply 79:11 81:24 component 14:4,5 48:23 130:25 138:19 components 10:20 44:22 119:21 122:11 123:7 comport 143:14 comports 143:17 comprehensive 23:12 comprised 85:20 COMPSTON 2:22 conceded 9:10 conceivable 91:20 concept 18:4 27:7 conception 8:8 concepts 93:16 conceptual 85:5 conceptually 81:6 86:12 concern 22:6 81:23 142:8 concerned 21:25 51:15 66:10 143:13 concerning 8:17 24:17 42:17 104:9 concerns 21:17 91:23 97:16 concession 5:23 10:5 30:21 126:8 conclude 100:8 concluded 24:22 99:24 152:3 concludes 82:21 151:12 conclusion 22:19 33:3 62:15 65:18 68:6 89:19 144:16 147:15 149:6 conclusions 56:15 96:15 101:1 106:7 144:8,14 concrete 89:8 conditions 4:17 17:20 59:2,4 60:24 conduct 38:3 66:17 82:6 86:5,9 129:9 conducted 129:9 confidence 55:23 114:23 115:8,24	116:4,8,9,11,12,15 116:19 117:2,9,10 117:12,15,17 confident 66:6 confidential 149:9 confine 76:8 confined 10:6 confirmed 1:22 31:3 confirms 25:4 90:8 conform 90:9 conformity 4:14,22 confused 77:6 connection 66:23 67:10 68:23 71:19 CONNIE 2:21 conscious 24:25 consequence 111:12 111:16 115:13 consequential 4:25 conservation 5:15 25:18 60:16 63:6 143:12,17 consider 6:2 11:10 25:11 28:11,16 65:15 66:21 81:13 83:18,20 88:4 89:3 97:1 99:19 105:20 considerably 151:23 consideration 23:5 80:13 83:11 91:9,17 96:12 99:17,18 considerations 71:5 93:11 considered 5:11 24:6 24:21 28:12 29:21 34:6 57:12 61:6 67:5 81:20 86:13 95:19 96:8 102:16 127:18 129:11,15 146:19 considering 94:15 96:24 100:6 considers 7:14 26:25 32:19 40:4 66:18 94:25 consistency 7:16 8:20 9:24 consistent 8:1 73:22 102:8 consistently 7:21 95:12 consists 89:5 constituent 89:14 142:22 constitute 128:23 129:6,10 130:4 constitutes 129:5 132:19 constrained 77:3 78:11 95:5 constraint 83:14,20 constraints 78:15 79:14 129:11 constructed 121:25 construction 8:24 construed 6:11 126:8 construing 27:17 consult 149:4	consultation 31:11 85:21 consulted 150:5 consume 46:1 consumed 12:7 13:7 23:18 124:14 Contact 17:7,8 contained 67:20 73:20 77:12 134:25 contemplate 143:9 contemplated 143:11 contemplation 143:14 contended 9:13 contends 43:14 content 86:20 106:8 139:16 contested 128:3 context 2:13 3:14 5:21 6:7 28:9 31:22 39:19,21 40:12 53:10 74:2 84:19,22 84:25 85:3 86:3,4 90:11 92:12 93:3,6 93:12 139:24 144:24 contextual 27:17 continue 54:12 72:25 75:18 126:12 144:2 continued 59:10 contradicted 13:18 contradiction 129:24 contrary 4:12 6:4 37:7 contrasted 31:21 contribute 79:9 contribution 27:14 67:4 contributions 60:13 control 58:20 59:3 109:22,23 114:11 controlled 58:3 controversies 56:8 105:23 106:14 controversy 107:7 Convention 92:11 COOKE 2:17 cooperation 1:1 5:9 5:11 77:4,13,15 78:2,16 80:5,10 87:3 88:15 92:5,14 copy 85:11 core 3:8 13:20,22 14:16 60:22 78:20 84:25 85:16,24 98:5 118:10 122:18 correct 11:5 29:7,12 36:25 37:7 39:21 63:7 81:1 105:4 107:25 108:10 109:5,7,9 111:2,14 111:19 113:19 114:1 135:12 137:16,18 corrected 149:14 correction 149:6,23 150:2 corrections 149:2,11 149:13 costs 26:3 27:15 29:11
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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29:13 32:3 34:4,14 34:21 80:12,15 94:16 96:1,14,20 97:16,19 99:11,21 144:10 COTA 2:9 counsel 3:6,7,8,8 1:25 2:7 6:8 8:11 9:9,13 10:23,25 11:9 13:8 16:12 18:24 20:17 21:20 24:15 26:10 30:2,20 32:5 34:20 35:22 72:15 137:7 141:14 148:5 151:20 counter-reply 1:10 102:1 countries 21:9 counts 7:5 couple 121:20 143:25 144:2 coupled 24:2 course 25:7 31:8 36:10,25 39:14 42:15 50:9 51:9 57:11,16 59:20 62:14 69:12 71:22 74:8,20 87:3 88:6 103:20,23,23 135:6 137:5 144:25 149:25 151:3,16 court 1:5 2:16,16 3:5 6:10 150:15 courts 38:24 covered 15:1 87:24,25 covers 47:14,16 co-Agent 24:10 28:23 31:23 CR 1:24 CRAMP 2:21 create 117:17 created 59:5 114:23 creates 117:18 149:25 creating 54:7 124:5 creation 73:9 credibly 136:16 critical 78:7 121:16 criticise 42:25 69:6 criticised 130:2 criticism 8:14 16:14 52:5 66:7 criticisms 10:2 36:4 44:13 56:3 65:25 71:14 117:21 cross 135:19,22 crossed 135:20 crucial 53:9,9 55:10 current 23:13 115:8 currently 110:7 cursorily 83:9 customary 93:23 C-19 64:5 C-40 57:1 C-41 22:14,17 61:9 C-43 31:9 C-44 96:14 C-45 13:21 21:5 50:24	D dampening 59:18 60:24 danger 30:17 81:9 DANIELA 2:5 Danish 51:5 data 10:18 12:15 14:6 14:8,9 16:23,25 17:24 18:3,20 19:11 19:23,25 20:23 44:5 44:6,7,9 46:3 49:3 49:20 50:3,17,18 51:17,18 52:6 54:24 55:17 56:19 59:7,23 64:12,14 65:7 120:24 121:11,12 121:13,14 122:14 122:16 123:22,24 124:2,15 125:3,7 database 15:6,16 17:9 46:14,14,18 dataset 14:24 15:2,10 46:13,18 123:13,14 datasets 14:21 15:22 16:1,4 118:5 date 48:9 50:7 102:21 149:12 David 1:12 151:15 Dawes 2:4 4:4,6 11:24 29:1,2 35:2 110:14 111:11,18 113:3,17 116:2,3 118:18 125:1 127:7 128:20 129:1,6 130:11 132:6 133:9 137:11 137:17,25 day 1:9 2:7,8 3:1,2 8:5 8:12 9:13 10:14 11:4 26:15 32:6 35:7,11,14 de 96:13 144:7 deadline 150:24 deadlines 148:23 149:20 deal 36:3,6,7 52:20,21 56:10 76:14 dealing 145:6 149:10 dealt 97:17 debate 20:9 43:17 70:2 73:3 107:20,21 109:13,17,25 decide 6:18 94:24 141:12,13,17 decided 94:11 132:10 decides 11:2 deciding 4:19 77:2 141:16 147:12 decision 32:17 84:2,3 85:25 86:8,16 91:1 95:1 decisions 114:9 decision-maker 7:4 25:10 81:12,18 82:20 86:16 95:4 131:12 132:9 135:23 147:10,11 147:23 decision-makers	97:25 decision-making 7:24 32:13 34:8 63:25 83:15 86:4,15,23 90:11 95:21 139:4 139:20,22 140:1,25 141:1 decline 59:2,10 61:12 declines 59:16 decreasing 65:18 defence 36:24 37:20 37:25 38:8,11,14 40:22 50:14 deferential 139:2 deficiencies 129:2 deficiency 130:8 defined 13:12 26:3 48:12 52:10 74:14 definition 52:9 72:4 degree 55:5 67:3 69:5 69:5 116:12 122:5,6 132:2 Delegation 2:13 delegations 148:6 deliberate 87:2 deliberately 140:5 143:6 delighted 151:8 demanding 27:18 demersal 14:2 demography 60:11 demonstrate 60:6 65:24 103:15 145:11,12 demonstrated 42:2 demonstration 146:3 146:8 denial 38:1 40:23 denied 46:19 Denmark 21:9 51:11 departing 116:24 departures 53:19,21 dependent 128:10,14 depending 131:6,7 depleted 30:14 128:12 128:16 depletion 30:13 68:3 68:15 128:8,9,13 depletions 68:12 deployed 47:4 deprive 12:15 18:20 49:4 describing 2:24 design 5:4 designed 138:2 despite 23:24 detail 17:7,8 103:10 146:6 detailed 99:16 112:13 112:25 113:4 determination 23:10 determine 2:17 104:21 105:21 109:12 determined 27:25 69:14 detrimental 146:1 develop 13:17 16:18	43:23 44:3 118:15 developed 48:6 54:22 139:10 deviation 59:23 DG 2:9,9,10,10,11,11 diagonal 115:2 dictate 10:4 diet 60:8 64:22,24 121:21,24 dietary 30:6 diets 46:1 difference 55:12,16 56:4 66:2 84:1,3,6,8 89:2 97:24 98:1 105:10 119:7 121:15 137:1,4 140:7,10 151:1,3 different 8:7 21:19 39:19,24 44:22 45:11,14 47:24 60:13 64:16 76:15 90:15 93:2 119:20 120:6 122:11 123:7 125:13 131:21 137:6 141:14 144:6 147:24 148:10 differential 111:13 differentiation 127:4 difficult 54:13 106:9 151:23 difficulties 39:1 60:12 difficulty 41:17 146:25 digging 87:6 diluted 115:17 dilution 115:25 diminish 91:12 134:22 direct 6:24 directed 126:22 directive 85:11,23 86:1 disaggregate 63:7 disaggregated 61:17 disaggregating 52:13 disagree 10:24 52:1 143:20 disagreement 77:7 91:2 96:21 111:9 126:13 disagrees 7:5 8:6 10:9 discernible 36:12 discharge 88:5 discharged 38:19 discharging 38:5 39:1 disclose 30:19 34:13 34:17 95:25 96:19 disclosed 34:21 discount 59:13 discretion 7:2 79:16 82:13,14,17 83:7 87:25 90:23 discrimination 91:23 discuss 76:16 discussed 54:13 discussion 100:4 discussion 82:8,15 107:13 disposal 10:13 42:15	74:20 110:9 dispositive 8:18 9:21 disproportionate 76:1 disprove 41:25 dispute 1:24 2:13 5:12 6:14 8:12 23:10,15 28:9 76:2 91:3 97:10 110:22 136:23 disregard 3:4 25:21 79:23 82:14 distinct 13:2 distinction 88:24 89:21 119:10 123:12 143:7 distinguish 123:24 distinguishes 64:16 distributed 16:15 49:10 distribution 16:24 17:21 47:20 48:15 48:19,24 137:14 distributions 17:25 divergence 25:5 81:6 divided 44:21 dividing 81:9 diving 22:1,4,10 51:25 document 13:20 14:19 15:5,9 17:3 19:14 19:16,18 22:13,16 22:20 31:9,11,12 44:25 147:22 documentation 147:13 documents 14:14,15 16:22 31:17 96:11 96:12 98:13 106:25 145:3 doing 19:8 39:17 44:1 95:4 120:2 125:12 142:11,14 domestic 6:6 92:4,20 92:24 93:2,16,20 domino 45:21 done 14:10 48:11 55:7 55:15 63:20,20 70:3 82:8 85:9 97:2 106:21 108:25 109:17 113:1 120:2 124:17 130:5,8,12 132:7 144:13 145:14 146:10,12 dotted 115:9 doubt 54:7 73:3 106:10 DOWELL 2:25 down 2:20,25 6:15,22 14:7 15:12 28:2 37:3 45:14,18 134:5 downwards 58:21 DR 1:11 2:6,8,12,20 3:1,2,6,8 150:22 drafting 102:14 draw 69:18 78:17 89:21 drawing 88:24 123:13 drawn 85:6 143:5 drivers 60:13 121:17	122:3 driving 121:23 DRUMMOND 2:18 DTU 2:12 due 62:14 102:22 150:15,18 during 30:2 31:8,23 58:14,25 62:24 76:12 136:15 149:9 duty 86:5 dwelt 78:14 dynamics 18:12 48:16 E e 91:22 each 3:17,20 6:10,13 25:16 33:23 36:23 40:11 42:19 76:22 83:2 90:15,21 106:8 134:1,3 141:16 earlier 87:9 126:2 139:21 140:19,25 ease 55:5 easily 46:4 easy 55:6,9 120:14 eat 46:5,7 124:12 echo 151:6 Ecological 101:3 economic 1:19 4:7 5:13,20 32:20 33:16 79:9 Ecopath 17:6,13 47:25 Ecosim 17:6,13 18:8 18:11 47:25 127:12 Ecospace 17:7,14,15 17:19,24 18:2,4,8 18:11 47:23 48:10 48:14,18,23 118:6 ecosystem 2:3 9:16 23:14,20,23 36:6 46:9 47:7 48:3 53:3 53:8 58:8 60:25 68:21 70:1,1,3 74:4 91:8,8,21 98:22 107:17,21 109:10 109:12,16,20 110:1 110:6 115:18 123:8 132:24 133:15 137:16,23 138:13 ecosystem-model 110:7 edge 84:23 EDOARDO 3:12 EEZ 51:6 effect 45:21 59:5,18 69:20,24 108:2 114:18 115:6,17 117:15 139:19 effectively 9:1 82:14 87:9 88:15 effects 36:6 47:8 57:18 64:3 74:11 112:7 efficient 35:3 effort 123:9 efforts 63:6 either 2:4 32:24 39:15 56:14 61:21 70:10
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

87:18 93:5 128:13 128:14 131:23 135:10 elaborate 119:14 element 11:1 92:22 133:16,17 134:1,4 elements 23:19,21,25 24:2 30:24 34:7,12 34:13,16,17 95:20 95:24,25 96:4,7,19 96:19 105:25 108:3 118:11 131:4 133:11,13,16,18,23 133:24 134:6,7,8 ellipses 140:21 eloquently 151:22 elsewhere 93:4 else's 56:2 71:15 emergency 31:4 99:16 eminent 54:15 EMMA 3:3 emphasis 88:18 emphasise 74:6 emphasised 41:21 99:3 empirical 123:2 empowered 7:23,25 empty 25:13 81:15 82:16 83:7 86:15 enable 19:1 49:8 50:11 122:13 enables 122:16 encounter 38:25 end 27:11 35:7,11,13 52:23 55:10 67:4 70:16 71:1 76:19 79:18 87:22 88:20 95:17 102:15 107:6 115:8 116:12,13 136:9 endeavour 126:12 134:15 136:22 endeavoured 126:3 127:9 128:1 ends 26:12,14 38:17 142:9 endure 74:9 Energy 1:2 engage 72:13 73:13 100:9 143:1 engaged 107:14 engagement 85:4 Engelhard 64:8 103:10 engine 121:18 122:8 English 9:18 13:18 14:4,12 17:1,11 19:2 20:22 21:1,4 23:11 36:5 40:13 42:22 43:3,24 44:18 44:20 47:4 48:17 49:6,12,16,22 50:1 50:17,20,24 51:10 51:17 52:2,3,12 55:13,23,24 56:16 57:11,12 60:18,19 60:22 61:5,16 63:8 63:11 64:15,19 66:1	66:2,10 67:22 69:23 70:24 114:14,19 116:25 122:21 126:22 127:1,3,5,20 127:25 129:4 130:4 131:3 132:10 133:12 137:12,20 137:22 138:10,12 146:25 147:1,3,6 enjoys 7:2 enough 25:10 41:25 42:3 56:1 70:19 72:8 81:12 106:11 136:3,5 enquiry 136:10 ensemble 47:1 ensure 86:21 ensuring 79:7 139:17 enter 73:2 entering 3:6 enters 77:6 entire 45:19 47:7,16 70:3 107:21,22,24 108:7,23 111:4 114:20 130:6 entirely 39:16 49:9 90:19,20 100:12 150:22 entirety 127:14 entitled 39:10 53:1,5 99:13 enumeration 147:25 environment 1:21 25:19 86:2,17 environmental 1:15 17:20 60:14,24 73:19 76:23 85:6,7 85:8,13,13,16,19,20 86:4,8,14 environmentally 79:8 envisage 102:12 146:3 equally 40:16 equals 93:13 equivalent 39:24 66:11 erase 72:4 error 80:1 errors 10:7 126:21 133:2,3 134:10 escaped 34:5 especially 59:1 69:11 essence 125:4 essentially 26:1 90:22 120:14 121:13,15 121:17 122:14 Essex 2:16,16 establish 36:14 37:24 38:7,21 40:8,16 47:18 54:14 55:4 72:9 118:10 established 4:20 37:22 53:11 66:22 67:18 67:23 68:22 116:16 117:7,13 133:2 establishing 37:16,17 38:5,16 40:7 42:9 42:12 establishment 117:10	et 79:16 84:12 91:8 EU's 16:14 28:16 32:8 32:21 33:17 36:11 36:21 38:16 40:23 41:6 50:12 55:19 57:7 61:13 63:17 65:13 70:16 71:4,11 78:7 79:20 80:24 81:2,10,23 82:24 88:11 95:16,22 97:15,15 110:23 111:13 112:14 115:4 116:5 117:5 117:22 118:3 127:16 128:6,22 129:13,21 130:11 132:14 133:22 134:5 EVA 2:11 evaluate 112:7 127:13 127:21 138:3,8,11 evaluates 127:18 evaluating 106:5 evaluation 17:19 19:11 even 6:19 9:4 20:22 27:18 44:7 46:3 55:18,21 56:3,17 59:2,4,16 64:2 69:21 72:11,12 73:11,12 92:20 117:7 129:16 event 30:12 99:11 101:6 every 19:21 25:16 117:5 121:3 134:1,4 everything 67:20 117:17 119:25 evidence 30:11 31:10 39:5,16 43:21,25 60:9 63:12 69:2,3 72:7 97:21 98:18 101:1,6 104:8,14,20 105:15,17 106:4,13 107:4 118:25 119:3 119:18 127:17 128:17 131:2 145:25 146:11 147:9,10,15 148:2 evident 9:4 evidential 28:23 69:9 104:10 evidentiary 104:15 evidently 57:14 EwE 17:6 45:2,7 47:5 47:6,14,25 48:5,10 64:19 107:17,23 109:1 122:20 132:23 EWEN 3:1 exactly 94:22 147:5 examine 7:15 108:1 example 15:21 33:19 39:3 46:5 47:13 61:7 62:19 64:4,5 64:17 68:12 89:9 91:23 96:13 108:4 108:22 117:20	119:19 120:2 121:23,25 123:16 123:18,21 124:1,9 124:14 130:25 138:7 examples 14:22 56:23 65:20 71:11 exceed 65:1 excellent 150:15,16 except 67:13 120:25 exception 37:20,23,24 exceptions 40:1 exchange 114:2 excited 55:18 exclusive 1:19 exclusively 147:9 excused 38:3 exercise 1:7 3:16 4:18 5:5,21 9:12 20:24 41:12 42:21 71:2 77:2 85:21 89:22,25 94:18 97:17,18 136:6 144:13 145:13 146:23 exercised 3:12 exercises 78:10 exercising 91:1 exhibit 13:21 14:20 15:3,4,7 17:3,5,16 18:3 19:15 22:14,17 31:9 45:5 48:7,9,13 48:22 132:11 exhibits 14:17 103:14 exist 46:20 47:22 130:18 existed 48:25 existence 26:23 28:3 48:6,14 existing 10:17,20 12:15 14:10 15:17 15:22 16:2 44:10 54:23 59:21 70:25 122:13 123:13 exists 14:9 122:15 130:19 137:18 expanded 27:1 expect 41:24 89:18,24 106:16 146:17 147:13,22 expected 87:20 expense 5:25 experienced 70:7 108:13 experiment 70:23 expert 46:10 106:20 106:20 119:18 122:6,6 123:4,5 expertise 13:17 experts 120:17,18 121:25 122:23 explain 12:4,8 30:3 65:22 121:2 128:1 141:5 146:19 explained 6:9 17:15 23:16 29:18 30:10 34:10,16 87:14 92:7 94:8 explaining 25:1	explains 15:5,11 18:4 18:7 30:12 86:1 explicit 5:23 explicitly 24:21 72:19 132:7 explore 47:8 export 39:17 exposed 132:3 express 151:13 expression 114:4 expressly 43:9 97:24 extend 10:20 35:14 54:25 extended 22:20 extends 18:8,11 59:25 extension 17:14 extensive 23:12 43:5 extent 2:17 23:3 25:7 47:2 66:18,19 77:9 78:1 80:9 81:18 100:7 115:21 127:16 128:7,12 129:16 131:20 134:23 135:6 138:5 138:14 139:5 147:7 147:16 extract 108:3 extracts 87:8 extreme 9:10 54:12	fall 9:1 147:9 fallback 11:14 falls 80:1 familiar 106:25 far 7:17 66:8 71:6 80:10 84:6 89:11,23 105:21 106:11 116:24 143:7 fared 23:1 fast 55:9 favour 55:19 90:18 features 131:20 February 102:22,22 102:24 148:18,19 148:21 149:16 150:19,20,21 151:9 151:10 fed 113:7,16,18,19 114:4,7 123:24 124:10 feed 124:11 125:3 feeders 22:10 23:1 62:5,6 feeding 57:6 111:25 fellow 151:14 felt 148:11 FERNANDEZ 2:11 few 69:15 136:21 fide 83:25 fifth 12:24 15:13 51:14 93:3 figure 12:20 50:15 58:10,11 59:21 64:14 110:18 111:1 111:7,14,22,24 113:18,19 116:14 figures 112:23 113:15 115:24 116:18,19 file 16:23 filed 61:3 final 16:14 21:16 46:23 88:11 102:25 116:3 143:25 148:22 149:1,15 finally 34:4 79:11 99:21 151:13 find 31:5 50:10 107:12 findings 60:8 finds 80:7 85:1 93:5 fine 113:2 118:17 143:7 finished 109:18 first 3:9 6:14 8:12 12:4 14:19 17:7 29:6,17 30:18 31:11 31:16 32:5 33:12 36:2 37:19 38:6,22 39:9 42:24 44:15 45:23 52:20 53:23 55:1 57:1,19 61:22 65:22 75:22 77:16 78:18 81:3 82:16 83:7 84:20 92:11 96:3 98:16 102:15 103:2,19,25 108:9 109:3 110:15 112:17 126:18 128:15 129:14
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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<p>130:17 135:19,20 139:12 143:5 144:3 Firstly 82:13 fish 2:6,16,20 3:21 4:7 6:23 14:2 25:16 30:1,20 32:22 33:22 45:10 46:14,21,25 47:14 53:6 62:18 64:11 65:1,5,11,16 65:19 68:4,4 69:1,8 74:12 77:12,25 109:13 110:3 114:16 117:6 fisheries 4:13 5:10,18 6:19 60:10,16 77:3 78:6 101:3 147:12 fishers 100:5 fishery 21:8 58:13,15 58:16,24,25 59:11 59:14 60:7 fishing 3:25 4:4 7:16 9:25 11:11 12:21,23 17:21 18:12 20:6 24:5 28:19 32:9,24 32:25 34:1 47:9 55:20 56:20 59:5 65:12,18 68:18 69:3 69:25 79:7 91:7 108:5,5,6 109:23 114:19 115:3,16,19 123:3,8 fit 145:9 five 2:21 7:17 8:1 11:25 18:2 92:10 101:16 flaw 134:18,25 135:1 135:15 136:4,13 137:18,20,22,23 flaws 9:4,23 12:1 104:16 132:23 137:3,12 fleets 18:12 floor 1:12 11:22 24:10 28:22 35:23 42:18 75:16 101:11 133:7 136:20 flu 99:5 focus 69:14 126:12 focused 55:22 focusing 41:10 follow 39:22 53:4 73:6 112:12 146:22 followed 98:17 following 94:10 96:16 137:11 follows 37:12 50:9 67:1 follow-up 128:21 138:23 140:12 141:23 food 47:14,16 58:1 98:22 footnote 46:23,24 57:7 61:14 forage 30:15 58:19,22 60:10 62:18 64:11 65:5,16,19 68:5 foraging 41:20,22</p>	<p>42:3 59:25 foremost 78:18 forensic 98:14 foreseen 31:24 form 2:3 25:14 43:20 53:8 54:17 69:7 81:16 104:7 106:20 146:18 formally 151:19 formed 34:8 95:20 forming 129:15 formulation 81:17 87:13 forward 8:15 34:25 87:17 107:5 120:11 found 67:9 87:17 139:16 144:12 147:5 foundational 49:23 50:8 121:18 122:18 four 61:24 65:21 78:17 82:9,11 87:24 141:25 142:1 fourth 12:17 20:4 50:12 66:8 79:11 92:24 fourthly 52:22 82:23 framework 27:1 frameworks 39:23 FRANCO 2:9 Frederiksen 58:4 free 43:23 76:22 Friday 151:2 from 4:15 8:20 9:2,9 13:2 15:13,24 18:7 21:19 24:14 26:17 26:21 32:15 33:22 43:9,21,22,23 45:9 48:5 50:21 51:5 53:4,19,21 55:2,8 56:24 57:19 58:10 59:3,21,22 60:2,9 64:6 67:11 68:10 69:2,16,22 72:4,18 82:8 85:6 87:9 88:21 97:3,21 98:2 101:2,24 102:12,22 102:23 108:3 109:1 109:8,20 111:16,20 112:2 114:4 116:24 117:4 121:11,12 122:12 125:11 126:2 128:16 130:11 137:23 139:24 147:4 148:22 149:16,18 frustrating 113:24 FTB 2:17 3:3 fulfilling 73:21 full 3:21 30:19 32:21 42:4 68:23,25 108:2 138:13 147:5 FULLER 2:18 fully 135:14 140:22 fulmar 62:25 function 6:14 7:3 49:23 50:8 functional 13:25 14:1</p>	<p>14:6 45:6,8,11,16 45:18 47:13,15 62:1 62:9,13 124:6,7,21 fundamental 68:16,17 93:17 114:1 118:11 fundamentally 44:11 84:9 88:18 143:20 further 11:22 18:5,5 24:21 34:11,23 35:1 35:13 56:17 66:13 66:21 69:15 71:10 71:21 73:5 95:23 96:18 110:9 119:15 120:18,19 122:14 126:10 137:8 future 119:23 122:16 122:18</p> <hr/> <p>G</p> <p>GALLOUZE 2:9 gannet 65:1 GATT 27:19 39:25 GAUCI 2:5 gave 141:25 general 18:7 39:25 52:25 53:16 146:15 147:7 generality 41:24 generally 22:22 33:13 57:10 59:3,17 64:18 68:8 96:6 127:23 132:12 generated 12:2 29:19 129:14 132:8 gentlemen 1:3 35:21 101:23 Georgina 1:23 gets 53:17 96:9 GIBB 3:2 give 4:9,25 33:19 36:1 45:2 85:22 89:8 90:21 91:20 98:4 123:21 134:15 148:11 given 5:23 16:22 30:6 54:4 70:21 92:12 98:21 99:17 111:12 123:16 126:5,10 136:17 149:19 gives 119:22 130:8 145:18 gloss 80:21 go 2:10,15 24:11 26:24 34:11 60:3 66:21 71:24 76:16 84:6 87:22 89:11,14,23 95:23 96:18 100:11 100:23 102:9 106:11 109:20 130:7 135:7 141:1 142:22 143:6,22 goes 42:6 62:4 80:10 88:8,14 92:2 97:20 98:14 99:7,10 115:3 141:20 144:22 148:25 going 83:3 84:11 87:24 90:2,19 95:13</p>	<p>99:4 118:21,22,23 138:22 139:22 141:8 142:21 gold-standard 67:22 good 1:3 35:21 37:10 53:20 56:23 78:22 82:18 83:5,16 87:25 95:9 govern 140:5 governing 37:1 Government 2:17,18 2:20,21,21,22,22,23 2:23,24,24,25,25 3:1,1,2,2,3 98:3 governs 140:4 GRAHAM 2:10 grant 3:17,20 19:12 granted 2:11,12,14 grants 18:22 78:1 graph 114:24 115:1 grapple 94:9 grappled 7:4 28:20 94:7 grateful 125:22 gratitude 151:6 grazing 62:6 great 1:3,17 67:13 134:19 greater 7:18 22:24 23:1 30:8 62:5 63:13,22 65:11 68:19 91:21 grey 64:23 grossly 117:22 ground 53:9 81:5 90:16,20 110:19 group 13:25 14:1,2 18:23 19:5 29:6,9 29:11 45:16,18 58:20 59:3 120:16 120:17 124:4,6,7,20 124:21 groups 13:2 14:7 21:19 45:6,8,11 47:13,15 62:1,9,13 123:17 124:1 Group's 44:25 49:19 guidance 150:21 guillemots 64:24 guise 53:22 Gulland 1:23</p> <hr/> <p>H</p> <p>habitat 58:1 Hague 1:6 half 1:9 halve 124:9 hand 5:14 43:14,16 47:15 50:5 52:16 111:22 hands 150:22 handwritten 105:8,9 happened 37:5 59:7 120:4 143:2 happens 42:2 happy 71:22 harbour 64:23 hard 63:14,24</p>	<p>harder 74:8 harmful 91:7 having 48:1,2 76:16 77:20 87:4 89:10 91:22 106:3 114:17 115:13 140:14,15 142:19,21 hav[ing] 88:8,25 89:2 139:2 140:3,4,8,9 Hazen 57:24 head 137:17 heading 2:21 5:23 7:17 8:1 15:13 22:19 74:15 75:2 85:25 93:25 headings 76:15 82:11 96:14 97:16 health 58:2,8 healthy 62:3 hear 127:8 heard 12:20 17:13 22:8 36:11 50:13,16 54:11 55:8 64:7 72:24 97:21 hearing 34:24 35:14 37:5 73:6 76:12 102:8,20 107:14 128:2 136:16 149:7 149:9 151:13 152:1 152:3 heavily 121:19 122:4 held 80:17 help 63:17 84:12 108:25 109:1 119:8 142:10 helpful 61:2 84:18 86:11 138:20 141:4 145:17,18 148:3 helpfully 150:10 hence 4:9,13 her 105:6 herring 62:19 hesitate 72:14,21 heuristic 28:14 hierarchical 90:17 hierarchy 91:11 high 2:2 9:3 25:20 53:2 73:18 79:22 86:1,12 115:23 higher 30:8 64:3 116:13 highlight 60:12 highlighted 62:4 highlighting 61:23 high-level 117:23 hindcast 120:4 hindcasting 120:3 hindering 60:14 hinterland 106:22 historical 59:7 HOFSTÖTTER 2:6 hold 87:19 holistically 137:3 HON 1:12 honourable 11:24 151:14 hope 103:1 horizontal 93:13</p>	<p>hours 1:5,8,9 human 93:6,8 humans 65:12 hurdle 135:24 hypothetical 33:15,17 63:21 70:22 91:19 HÉLÈNE 1:12 Hélène 151:15</p> <hr/> <p>I</p> <p>ICES 18:22,23 19:4,4 19:12 20:20 40:14 43:2 44:24 48:20 49:1,19 50:17,21 64:6 120:16 121:13 122:22,25 124:20 ICES's 43:7 idea 100:20 129:3 143:17 ideally 124:19 ideas 84:25 identification 146:18 identified 9:15 24:5 34:13 43:15 49:16 52:11 55:14,23 66:20 70:12,14 86:7 95:24 96:4 111:4 117:2,14,16 132:23 133:4,25 137:8 146:9 150:12 identify 9:22 23:17 34:7 43:11 95:20 104:16 identifying 126:3 ignore 140:3 142:16 illustrate 8:7 immediately 118:17 immense 16:20 IMOGEN 3:1 impact 56:19 60:11 63:13,24 70:5,7 84:2 85:13 86:7 91:13 99:20 108:13 108:16,18 109:12 110:1 113:12 114:12 115:17,19 115:25 127:14,21 139:7 146:15 147:16,18 impacts 32:21,23 33:16 86:9,17 91:7 91:22 99:25 100:1,5 100:6 108:21 145:21 146:1 impaired 4:8 impairment 2:19 4:16 77:10 impeach 2:2 implicit 53:18,21 implied 44:2 implies 25:4 139:2 implying 11:1 import 93:17 importance 74:6 98:19,21 important 1:15 14:6 15:20 16:4 23:19 25:19 58:6 60:6</p>
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<p>64:10 65:6 67:2 68:7 69:18 74:9 78:13 81:6 87:12,12 88:18 91:16 99:13 110:17 127:11 130:21 133:14 134:8 142:16 148:11,15 importantly 25:24 122:17 imposed 67:9 imposes 27:15 impressed 145:11 improve 86:22 improved 136:8 improvement 58:23 124:2 improves 86:15 impugned 126:24 inaccurate 19:7 72:22 inadequate 72:10 117:22 inappropriate 93:15 included 13:15 49:1 51:12 74:3 131:4 133:18 includes 15:6 16:25 22:24 53:2 64:9 87:14 111:5 118:4 including 94:16 96:13 97:2 134:6 136:11 inconsistent 6:20 81:1 88:18 incorrect 101:7 increases 12:2 13:2 21:19 29:19 65:19 69:4 115:15 116:18 incumbent 37:23 indeed 28:15 33:6 45:16 46:21 52:1 66:24 84:16 97:5 104:2 113:5 133:9 141:9 independent 3:12 indicate 141:10 indicated 21:2 103:6 127:7 148:16 indicates 21:13 128:7 indicating 62:2 63:5 indication 139:19,20 indicator 58:7 indirectly 80:21 individually 134:5 individuals 93:8,16 industry 99:20 inescapable 33:3 inevitable 89:7 inexplicably 50:22 inferences 39:10 influence 121:19 influential 122:4 influenza 74:10 information 11:18,20 20:20 21:13 46:8,9 50:10 51:11,12 72:3 72:9 85:19 86:14 97:1 104:18 109:19 114:15,21,22</p>	<p>115:22 117:1 124:10,11,13 133:20 134:24 149:9 informed 74:1 informs 6:14 inherent 58:7 114:2 initial 118:14 initially 103:4 120:17 133:6 input 19:11 122:6 inputs 119:16,17 inputted 98:18 113:11 inputting 12:14 18:19 19:25 49:3 insert 125:7 inside 58:22 insignificant 79:4 insofar 10:5 40:7 71:18 97:23 instance 2:19 9:14 28:12 77:11 85:10 96:3 instead 5:24 50:19 140:7 integrative 58:2 intensity 7:15 intentional 140:21 intentionally 122:20 interact 119:19,22 interaction 48:4 interactions 121:24 122:2 interests 45:3 102:4 146:14 148:10 internal 19:18,19 22:18 international 1:16,22 2:25 5:20,25 6:21 37:9,11,13 38:24 73:23 84:21 92:15 92:18,22 99:2 interpret 92:4,25 106:19 interpretation 6:21 7:8 10:16 25:5 76:17 93:21,23 135:12 142:3 interpretations 141:25 interpretative 92:1 interpreted 27:19 interpreting 5:18,22 6:7 interrupt 88:23 interval 55:23 114:23 115:8 117:2,9,11,12 117:15,17 intervene 72:15,21 intervention 59:19 inter-species 121:24 inter-state 92:25 93:12,18,22 intricacies 147:20 introducing 98:19 introduction 52:24 invaluable 151:17 invite 35:22 72:17</p>	<p>97:4 133:6 139:12 inviting 2:4 involve 38:9 involved 13:11 37:4 44:1 45:13 121:1,6 Ireland 1:3,17 ISABELLA 3:8 issue 8:17 9:7 10:16 16:4 27:3 32:19,23 72:7 79:1,3 100:9,9 107:15 109:4 112:11 114:5,9,10 114:12 115:3 118:7 125:12 126:17 128:10 133:10 136:13 138:24 149:1 issues 1:25 23:7 96:23 99:24 148:12 item 142:12 items 142:1 i.e 77:1 82:1,20,23 85:4 87:13 93:8</p> <hr/> <p>J</p> <p>JACOB 3:2 JANE 1:11 January 1:9 1:1 JOANNA 3:9 JOSEPHINE 2:7 JOSÉ 3:7 journal 64:6 judge 67:1 judgment 56:6 69:7 123:4,5 judgments 56:9 67:7 103:9,19 119:18 junction 11:21 24:10 34:23 141:3 Juratowitch 2:16 4:9 4:11 35:23,25 52:17 52:18 71:25 72:24 73:1 74:23 75:7 97:21 101:11,12 103:6 105:1,2 108:11 109:3 113:21,22 116:21 116:22 118:1,21,22 134:13 136:19 149:18 150:25 jurisdiction 1:20 jurisprudence 39:19 jurists 54:15 just 7:19 14:22 18:4 21:23 25:10 29:17 38:1,10 41:10,18,23 46:3,17 48:21 55:12 56:1 58:6 60:3 64:18 68:8 70:24 78:14 84:18 85:22 88:23 89:3 92:9 96:4 97:17,18 98:4 102:2,9 103:4,24 105:3,11 107:6 109:5 112:4,12,22 114:2 115:7 116:3,3 118:13 119:11 121:6 123:11,20</p>	<p>124:9 125:15,18,20 128:20 131:17 133:7 135:22 136:11,24 137:11 137:15 140:13 142:20 143:25 144:1 145:8 146:22 148:23 149:10 Justice 1:12 26:10 82:15 83:23 88:23 112:12 113:14 114:3 123:11,16 124:24 128:20 129:2,22 131:17 141:23 143:9,23 151:14 justifiable 4:16 justification 41:11 54:4 77:16,18,23 justified 4:9 27:20 31:4 36:18 38:3 64:2 66:19 justifies 68:25 justify 2:18 40:2 42:4 54:9 77:10 juvenile 44:22 45:18 45:23 46:2 123:18 124:12,22</p> <hr/> <p>K</p> <p>KC 2:16 keen 69:18 KEITH 3:8 kept 122:20 key 12:16 14:25 18:21 18:21 19:3,4,9,12 19:20,21 20:3 43:2 43:7 44:24 48:20 49:1,4,11,19 50:2,3 50:3 52:5 68:20 81:10 85:23 96:8 100:16 118:8,10,11 118:12 121:13,15 122:22,25 137:16 145:8,10 kick 11:18 kind 38:11 39:9 40:22 46:9 48:1 93:11 105:16 kinds 41:23 Kingdom's 5:19 16:8 21:17 26:9 29:10 33:4,10 36:18 37:6 96:24 106:6 140:2 140:11 149:19 kittiwake 51:23 58:12 62:25 64:25 kittiwakes 22:8 58:18 58:22 59:25 61:11 63:17 knew 138:22 know 1:6 11:3 46:5,7 50:20 58:17 59:21 71:7 84:1 98:13 102:11 112:4 125:11 135:6 143:13,25 150:6 known 12:14,19,22</p>	<p>18:19 20:6,15 46:10 69:22 KOOPMAN 2:24 KYRIAKOU 2:10</p> <hr/> <p>L</p> <p>lack 29:20 31:21 137:2 ladies 1:3 35:21 101:23 landings 20:21 50:21 51:5 117:4 language 4:2 80:2 82:5 84:12 85:1 87:2 88:8 89:22 90:9 large 70:19 last 18:1 21:6 22:16 60:4 74:5 95:15 97:12 101:16 131:17 138:22 late 35:15 148:24 later 9:12 53:21 117:16 144:10 LAURA 2:8 LAUREN 3:3 law 1:16,22 3:3 5:17 5:20,25 6:6 37:9 73:24 84:7,21 85:6 92:4,4,15,18,20,21 92:24 93:2,4,6,8,16 93:21 147:2,21 lawful 91:19 lawfully 32:8 lawyers 113:25 lay 103:2 lead 51:20 150:12 leads 10:10 97:12 125:9 least 39:23 45:17 53:18 83:12,20 99:5 99:12 120:12 136:14 140:20 149:25 150:9,19 leave 149:22 leaving 35:10 41:8 left 33:7,21 116:23 legal 2:4,5,6,7,8 3:6,7 3:7,8,8 2:13 29:5 41:10 85:10 117:22 legislative 147:19 legitimate 1:15 5:14 length 29:18 lengthy 19:16 lenient 27:20 less 27:14,18 30:22 61:25 63:16 69:10 149:22 lesser 30:22 let 1:6 8:16 let's 3:7 5:12 122:19 127:24 level 2:2 3:23 25:20 27:13 53:2 73:18 76:22,24 77:1 80:22 80:24 85:17,18 86:1 86:12 94:24 95:7,11 99:14 115:24 116:19 146:15</p>	<p>147:7 levels 58:3 79:23 116:4,8,10,11,16 135:10 LEVENT 3:6 liberal 39:10 lies 127:6 life 120:9 lifespan 57:25 light 78:13 92:13 118:14 131:22 like 20:4,12 26:7 34:24 72:17 107:19 114:6 122:9,13 123:3 125:3 126:17 137:21 151:19,25 likelihood 73:20 likely 51:24 63:12,21 86:16 113:9 115:17 145:16 likewise 40:25 51:12 limb 76:4 limit 3:16 limitations 5:5 43:24 44:4 49:15 144:19 limited 14:10 38:23 67:5 139:3 limiting 4:18 62:20 limits 83:19 line 13:10 15:11 16:13 18:13,25 20:10,19 21:22 22:21 43:10 58:18,21 59:4 114:25 115:2,4,7,9 143:4 lines 19:19 21:7 26:22 30:5,23 114:24 129:3 130:3 link 11:8 28:1 83:24 131:5 linked 10:14 links 60:6 Lisa 1:23 list 14:21 listed 3:23 4:3 45:8 51:8 listen 113:25 lists 64:17 literature 59:17 66:9 68:25 71:1,10 122:1 130:24 131:2,6 little 78:15 82:3,4 83:5 86:25 97:18 102:17 141:2 144:12 145:8 living 2:11 143:12 lob 41:23 local 128:8,9,13 localised 30:13 68:3 68:11 locally 30:14 128:12 128:16 located 39:6 location 12:10 16:10 16:16 23:17 118:6 locations 68:9 logic 9:4 logically 75:9 long 43:22 55:1 57:25</p>
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79:9,16 118:9,13 longer 116:6,15 134:15 look 3:7,19 45:25 64:21 73:3 94:14 98:23 104:19 106:4 108:6,16 145:24 looked 108:18 looking 28:9 61:22 71:9 80:7 108:5 112:24 115:1 120:3 132:4 133:14 143:2 143:5 146:10 150:20 looks 15:10 23:4 26:12 34:25 50:25 70:10 98:16 116:16 120:6 122:1 127:17 130:24 132:19 133:12 134:3 138:17 lose 20:2 loss 34:1 losses 33:11 lost 19:8 lot 12:20 83:3 107:13 low 63:4 lower 58:2 111:24 115:8 116:12 LUIS 3:7	major 137:12 150:12 majority 21:11 51:2,5 89:17 make 29:16 31:1 32:4 33:2 36:19 38:11 42:17 43:4 53:20 54:18 55:11,16 56:3 56:6,9,23 66:1,7 67:7 71:15 72:12 84:1,3,6,8 92:22 96:15 97:8,24 98:1 103:8,19 114:9 119:1,24 120:13 121:7 131:19 132:2 137:4 140:7 150:25 151:3 makes 92:24 93:15 104:11 105:10 142:23 make[s] 8:14 making 37:15 45:21 85:25 129:25 mammals 30:1,13 53:6 69:1,8 74:12 management 4:14 6:19 17:19 60:16 77:3 78:6 98:19 101:4 147:12 manager 3:9 mandate 66:17 mandatory 89:3 manifestation 11:15 manner 4:8 6:10 49:21 143:11 many 19:16 41:22 46:4 142:24 marching 144:1 MARE 2:9,9,10,10,11 2:11 margin 7:2 MARIA 2:11 marine 1:21 5:15 25:18 30:1,13 53:6 57:22 60:9 61:10 69:1,8 74:12 91:7 98:22 101:4 143:12 mark 89:1 marked 15:25 59:16 62:10 115:9 MAROUSO 2:10 material 6:13 134:21 135:15 136:13,25 materiality 133:3,5 134:2,9,18 135:5,5 135:10 materially 86:13 133:14 mathematics 111:18 matrix 121:21,22,24 MATT 2:22 matter 1:1 23:9,11 27:5 53:16 54:19,20 55:9 65:21 69:6 73:5 79:18 82:2 83:10 84:7 89:21,23 90:22 97:9 99:12 105:17 107:12 110:22 111:18	117:9 124:8 132:1,6 143:22 matters 24:21 26:18 39:2 56:9 63:3 75:21 76:15,19 123:4 126:12 MATTHEW 2:24 mature 44:22 45:19 124:13 maximalist 117:11 maximum 55:18,21 may 4:8 5:20 6:2 7:15 9:24 25:20,21 30:18 35:1 38:25 39:9 59:14,18,19 62:13 64:15 66:14 67:4 71:15 73:4,4 76:11 80:11,19,19 82:10 84:12 85:5,15 86:6 90:19,23 92:16 94:17,24 110:12 113:4 115:23 126:6 127:8 128:8,9 129:2 130:18 132:3 133:9 134:3,4,22 138:1 140:12 141:2 143:7 146:11,25 147:11 147:18,21 149:21 McGowan 1:23,24 150:16 151:6 McKenzie 2:19,19,20 mean 10:13 24:4 27:5 28:14 88:2 105:22 119:10 120:11 145:24 148:13 meaning 6:6 10:11 24:7 55:2 84:12 90:5,11 92:12 140:2 meaningful 25:14 56:4 78:22 81:16 83:10,13 85:4 meaningfully 83:17 means 16:16 20:21 26:12,14 40:12,25 43:12,13 47:2 56:10 68:18 76:25 78:10 86:15 95:7 104:15 111:25 116:7,15 117:8 119:12 120:15 142:20,20 meant 108:4 112:18 measure 4:14,21 6:19 8:20 9:5 11:16 23:23 26:11,23 27:10,12,22 28:4,12 28:17,18,21 29:9,11 29:14,24,25 30:12 30:25 31:2,4,22 32:2,17 41:5,7,14 41:15 52:20 55:24 58:2 60:21 67:9 73:17,18,21 74:8 78:8 80:12 82:21,24 87:18 91:21 94:6,11 94:25 95:6,8 99:16 99:17 104:12 112:6 112:6 113:13 126:23,24 127:1,1,2	127:3,4,5,20 129:4 129:18 130:1,4 131:10,13,15 132:10 135:17 137:1 138:3,9,25 139:9,10 142:9 143:10,14 144:9 145:21 146:1,11,13 146:21 147:1,1,2,3 147:6,12,19 measured 72:10 73:11 measures 4:19 7:9,11 9:2 10:1 11:19 24:20,22 25:12 36:18 40:3,17,21 41:3,9 42:11 52:22 53:12 64:2 66:15,19 66:23 67:25 76:18 77:3,17,19 78:6,18 78:25 79:2 80:17 81:4,14,20 83:21 87:14,15 90:8 94:1 94:4,13,14 97:14 98:11,20 99:7 105:13 107:8 128:18 139:7 140:9 143:2 146:16 mechanism 28:18 94:18 meet 39:12 41:16 52:9 81:25 104:10 105:14 129:11 133:4 meeting 42:6 61:13 95:7 meets 134:1,8 member 2:4,5,6,7,8 92:21 members 1:14 4:1 5:7 7:23 11:21,24 24:12 28:19 34:22 35:5 37:18 38:13 40:4,10 42:14,19 46:6 47:24 52:15,18 53:14 56:1 58:5 59:6 60:17 61:1 63:3 64:4 65:20 66:12 68:16 70:9 71:20 72:8,14 73:22 74:5,19 75:17 79:4 101:13 115:11 117:20 mention 39:14 69:8 121:20 mentioned 46:22 85:7 120:24,25 148:7,14 menu 141:25 142:2,12 mercifully 145:2 met 10:5 36:15 104:16 107:3 methodological 128:4 129:8 137:2 MICHAEL 2:25 microphone 101:14 127:10 middle 71:3 midnight 148:24 might 9:11 26:24 28:11 38:12 39:12	39:20 55:7 56:21 70:6,7 77:5 82:8,13 82:18 84:21 88:1 89:18 91:14 93:1 97:24 101:15 106:16 108:13 114:12 119:14 120:7,7,22 134:18 136:16 146:17 150:2 militates 56:17 mind 28:22 30:25 59:20 83:9,18 85:4 136:23 144:1 145:13 147:23 minimis 96:13 144:7 minimised 91:21 minimising 91:7 139:16 ministerial 32:16 98:2 98:4,6,25 99:23 144:7,22 145:1 147:21 minke 30:6 64:17,22 minutes 101:16 mischaracterisation 96:2,16 mischaracterises 97:11 misquoting 105:6 misreads 100:2,3,12 misunderstanding 77:14 114:1 misunderstood 121:1 mitigate 33:10,15,25 100:4 mitigated 32:24 100:1 mitigation 100:20 MMO 147:4 MNZM 1:11 modelled 70:2 107:18 107:22,24 109:10 modeller 43:22 modelling 36:5 42:17 42:21 47:1,25 48:1 48:9,11,12 52:7,15 56:18 69:14,16 70:3 71:2,13 104:23 107:15 109:17 114:17 126:22 127:12 128:23 129:3,9 130:1,3,7,7 130:12,18,18,19 132:7,14,15,17 models 46:20,25 47:3 47:10 109:16,21 110:8 model's 121:21 138:8 modest 64:25 modular 18:13 103:13 118:3,6 moment 33:3 46:15 83:22 130:12 moments 136:21 monitoring 139:4 mooted 50:15 more 3:7 26:13,14 27:7 30:7 33:13	39:10 41:19 44:9,17 51:25 55:14 57:10 59:16 64:2 81:23 82:3 83:2,3,12 84:13 86:16,25 93:24,25 102:17 112:13,25 113:1,4 122:13,15 123:2 124:4 127:23 132:3 132:3,12 141:2,3,5 145:8 146:6,15,17 147:17 149:21 150:3 moreover 10:5 26:20 93:3 morning 1:3,4 35:4 36:11 41:4 42:6,20 43:8 44:14 47:18 49:2 50:14 51:14 53:25 54:24 61:9,15 61:19 68:1 72:1,18 73:7 76:9 78:4 79:21,21 81:10 82:2 94:5 95:17 97:15 98:10 100:15 mortality 12:21,23 20:7 65:10,12,19 108:6,6 most 64:10 65:5 94:17 motor 122:11 mounted 50:14 70:11 70:13 move 40:10 61:7 62:15 66:15 71:22 81:4 117:16 moving 120:10 125:11 much 22:8 35:2,8,25 46:22 50:13 63:16 65:11 72:21 87:1 101:14,17,18,23 105:2 107:11 113:20,22 116:1 124:10,12,13 125:10 126:15 132:21 134:13 136:18,24 138:20 143:24 148:4 150:14 151:10 multiplier 121:22 122:1 must 2:17 4:23 11:5 27:8,23 28:5 53:4 70:17,19 78:18,21 78:22,25 79:11 80:24 81:24 84:3,5 84:8 86:9 90:8 92:18 104:10 112:15 113:24 129:10 131:24,24 132:15,18 137:3 138:16 139:6 myself 87:1 119:2
<hr/> N <hr/>					
name 138:11 natural 105:16 nature 107:1 128:3 129:7 139:21					

NatureScot 59:24 NEAT 2:24 necessarily 26:16 84:7 89:15 94:14 111:19 111:22 116:7 122:5 necessary 5:22 16:23 27:19 29:20 30:21 39:6 69:13 70:4,15 88:5,7 93:11 105:21 114:1 129:7,21 132:16,18 necessity 28:10 NED 2:17 need 14:11 15:14 25:11 31:13,18 34:18 46:10,11 55:4 55:11 57:4 81:13,20 82:3 83:20 89:11 90:17 94:9 96:7 99:3,4,6,19 106:11 106:13 113:4 118:24 120:7,8,11 120:12,22 122:23 124:11,13,16,17 125:5,9 134:4 135:4 135:5 144:20,23 145:16 149:5,16 150:1,19 needed 9:14 49:14 67:17 97:5 98:20 needs 26:19 55:15 79:19 91:9 105:14 105:15,20 111:3 119:24 125:6 130:14 143:4 negative 74:11 negotiate 84:23 negotiated 3:5 negotiations 87:10 neither 92:20 net 41:24 Netherlands 1:7 never 4:11 5:17 46:19 new 12:14 18:19 19:11 19:23,25 45:16 49:3 87:13 116:15,23 117:17 118:12 124:5,15,20,21 125:3,7 next 18:13 22:25 43:2 58:10 62:4,8,16,22 62:23 64:13 65:4 78:8 91:25 139:17 NG 2:23 NIALL 2:21 night 148:24 Nods 137:17 none 49:22 65:1 nonetheless 59:11 67:6 135:13 non-breeding 62:7 non-discrimination 24:18 76:4 81:25 140:15 141:21 non-discriminatory 7:11 24:20,23 25:12 41:3 42:11 81:14,19 83:21 87:16 89:20	90:1 normally 37:22 118:13 NORMAN 2:10 norms 6:1 Norris 2:7 4:3,5 1:11 1:14 24:11,12 35:3 72:14,23 104:2,25 125:22 136:20,21 141:7 146:5 147:7 150:8 151:8 North 4:3,5,6 9:16 16:18 21:8 22:24 23:2 30:8 32:22 45:7 47:5,6,8,9,11 48:6,14,18,21 53:3 56:21 62:5,9 65:17 68:21 69:20 70:4,8 107:22,24 108:4,7 108:14,19,23 109:21,24 110:2,20 110:25 111:1,4 112:2,15,19 114:8 114:11,18 115:5,14 115:15 123:9 127:15,22 138:5 northern 1:3,17 62:25 Norway 21:9 51:11 111:6 Norwegian 20:15,21 21:3,11,12 50:21 51:2,3 55:17,20 111:16,21 112:11 112:22 113:15 114:5,8,13,15 115:3 115:5 117:4 note 31:14 74:16 75:3 75:19 76:3 83:24 84:15 105:8,9 148:23 noted 50:14 59:11 84:15 nothing 34:18 93:23 107:1 144:17 noticeably 42:5 notification 79:12 noting 103:23 149:13 notion 130:15 notwithstanding 59:10 NOURA 2:13 nuance 38:22,23 nuances 37:18 nullification 2:19 32:21 33:16 77:11 nullified 25:17 nullify 32:8 33:8 number 15:18 33:18 55:21 63:17 75:20 76:15 99:17 101:25 139:15 141:7 144:6 145:3 148:8,10 numbering 17:4 19:18 19:19 22:18 numbers 63:19,22 69:13,16,17,19 70:10,15	O object 27:21 92:13 objective 1:16 5:15 11:5 25:23 27:13,22 28:1 41:16 42:1 52:19,24 53:1,10,15 53:19,20,23 66:23 67:2,2,4,10,19,24 68:14,23 71:18 72:11 73:9,21 74:7 74:17 75:4,11 76:14 79:7,25 80:23,25 82:24 86:1,12 97:8 99:9 131:23,25 136:2,12 objectively 11:17 objectives 77:20 78:25 79:6 obligation 9:25 24:24 25:2,7 28:2 37:14 37:14 80:6 82:6 84:9,10,22,24 85:1 85:24 86:9,10,20,21 87:5 88:6 129:8 obligations 3:11 4:10 6:22 7:8 8:8,10 25:22 37:12 40:1 79:17,24 80:2,4,16 80:21 84:21 88:16 90:10 obliged 93:9,22 observation 81:22 observational 123:2 obtain 128:15 obtainable 11:19 43:20 44:18 46:4 48:25 obtained 10:19 11:7 46:11 obvious 39:3 63:16 117:18 obviously 24:23 38:18 occasion 72:15 occasions 31:8 occur 119:23 occurred 58:17 ocean 57:23 October 31:10 odd 132:4 off 122:11 offered 141:14 often 57:22 89:24 Okay 150:14 OLIVER 2:20 omission 140:22 omits 11:19 omitted 140:13 once 4:20 18:22 24:25 36:15 41:13 53:16 70:18 109:15 117:14,16 136:8 ones 50:6 69:9 93:7 one's 83:9 only 2:12 4:24 5:10 8:8 11:1 33:3 34:12 34:18 47:7,13,13 49:7 54:1,4 56:20 62:5 67:8 69:4,21	69:25 70:2,5 75:12 81:20 90:25 95:23 96:18 98:12 107:2 107:21 108:24 109:16 110:24 111:7 113:17 115:3 115:11,14 116:18 118:23 119:1 139:10 147:14 148:2 open 15:23,25 16:1 83:18 85:4 150:8,13 opened 8:3 open-source 14:9 15:6 operation 58:15 operational 58:14 operations 21:11 51:2 opine 69:24 opinion 46:10 73:25 104:22 opponents 60:20 opportunities 3:25 4:4 108:5 opportunity 94:19 104:4 112:10 138:22 148:19 151:5 opted 142:1 option 83:16 88:1,11 options 87:24 142:21 oral 25:1,4 30:2 107:13 125:12,19 144:5 149:9 151:13 151:25 orally 102:2 oranges 137:21 Orbit 2:12 order 13:11 16:6 23:7 29:21 37:1 46:11 81:25 90:17 102:9 102:11,14 107:3,24 107:25 109:11 120:13 124:18 129:11 134:15 143:12 149:3 Ordinarily 106:16 ordinary 55:2 82:5 92:12 Organisation 101:4 Organization 39:18 original 137:19 orthodox 40:5 OSPAR 22:9 23:4 61:10,13,24 other 3:17,20 5:16,25 8:15 10:19 11:6 13:12 14:13 24:2 26:4 30:1 32:25 33:6,8,9,22 34:1 38:2 39:7 45:25 46:20 47:10,15 50:5 54:8,9,16 59:9 60:2 63:17 84:17,20 90:15,18 92:15 95:12 98:9 99:20 102:23 104:17 106:8 112:21 115:11 117:19	121:21 124:23 134:7,24 139:9 142:4 143:13,15 144:15 147:13,15 148:13,14 others 15:21 57:2 82:10 145:2 otherwise 26:23 28:3 33:8 38:3 42:16 51:22 63:15 71:22 74:21 137:4 ought 43:19 ourselves 102:1 out 11:10 21:9 38:11 38:15 43:1 45:8 49:20 57:10 61:24 64:12 65:7 72:12 73:11 76:1 79:17 81:7 82:5 92:8 97:5 97:15 99:2,18 103:2 107:8 108:3,8 109:21 110:1 112:21 113:8,11 130:14 140:20 142:4 148:23 outbreak 74:10 outcome 84:8 131:8 144:16 146:2 outcomes 82:9 outline 40:10 outlined 40:5 output 7:25 15:16 111:25 116:17 120:6,14 121:19 141:10 outputs 15:13,15,19 21:24 51:15 outset 75:19 outside 30:14 58:19 115:6 117:6 128:16 outstanding 76:9 outweighing 144:10 over 25:14 30:15 41:24 51:20 52:16 90:18 99:17 102:9 114:18 117:17 overall 27:6 56:22 58:20 63:4 64:1 67:3 overarching 42:23 overestimating 112:3 112:5 overestimation 12:22 20:8 112:1,3 113:8 113:9,12 overstated 29:8 32:1 overstatement 29:15 overstates 7:20 overstating 111:8 overview 23:12 own 9:6 25:1,20 33:4 33:10 37:16,17 39:21 53:1 54:10,17 66:18 71:16 76:22 104:7 106:18 119:11	PABLO 2:19 packaged 106:21,24 107:1 page 3:8,18 13:9,21,24 14:20 15:4,8,12,15 16:12 17:4,16,23 18:1,3,6,25 19:17 19:19 20:18 21:6,21 22:14,17 24:14 26:18,22 30:5,23 31:5 43:10 45:5,7 46:16 52:3 53:25 57:19 60:21 62:12 62:16,22 65:3 77:7 80:1 81:11,16 87:11 95:18 98:5,7,8 99:1 99:22 100:22 107:16 108:11 papers 17:16 45:4 60:4 70:24 Palace 1:6 paper 57:2,9,10,24 58:4 59:9 60:17 61:3,6 62:16,16 64:8,13 65:3 103:9 103:10 papers 56:14,16,24 103:17 105:25 paragraph 13:23,24 13:24 18:9 60:4 65:4,13 74:1 98:8 99:2 102:12 149:3 paragraphs 34:19 36:22 91:5 92:9 98:6 100:16,25 parameter 112:20 123:19,20 124:2 131:1 parameters 19:23 23:22 45:24 49:24 56:19 118:11 119:16,20,23 120:8 120:10 121:3,16,23 122:3,10,19,22 parametrisation 119:7,10 parametrise 10:19 parametrised 12:6 paraphrase 1:25 parrot 55:12 part 2:3 6:7 15:20 27:6 34:8 39:5 47:14 53:9,9 56:20 88:20 95:20 105:24 106:4 107:18 108:8 109:3,8,24 110:15 110:17 114:10 127:18 129:5,15 130:4 144:19 147:1 147:11 partial 41:19 57:19 59:21 participants 53:7 particular 22:6,16 25:6 35:6 38:11,25 39:2,24 48:2 60:23 78:13 86:7 118:19 119:9 133:22 138:3
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

138:9 particularly 21:25 41:17 144:6 146:20 parties 2:16 3:12,13 3:15,24 6:10 9:2 10:24 25:6 32:17 73:3 76:21,25 78:3 78:5 79:2 90:23 91:20 92:16,19 93:1 93:13 97:11 102:13 103:5,7,16 106:23 110:22 111:10 126:13 132:22 139:6 141:15 142:25 149:5 150:17,23 partly 99:19 104:8 144:20 parts 5:8,9 71:1 108:3 party 3:20,21 6:18 8:19 9:6 11:16,18 25:20 36:3,13,23 38:25 39:7 40:8,8 54:8,9,14 67:8 79:11 81:20,23 83:9 87:18 88:3 89:7,10 89:13,18,24 90:17 90:25 94:13,24 102:23 104:10,11 106:16,17 131:23 132:13 141:16 145:25 party's 37:25 54:16 83:14 148:20 pass 11:22 24:10 28:22 passage 52:2 62:4 100:16 passages 60:2 99:22 100:2,15,19,23 144:6,12,20 145:8 145:10 passed 135:24 past 120:4,9 PAUL 2:11 Pause 15:8 22:20 35:9 pay 83:10 PCA 1:4 150:21 151:16 Peace 1:6 PENELOPE 1:11 people 114:9 per 77:22 percentage 51:4 69:19 69:24 109:15 110:1 111:24 percentages 51:7 108:21 perfectly 115:22 performed 24:23 25:8 perhaps 100:10 101:15 123:21,24 133:6 141:15 142:10 144:10 145:2 149:16 150:19,23 period 31:24 58:13,25 125:7	Permanent 1:5 3:5 permissible 92:7 permitted 38:2 92:3 person 17:9 perspective 109:2 149:19 pertained 44:15 50:12 phenomenon 128:7,9 128:13 phrase 139:1 pick 76:9 125:15 picked 90:4 picking 57:20 picture 145:10 piece 8:22 48:1 54:2 127:17 129:10 130:13 131:13 pieces 121:18 128:4 place 20:10,16,21 21:3 21:12,15 51:3 110:20 112:22 114:21 128:15 130:17 plain 84:11 98:16 plank 70:18 planks 70:20 plans 85:12,13,17 play 10:22 41:9 playing 93:21 plays 77:21 pleadings 7:19 81:2 please 24:11 42:18 71:24 72:24 107:25 113:1,21 141:4 pleased 125:11 plenary 120:18 plots 58:11 plugged 14:9 15:17 16:1 18:15 plugging 21:24 plug-in 18:13 118:7 plug-ins 103:13 118:4 plus 110:25 112:16 pm 1:10 35:9,18,19,20 101:20,22 152:2 point 2:9 5:2,3 12:8,12 12:17,24 13:14 14:6 16:3,7,14 18:17 19:25 20:4,11,25 21:16 22:3 25:5,24 26:8 29:17,25 31:1 31:14,20 32:5 33:2 33:12,13 37:9 42:5 42:24 43:8 47:17 49:2,11 50:12,13 51:14 52:5 53:21,23 55:1,10,11 63:10 65:14,15 66:4,5,8 68:1,13 73:8,8 74:5 74:15 75:2,8 77:16 78:7,8 79:4 82:15 83:24 84:4 85:5 87:12,13,22 90:19 91:2 95:15 97:12,18 98:9,14 99:6 100:14 111:9 115:11 116:3 116:9,14,23 118:19 118:24 119:1	120:20 121:10 125:24 136:15 138:2,15 139:21 142:13 145:7 pointed 9:23 137:3 pointing 99:2 118:3 points 11:25 23:9,10 28:23 29:4,6,9,11 29:16 30:17 32:4 42:23 75:19 76:8,10 81:5,7,7,8 84:11 92:10 93:25 95:13 97:22 126:3,7,9 145:5 population 74:9 populations 53:8 68:8 68:19 74:7 pose 102:2 posed 112:17 poses 106:12 positing 89:1 position 10:11 23:3 25:2 29:7 37:6,8 38:20 40:19 58:1,8 69:10,10 71:3 72:16 72:22 82:19,24 83:4 83:5 90:20 96:2,17 104:5 106:2 110:23 111:2 112:14 113:4 116:5 117:8,11 125:2,4 128:6 129:13,14 130:11 132:14 133:22 134:5 135:9 positions 106:22 150:23 151:21 positive 59:5 positively 8:23 54:3 possession 39:7 possibility 33:15,17 41:8,13 59:13 60:23 135:11,12 possible 9:11 55:18,21 66:19 82:9 91:19,24 95:2 112:4 127:9 potential 60:10,24 67:12 100:4 129:23 141:15 potentially 84:18 power 59:24 powers 7:13 PO1 148:23 practical 54:19 56:11 60:15 90:13 118:9 142:25 149:22 practice 89:24 pragmatic 150:9 preamble 3:15 147:2 precaution 74:5,16 75:3 precautionary 11:8,13 11:14,15 52:23 71:23,25 72:1,13,20 73:14,15 74:4,14,17 74:18 75:4,5,9 105:5 139:23,25 precisely 2:14 4:17 8:7 25:2 44:17	141:8 147:22 precision 27:8 preclude 86:18 precluded 8:20 predate 124:22 predated 124:23 predators 12:7,10 13:7 16:10,16,20 23:17,19 45:25 46:5 46:8 47:21 48:15 57:22 65:6,16 67:17 118:6 119:19 124:23 128:10,14 predatory 65:1,11 68:4 69:1,8 predator-prey 122:2 predicated 113:14 predict 56:19 122:14 predicted 64:3 69:19 114:18 115:15 117:1 predictions 119:22 predicts 123:7 prefer 46:7 preliminary 104:3 113:3 premise 68:10,18 128:22 129:21 preparation 1:9 prepare 102:17 147:19 prepared 102:3 146:16 present 14:23 22:17 43:17 76:7 92:9 109:18 133:21 presentation 51:17,19 presented 13:1 21:18 23:6 52:6 87:11 151:21 presents 1:10 preservation 1:21 presumed 37:10,11 pretty 63:11 70:9 prevail 54:1 prevailing 59:2,4 prevails 126:25 127:3 prevent 33:5 previous 60:9 74:25 previously 64:7 prey 30:14 53:6 60:7 64:10 65:6 68:4 75:12 119:19 124:22 prima 4:21 10:3 36:14 36:16,20 37:4 38:9 38:19 54:6 primacy 7:1 primarily 21:8 27:10 28:1 47:14 126:21 primary 93:6 principal 136:3 principally 65:9 93:7 principle 6:6 11:15 37:7 41:2 52:25 53:16 76:15,17 81:8 82:22 88:4 89:8 90:18 91:13,16,17	91:22 93:25 95:4 96:5 105:5 139:23 139:25 141:19,19 143:15 principles 6:15,20 7:4 7:7 26:1 77:20 78:23 82:7 83:1 90:4,6,7,9,10,15,24 90:25 92:1 95:10 139:17,21 140:14 140:14,16,17,23 141:1 prior 145:1 146:16 149:15 probably 62:20 120:21 problem 117:18 150:12 problematic 80:3 91:14 procedural 37:1 79:12 84:5,10,20,24 102:8 102:11,14 142:7 149:2 proceduralism 82:16 83:7 proceed 73:18 proceedings 83:25 94:10 126:5 process 7:24,25 32:13 34:8 77:22 83:15,25 85:8 86:7 89:15 95:21 98:17,18 100:12 139:4 144:25 produce 9:6,22 13:12 39:8 43:11 produced 1:23 9:18 43:19 48:17 produces 114:25 producing 115:14 product 115:2 Professor 1:12 2:12 3:10,12 34:9 120:21 146:22 148:3 151:15 proffered 65:23 106:3 proffering 54:17 programmes 85:12,14 85:18 progression 124:3 prohibiting 32:9 56:20 68:18 115:19 prohibition 7:16 9:25 11:11 24:6 28:19 59:5 68:24 70:5 79:5 95:1,7 114:19 115:16 138:4 project 85:18 projected 46:23 50:25 projects 59:24 prompted 34:9 proof 8:24,25 39:1 54:11 104:9 proper 34:14,17,21 88:17 95:25 96:20 145:20 properly 23:21 29:13	133:19 proportion 76:1 110:3 proportionality 6:3 24:17 27:2,25 28:2 28:24 33:5 75:24 76:14,19 80:13,14 81:24 89:8,9,14 91:25 92:2,6 93:5,5 94:1,16 96:6,23 138:25 140:10,15 141:21 142:23 143:1,18,22 proportionate 7:10 24:19,22 25:11 26:11 27:9,10,12,18 28:6,17 41:2,7 42:11 81:4,13,19 83:21 87:16,19 89:19,25 94:6,12 97:14 139:7 140:8 143:11 150:4 proportions 46:1 propose 102:6 proposed 41:12 60:21 proposes 66:25 103:3 proposition 30:4,9 57:3 61:16 65:10 70:16 128:25 protect 63:18 98:20 protection 1:15,20 2:3 53:2 73:19 76:23,25 77:1 79:23 80:22,24 86:2,13 94:24 95:8 95:11 protocol 2:24 prove 34:2 40:13 118:24,25 proven 44:8 provide 5:21 15:16 23:12 66:14 146:11 148:9,16,18,19 149:17 provided 15:2 102:7 102:15 115:21 150:11 provides 28:18 38:8 61:1 providing 39:25 102:18 proving 36:23 39:4 40:9 provision 6:16 27:24 81:15 82:6 131:18 142:5,7,17 provisional 43:9 provisions 2:24 3:2 4:17,22 5:10,22 6:8 25:14 77:4,25 78:11 140:4 public 93:8 published 48:21 60:18 PUCCIO 2:8 puffin 64:24 pure 149:22 purport 55:6 99:8 purported 53:22 purportedly 9:5 purpose 9:19 19:2
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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<p>27:21 42:13 47:12 61:19 92:13 106:5 113:5,6 138:8 142:16 purposes 14:23 17:17 22:17 51:16,19 71:18 82:11 129:4 136:10 pursuant 1:1 pursue 2:2 53:5 77:19 78:25 79:2 95:11 pursued 67:6 77:1 79:6,6 pursues 27:11 pursuing 25:23 53:2 79:25 pursuit 5:14 put 8:15 10:23 75:25 82:1,15 87:7 104:5 107:5 114:24 118:7 122:19 134:19 136:15 140:5 144:17 puts 83:24 134:9 putting 71:16</p> <hr/> <p>Q</p> <p>quality 10:7 134:22 quantified 70:17,18 quantify 23:22 quantitatively 70:19 quarter 15:19 question 7:13 10:17 15:1,2 26:8 28:7 34:9 36:2,10 41:11 48:4 53:10 54:23 56:5 69:5 75:23 82:7 90:14 94:20,21 94:23 103:4,16,20 103:25 104:8 105:11,19,24 106:9 106:12 108:9,20 109:6,19 110:10,15 111:3 112:9 115:13 118:2,9 119:2,5 125:13,22,23 126:19 127:23 128:21 129:20,23 131:17,23 132:22 132:25 133:8,22 134:2,14 135:8,22 137:5 139:11,13 140:12 141:24 142:8 144:3 145:7 146:5 147:8 questioning 9:9 questions 4:12,14,15 1:7 20:14 24:9 34:23 35:1,6,10 74:25 76:11 78:14 88:21 90:3,5 94:22 101:8,24,25 102:2,3 102:6,7,10,12,14,18 102:19,24 112:13 112:17 115:22 125:13 126:11 138:23 143:25 144:2 148:8,12,14</p>	<p>148:17,21 149:20 quite 30:4 38:20 39:13 54:13 55:1 63:16 67:5 72:3 74:25 94:2 107:13 144:18 148:24 149:19 quota 33:20,21 quotas 33:24 34:1 quote 18:24 26:17,21 140:20 quoting 24:14</p> <hr/> <p>R</p> <p>raise 84:19 127:10 128:9 149:1 raised 26:8 49:2 51:14 76:8,10 94:10 98:10 100:14 125:24 126:7 raises 41:13 70:22 range 41:20,23 42:3 57:6 59:25 66:19 95:2 148:9 ratchet 70:5 ratcheted 70:6 108:12 rather 50:18 53:18 56:5,11 61:21 64:18 68:6 70:22 84:10 95:1 96:6 99:11 124:2 131:24 142:12 147:24 151:2 rational 66:22 67:9,18 67:24 68:23 71:18 136:2,11 rationality 26:14,17 26:25 27:4,5 razorbill 64:25 reach 56:15 reached 111:1 144:9 147:15 reaches 65:17 react 123:8 read 2:21 3:22 4:15,24 5:4 24:8,16 25:3 32:19 100:2 141:12 141:18 142:5,15 144:23 readily 43:20 44:17 48:25 92:25 reading 27:20,24 88:17 131:18 143:19 150:10 reads 3:10,19 13:23 ready 133:7 149:12 real 53:19 120:9 143:16 146:13 realistic 120:1 reality 30:19 119:25 120:5 really 52:24 55:6 73:8 78:6 84:7 93:4 97:10,20 99:7 103:5 107:19 124:15 126:12 136:23 real-world 59:6 reason 32:7 53:14 86:11 93:15 96:7</p>	<p>109:10 129:22 138:6 reasonableness 26:15 27:1,7 55:5 reasonably 3:24 10:18 11:7,19 12:5,9,14 12:19 13:1,6 16:9 18:15,19 20:1,6 21:14,18 23:25 24:3 28:17 54:24 55:7 133:20 reasoning 121:7 144:12 146:18 reasons 65:21 70:21 84:2 92:10 136:17 rebut 4:23 28:5 41:6 rebuttal 4:1,7 1:13 7:12 35:24 44:15 76:7 126:5 rebutted 44:14 recalibrate 120:7 125:9 recalibrated 45:20 119:24 120:12 121:4 124:18 125:6 recalibration 119:8,11 121:6 recall 48:20 87:1 91:6 recalled 31:23 receiving 34:25 148:22 recent 44:9 57:17 60:3 61:3 73:24 122:15 recital 3:9,13 recognise 38:25 74:22 recognised 1:16,22 23:4 25:19 28:8 97:25 recollection 148:25 reconciled 91:9 record 14:14 15:3 19:14,16 22:14 30:19 31:18 73:25 85:11 97:1 98:17 118:25 132:6 145:2 records 121:25 recourse 11:13 39:10 92:4 rectangles 20:20 50:22 red 20:10 62:10 114:24 115:4,7,9 redactions 149:8,10 redo 104:6,23 redress 49:15 reduce 80:24 reduced 7:3 100:7 reducing 69:3 reduction 12:20 20:6 109:23 110:2 refer 10:14 16:11 31:7 72:19 87:8 107:2,16 reference 14:3,13,24 17:22 18:6 19:13 27:10 28:1 31:12,16 31:18 36:12 43:12 44:20 45:2 50:12 56:23 85:23 98:4,12</p>	<p>99:22 100:18 101:1 104:17 105:15 116:9 118:25 121:11,12 references 15:18 85:22 98:2,23 referred 3:14 15:10 17:14 30:3 44:21 46:13,16 47:10,22 60:19 64:7 103:9,12 103:14 121:10 144:5,8 146:23 147:16 referring 49:5 72:20 75:14 100:15 144:20 147:17 refers 13:9 45:5 49:25 51:1,23 55:5 59:18 91:6 149:8 reflect 5:5 23:21 88:6 119:17 120:9 122:15 133:18 reflected 36:25 reflecting 59:7 reflects 83:19 119:25 reformulate 141:13 refusing 39:8 regard 1:20 6:5 24:19 41:1 42:10 76:16 77:20 78:23 80:9 81:19 82:6,18 83:5 83:17 84:9 86:21 87:4,25 88:9,25 89:2,10,13 90:12,25 91:16,22 94:12 95:9 96:22,25 99:24 100:11 139:2,6 140:3,4,8,9,14,16 141:16,20 142:15 142:16,19,21 143:10,21 144:16 146:25 regarding 12:1 18:18 21:14 23:13 29:4 118:5 125:16 137:11 144:9 regardless 27:13 regards 6:3,22 7:9 29:25 57:14 58:6 83:20 92:5 Regions 61:24 63:1 Registrar 3:6 150:21 Registry 151:17 regulators 147:18 regulatory 1:16 2:18 3:14 4:18 5:6,15 6:12,18,24 7:1,20 25:13,20 76:13,21 77:2,9,17,21 79:23 80:23,25 83:14 88:19 99:9 146:16 147:18 rehearse 133:16 REID 3:3 reiterated 79:21 relate 29:7,9,12 106:8 114:6 related 36:4,5 108:23</p>	<p>108:23 146:21 relates 103:20 118:2 132:23 relating 45:24 98:10 relation 4:5 7:7 46:10 133:1 relations 92:16,19 93:18 relationship 26:12,13 27:5,11,22 65:16 67:19,24 90:14 93:14 136:2,12 relationships 93:7 relative 62:2,10 relatively 97:13 144:21 150:8 released 31:11 relevance 11:4 85:15 140:17 141:11 relevant 5:1,3,21 6:7 17:2,12 18:23 22:11 23:5,9 26:5 29:23 31:22 42:4 60:2 61:3 72:8 73:16 77:19 83:18 90:24 91:1 92:15 93:1 94:15 95:10 108:3 111:23 127:19 128:18 130:25 134:20,21 138:19 relied 2:18 9:23 36:24 54:8 61:3,19 72:10 77:10 106:1,17 135:9 relies 37:19 38:7 48:22 56:24 71:11 rely 38:12 42:13 106:18 146:12 relying 37:23 56:14 57:15 106:23 remain 102:24 remainder 127:24 remained 70:8 71:16 108:13 remains 38:17 117:12 126:23 remarkable 47:21 remember 69:18 94:22 127:11 reminds 100:24 140:24 removed 109:15 112:2 removing 109:12 repeat 84:11 87:1 94:23 95:13 97:22 109:5 repeated 87:3 repeatedly 52:25 replaces 111:24 replied 26:16 replies 42:20 replies/responses 102:23 reply 1:5,5 35:11 75:18,20 95:17 102:1 123:10 125:17 report 9:18 13:19 14:4</p>	<p>14:13 17:1,11 19:2 20:22 21:1,2,5,24 22:6 36:5 40:13,14 42:22 43:4,25 44:19 44:21,25 47:4 48:17 49:6,13,17,19,22 50:2,10,17,20,24 51:10,13,18,19 52:2 52:4,6,12 55:24 57:11,12,13 59:23 60:19,20,23 61:2,5 61:6,11,16,17,20,23 62:8,12 63:3,9,11 63:19,23 64:15,19 66:1,2,7,10,11 67:22,22 69:23 70:12,24 71:9 85:20 106:20 109:18,20 114:14 116:25 122:21 127:25 128:1 133:12,13 137:13,20,22 138:10,12 146:24 reporter 150:15 reports 23:12,17 55:13 56:17 131:3 represent 69:19 115:24 represented 72:16 represents 110:18,19 reputable 129:11 request 148:17 require 1:24 45:19 63:5 86:6 94:13 122:5,6 123:4 125:8 required 9:6 13:16 29:21 34:11 39:12 45:17 68:11 71:19 81:18 89:22 94:25 95:23 104:13 142:17 requirement 25:21 79:12,19,24 81:25 85:16 86:24 89:3 90:8 94:11 95:10 130:17 132:13 133:3,4 134:17 requirements 7:17 8:1 30:6 requires 5:12 19:11 24:18 73:9 83:12 92:11 96:23,25 reserve 74:24 resilience 68:7,19 74:6 75:11,13 99:3 resilient 30:7 resolution 6:13 resolve 56:7 103:8 106:14 107:6 resolving 105:22 resort 38:19 resources 2:11 13:17 43:25 143:13 respect 16:19 37:6 40:11 42:21 44:25 46:21 47:20 51:16 56:6 74:13 105:5 114:10 150:18</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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151:5 respectful 57:9 67:21 respective 148:20 151:21 respond 10:10 11:22 11:25 29:3 94:20 96:5 103:22,23 112:10 113:23 137:8 139:12 respondent 1:18 36:17 37:19,23 38:6,7,10 38:12 106:2 Respondent's 102:15 response 26:9 28:7 40:15 60:20 75:18 76:7 104:3 110:13 113:3 119:15 135:7 responses 102:22 148:20 rest 126:25 restrained 102:1 restraint 1:7 25:14 78:20 81:16 restriction 28:13 93:10 restrictive 27:14 87:15 148:1 rests 70:16,17 126:21 result 63:15 73:15 86:10 88:16 90:13 107:7 115:10 results 23:7 60:6 117:1 129:14 132:8 132:17 retains 42:9,12 retract 105:6 return 7:12 20:9,12 26:7 35:12 36:6 returned 68:1 returns 17:23 review 7:13 26:6 66:18 75:24 76:24 80:22 103:21 106:13 122:7 124:20 138:25 139:3,8 151:9 reviewable 82:25 88:16 reviewed 120:16,17 120:18 122:23 reworked 49:9 re-estimate 45:23 re-parametrising 121:2 re-read 72:17 RIDINGS 1:11 right 2:10,20 4:6,8 8:19 25:15 32:22 54:1,5 57:5 77:11 77:18 78:5,10 91:12 109:11 115:7 117:5 117:12 123:10 124:6 148:7 rightly 111:4 rights 1:18 2:14 3:11 3:17 4:10,16 5:13 8:8,10 25:22 32:9 33:7,17 78:2,5	79:24 80:2,4,16,20 93:6,8,10,17 rigorous 52:8 rigour 29:20 128:4 129:8 132:16,18 137:2 RINDORF 2:12 rise 4:9,25 119:22 130:8 risk 112:3,5 117:14,16 149:25 150:13 risks 23:23 71:2 138:13 RLA-27 85:11 road 122:13 ROBSON 2:22 rocks 56:2 role 6:12,24 7:7,20,21 23:14,20 26:2 41:9 68:20 76:17,18 77:21 93:21 94:1,2 95:15 133:15 rolling 150:11 ROUSSI 2:13 rounds 126:10 routinely 123:25 row 14:23 15:24 17:7 17:17 ROWLAND 3:3 RUBY 2:24 Ruiz 1:12 3:10 34:9 120:21 146:22 148:3 151:15 rule 37:20,21,22,25 38:1,2,6,7 rules 92:15,18 93:23 run 6:4 12:16 14:25 18:21,21 19:3,4,9 19:12,21 20:3 43:2 43:7 44:24 48:20 49:1,4,8,19 50:2,3,3 118:8,10,12,12 120:3 121:13 122:16,22,24,25 137:16 running 62:22 runs 19:20,21 rushed 99:18 R-0161 15:4,7 R-108 14:20 19:15 45:5 46:12,16 R-120 87:11 R-161 17:4 R-76 60:21 R-77 98:5 99:1 100:18 132:11 R-98 98:7 <hr/> S <hr/> s 97:11 SABANOULLARI 3:6 150:22 same 9:7,19 17:3 32:15 48:2 51:11 56:15,15 58:10 62:8 62:12 64:14 71:7,19 72:7 93:11 100:15 107:1 122:20	137:23 sand 143:4 sandeel 2:3,16 4:3,5,7 7:16 9:25 11:11 12:7,11 13:7,14 16:10,17,19 21:8 23:14,18,20 24:5 28:19 30:8,13,14 32:23,24 44:17 45:1 45:12,14,18,19,22 45:24,25 46:2,2,5,7 46:8 47:6,9,20 48:15,24 53:6,7,8 55:20 56:20 57:5,18 62:19 64:10,12,23 65:5,10,11,12 67:16 68:4,5,5,8,18,19,21 69:2,4,25 75:12 77:25 98:20 108:7 111:15 115:19 118:5 123:8,18 124:7,11 128:8,10 128:11,14,15 133:15 137:13,15 138:4 sandeels 75:12 98:21 99:14 115:5 124:4 124:12,13,22 satisfaction 54:14 satisfied 72:12 satisfies 82:21 satisfy 32:13 41:25 54:6 70:19 79:19 105:14 saw 20:10 98:3 saying 38:15 54:22 67:12 73:11 82:10 105:3 111:20 113:6 125:17 132:1 144:22 says 13:25 17:7,8,17 17:23 18:2,9,10,13 19:20 22:21 36:15 41:13,18 50:25 52:2 54:8 57:21 60:5 61:23 62:17 63:20 65:4 81:2 83:17 85:2 97:6 131:12 138:12 149:3 scenario 108:1,16,18 120:1 134:22 scenarios 134:17 137:7 schedule 35:9 149:5 scheme 149:21 SCHÄFERLING 3:8 science 8:15 10:8 11:6 54:7,10,16,17 56:2 56:9 57:15 65:23 66:20,24 67:10,14 67:19,23,24 71:6,15 71:16,17 73:10,17 74:2 95:9 101:2 103:8,19 104:6 105:20 106:1,6,11 106:18,19 113:25 116:24 117:21,23 122:24 128:24	129:5,12 130:5 131:20,24 136:7 scientist 43:22 scientists 50:11 54:15 56:8 117:24 scope 81:7,10 147:5 149:5 Scottish 3:2,3 23:11 40:14 56:16 57:13 59:22 61:2 66:7,11 67:22 71:8 85:9 98:6 126:24 127:1,4 127:20,25 130:1 131:3 133:13 147:2 screen 64:8 screens 61:22 scrolls 15:12 scrutinise 7:24 34:12 95:23 96:18 scrutinising 26:2 scrutiny 9:2 97:3 se 77:22 sea 1:19 4:3,5,6 9:16 16:18 21:8 22:24 23:2 30:8 32:22 45:7 47:5,6,8,9,11 48:6,14,18,21 53:3 56:21 62:5,9 65:17 68:21 69:20 70:4,8 73:24 85:23 107:22 107:24 108:4,7,14 108:19,23 109:21 109:24 110:2,20,25 111:1,4 112:2,15,19 114:8,11,18 115:5 115:14,15 123:9 127:15,22 138:5 seabird 13:3 46:6 60:8 60:11,15 seabirds 21:19 22:1,2 22:4,5,11 41:21,23 42:3 51:16,19,21,25 52:6,13,14 53:5 57:4,18,22 58:6 63:4 67:14 69:10 108:22 seal 64:23,24 115:1 seals 30:6 Searle 57:2 60:17 61:6 103:9 season 62:7,24 second 6:24 12:8 14:21,23 15:24 16:7 22:21 24:13 29:9,25 31:20 33:13 38:23 43:8 47:17 51:1 53:24 55:4 57:21 58:14 61:7,8 64:4 65:24 66:3 76:14 78:21 82:18 83:16 85:5 92:15 100:14 109:8 110:17 134:22 142:1,12 secondly 52:20 Secretariat 151:16 secure 143:12 see 14:21 15:22,23 19:13 22:13 33:22	41:17 45:9 51:7 54:13 59:12 63:15 63:24 64:22 91:14 96:12 98:24 100:25 101:19 129:22 142:10 146:8,17 147:13,23 seeing 106:7 seek 39:17 56:8,10 68:2 107:4 125:20 134:16 135:13 seeking 2:1,2 37:3 40:2 63:18 68:14,15 72:3 73:18 113:10 127:12,13,21 seeks 42:13 seem 27:20 28:2 30:18 82:10 108:17 130:9 132:4 133:14 seemed 49:6 50:19 144:11 seemingly 44:3 seems 39:17 63:11 82:9 129:23 142:8 143:9 seen 32:15 43:21 46:24 59:22 63:12 65:7 99:23 sees 53:18 58:20 59:3 segues 104:8 select 94:25 95:6 self-judging 26:1 senior 3:6,7 sense 36:1 49:25 92:21 104:19 110:23 113:12 123:5 128:19 129:13 130:13 134:21 137:4 138:7 142:24 145:9 148:11 senses 92:24 sensible 120:14 sentence 22:25 46:24 51:1 57:21 75:1 sentinels 57:23 separate 31:7 80:11 separately 13:1 21:18 23:7 separates 2:16 September 98:25 100:17 SERHAN 3:9 series 29:3 33:23 123:23 serious 117:24 serve 60:12 86:23 served 6:15 serves 58:2 86:21 Service 2:4,5,6,7,8 40:15 session 148:8,15 set 2:20 6:15 25:20 53:1 76:22 79:17 82:5 86:23 92:8 97:5,15 138:2 140:20 148:23 sets 9:2 49:20 80:23 88:15	setting 2:25 6:22 79:22 116:11 settings 50:8 seventh 36:10 several 14:22 shape 122:2 share 4:4 shared 79:8 shares 3:24 shield 9:1 shift 37:3 38:18 116:7 shifting 36:20 37:4 39:11 shifts 36:17 short 7:14,19 8:4,12 24:13 101:21 105:19 126:6 134:14 142:13 shortcut 25:9,9 121:7 shortcuts 8:7 shortly 44:12 102:7 show 36:17 41:15 48:13 55:11,15 63:13,23 65:25 96:12 115:17 showed 96:13 showing 41:1 49:18 56:3 58:13 61:12 87:9 146:13 147:14 shown 14:13 45:12 46:15 63:21 146:4 shows 3:3,13 46:16 48:8 58:23 59:2 62:9 63:4 128:17 shrink 37:3 shy 97:3 side 96:9 106:24 107:2 sifting 112:21 sight 30:18 significance 61:20 100:7 141:9 significant 4:19 13:17 25:5 57:14 58:5 63:6 81:5 122:23 135:6 140:10 146:20,20 150:13 silent 42:5 similar 17:22 56:15 64:14 85:1,1 145:19 simple 19:10,25 20:25 22:3 44:3 45:15 95:3 99:6 119:15 120:15 125:2 132:14 146:17 simply 9:7 11:18 13:18 19:7 21:6 31:14 34:1,7 38:14 38:20 44:5 56:1 63:10 68:5 72:21 81:1,12 87:21 93:11 94:11 95:20 100:1 104:5 105:7 112:15 113:5 123:22 131:24 139:24 146:2 147:24 simulate 127:13 simulated 12:2 13:2 21:18 29:19 116:17
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

simulations 132:8 since 69:13 133:6,7 149:8 sincere 151:13 single 14:1 95:6 117:5 singular 94:25 sits 140:5 situate 43:17 situation 39:15 120:5 situations 84:18 93:9 six 5:23 118:15 size 14:7 41:22 45:11 67:16 118:5 123:17 124:1 sizes 45:14 size-structured 13:13 44:16 45:1 46:14,20 46:25 47:3,6 49:10 skua 62:25 slide 46:15,23 50:25 51:23 57:20 58:10 59:12 60:5 61:22 62:8,17,23 64:5,13 65:4 87:8 slides 20:11 49:18 slightly 96:9 98:14 131:21 132:4 134:15 small 46:7 62:18 121:10 SMS 14:24 15:10 46:13,17 47:10,12 social 4:7 5:13 32:21 33:16 79:10 socioeconomic 99:25 100:5 SOFIA 2:9 software 47:25 48:1,1 48:3,5,10 solid 115:7 solution 150:9 some 5:8,9 11:5 25:1 38:2 39:18 45:10 54:6,7,17,18 60:2 62:21 72:10 73:9 76:9 82:24 84:1,3 85:5,15 86:6 90:23 100:7 102:2,3,3 103:10 105:16 106:18 112:17,20 112:21 119:17 132:2 134:24 137:3 140:21 141:10 142:23 146:7,11,18 somebody 56:2 somehow 19:8 33:25 40:2 41:14 49:13 68:11 80:6 someone 71:15 something 18:14 26:24 27:25 34:1 39:21 41:24 52:19 73:4 84:24 99:7 112:4 118:18 120:8 122:10,10 138:16 145:16 150:1 somewhat 130:9 somewhere 68:5	sorry 88:23 112:12 116:22 123:11 sort 26:14 54:6,7,18 72:10 73:9 94:21 sought 30:3 47:18 118:13 119:6 sound 57:15 source 15:23,25 16:1 sources 5:25 49:20 sovereign 1:18 3:11 93:13 space 70:7 108:12 133:17 spatial 16:24 17:19,24 18:12 47:19 48:15 48:18,24 137:14 spatially 13:12 16:15 48:12 49:9 67:15 87:15 speak 120:23 speaking 75:10 speaks 98:20 special 5:18 90:11 140:2 species 13:3 14:1,2 15:19 17:21 18:12 45:10 47:11 52:13 59:9,15 61:25 62:12 62:18,21 63:5 64:16 65:5 67:16 74:7 75:12,13 specific 3:17 21:25 22:4 36:4 39:13 42:20 44:13 51:7 52:13 59:8 68:8,12 80:12,15 95:11 105:24 specifically 26:13 30:1 98:24 specification 17:24 specified 27:23 specifies 62:12 spend 82:4 83:3,22 spent 25:1 split 45:10,22,25 81:7 111:21 splitting 123:17 124:1 124:4,8 sprat 62:19 stab 118:21,22 stage 37:2 68:13 101:8 102:19 114:16 119:1 136:4,14 stand 84:12 125:20 standard 29:5 38:19 59:23 72:11 73:13 75:23,24,25 82:25 103:20 104:10,15 132:25 138:24 139:7 start 13:4 36:9 46:3 76:13 87:21 started 3:9 106:10 115:13 starting 2:9 5:1,3 29:15 37:9 43:10 45:7 76:21 116:14 starts 19:20 38:17	68:10 state 1:18 10:13 11:2 37:12,13,15 39:3,9 73:18 93:9 150:23 stated 14:12 15:18 26:21 47:2 132:7 statement 4:1,7 1:13 16:11,21 35:24 64:9 140:13 statements 21:1 147:21 states 3:12 36:22 37:10,10 92:22 93:8 93:12 state's 2:10 stating 139:5 status 5:18 12:16 18:21 19:12 20:3 22:23 49:4 118:8,10 118:12 STECF 101:2 STEFAN 3:8 step 23:8 44:3 139:24 steps 67:8 STEVEN 2:18 still 19:3,3 26:19 86:25 101:15 102:24 110:2 119:25 120:13 126:24 stock 15:11 16:11 25:16 32:10 stocks 3:23 12:11 32:25 33:9,22,23 79:8 stomach 121:25 stop 25:12 81:14 stopped 81:21 STOPPIONI 3:12 straight 60:3 straightforward 30:4 30:9,18 40:23 strategic 60:15 85:8 85:17 strategies 17:20 stray 147:20 stress 31:21 strictly 74:13 75:9 93:10 98:15 stronger 87:4 strongly 64:2 struck 80:4 structural 43:5 structurally 130:9 structure 14:8 36:1 44:11 49:23 50:7 76:13 stubbornly 72:3 studied 59:9 study 18:6 57:18 59:20 subheading 91:25 subject 20:13 26:6 33:24 54:12 66:13 78:5 90:18 105:16 133:2 subjective 11:1 submission 13:16	14:18 25:4 37:2 44:19 46:22 56:25 57:9 59:1 61:14 65:13 67:21 80:3 88:3,13 89:13 90:7 90:12,22 91:4,4,14 92:8 94:14 98:4,7 99:1 100:10,11,17 105:10 111:14 124:17 127:16 130:21 136:3 139:20 140:2,11 submissions 7:12 8:3 10:12 25:1 30:2 31:8 32:16 33:4,10 34:25 36:19 42:14 42:17 52:15 57:8,16 71:20 73:5 74:20 84:15 94:4 98:3 99:23 100:3 101:9 101:12,17 102:16 102:25 104:9 106:2 107:10 125:19,19 126:1,2,11 134:11 137:19 140:24 141:8,22 142:20 144:5,7,21,23,25 145:1,5 148:22 149:15,21,24 150:1 150:18 submit 79:15 128:17 submits 56:25 138:15 submitted 89:16 94:17 106:13 142:24 subordinated 91:9 subparagraph 3:22 subsection 24:16 subsequent 26:5 31:17 substance 56:4 68:14 substantial 39:5 56:21 substantiate 60:9 substantive 19:22 82:23 84:10,23 86:24 88:12 substantively 81:24 succeed 100:11 succeeds 38:4 success 22:10,12 23:5 58:12,18,21,24 59:15 60:8 61:12 62:20 suffice 81:21 89:12 sufficient 19:23 33:20 33:21 34:7 57:4 88:5 95:19 129:18 sufficiently 52:8 67:13 67:15 suggest 50:19 55:6 91:15 137:4 suggested 7:18 44:10 50:6 83:23 145:20 suggesting 44:9 49:7 51:22 108:17 132:13 suggestion 36:20 47:21 50:16 56:18 91:3 105:7 118:3	suggests 43:3,19 44:4 45:15 48:25 49:11 134:7 suitable 47:12 summarised 131:2 summary 92:10 superior 9:16,22 43:11,15,20 support 36:24 39:4,6 44:19 65:10 104:14 supports 68:6 supposed 56:6 73:10 supposedly 110:19 sure 87:6 88:24 111:18 119:25 120:13 121:7 149:13 surely 137:18,22 surface 62:19 63:8 surface-feeders 22:7 22:22 51:24 62:24 63:14,19,22 surface-feeding 22:1,5 61:18 62:21 64:3 surprised 16:21 surprising 65:17 survey 112:19 survival 62:21 SUSMAN 2:11 sustainable 79:9 swiftly 53:18 97:13 144:21 synthesis 65:3 systems 58:3 60:9	96:22 112:22 taking 16:19 21:23 51:2 86:14 137:15 142:4 tak[ing] 85:24 talked 119:6 talking 99:10 113:25 137:1 talks 107:17 116:4 task 6:25 8:9 151:23 TCA 1:17,23 2:21,22 2:24 3:6 4:11 5:8 6:5,12,15 7:17 8:2,9 8:19 10:4 24:8 31:24 36:15,21 39:22,25 40:6,7 41:11 43:13 53:17 54:20 66:17,20 67:8 78:9,11 79:17 80:16 80:18 81:2 83:9,12 87:17,20 88:17 93:1 95:12 97:6 team 117:22 teasing 60:13 technical 40:14 87:13 technically 124:5 Technology 101:2 tell 120:7 123:20 telling 8:4 temporal 98:19 tends 151:2 tension 129:24 130:10 term 10:11,14,22 11:4 14:8 27:3,9,17,18 54:21 79:9 141:9,12 terms 2:12 3:19 5:23 6:11 50:21 53:16,17 56:11 63:25,25 67:16 80:5 95:3,12 103:4 108:21 116:8 119:15 127:5,5 136:2,24 142:19 territorial 1:12 territory 39:7 77:6 test 26:15 27:8 41:10 42:5 53:22 66:24 72:11 81:24 96:25 105:15 113:10 131:7 136:24 textual 27:17 thank 28:25 29:2 34:24 35:2,8,16,17 35:25 72:23 74:23 75:7,15 101:10,13 101:14,17,18,23 104:1,2,24,25 105:2 107:11 110:11,14 111:11 112:11 113:20,22 116:1 117:25 118:1,20 119:4,13 121:9 124:24 125:1,10 126:14,15 127:7 132:21 133:9 134:11,13 136:18 136:19 137:10,25 138:20,23 139:14 141:22 143:23,24
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------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145:15 148:3,4,5 150:14 151:7,10,19 152:1 thanks 151:14 their 3:14 9:2 10:7 21:2 30:15 33:25 37:11 45:11 46:1 50:23 54:17 57:5,25 58:7,8 59:10 60:15 60:20 65:16,19 71:16 73:8 76:22 92:12 100:6 114:15 117:11 124:22 147:23 150:6,23 151:16 themselves 21:1 53:7 87:19 88:4 144:23 theoretical 56:11 149:25 thin 26:14,17 27:3,4 thing 107:2 115:3 120:15 things 31:15 59:18 67:5 99:20 117:19 119:22 120:24 123:1,2,3 149:21 think 32:7 73:1 75:25 76:11 81:5,9 84:13 84:22 85:22 86:11 88:20 89:15,17 90:4 90:15 97:10 98:5 101:3 110:17,19 111:20 114:25 118:18 120:22 122:9 123:21,23 124:5 125:3 127:11 128:1 129:1,6 130:11,21 131:22 132:6 133:11 142:23 143:4 144:19 145:6 148:24 150:12 thinking 86:19 89:25 thinks 96:10 third 12:12 13:23 15:11 18:9,17 29:11 31:1 49:2 55:10 64:5 66:5 78:25 88:1,25 89:4,6 92:20 98:7 135:11 136:14 142:12 thirdly 52:21 58:15 82:20 though 62:15 thought 51:9 70:22 89:7,9 101:15 103:1 103:24 108:15 122:24 125:20 136:16 three 13:15 16:25 17:10 19:18,21 21:7 29:3,16 56:23 59:9 61:8,24 65:20 71:11 97:16 106:25 three-hour 35:12 threshold 22:9,11 61:13 62:1,6,10 134:2,8 135:22	thresholds 135:19,20 137:6 through 3:16 32:18 34:15 87:6 104:15 144:21 throughout 126:4 128:2 throw 56:2 Thursday 1:9 1:1 tight 149:19 till 121:14 time 3:7 9:17 13:17 25:1 26:21 32:15 35:4,6,13,14 45:3 48:16 52:11 58:13 82:4 83:4 102:4,13 102:17 105:8 117:1 117:13 121:3 125:8 143:6,25 148:11 time-travel 117:18 today 50:16 71:12 140:25 144:5 together 2:21 4:15 5:4 24:8 25:3 32:20 102:24 134:6,9 141:18 150:3 told 2:8 20:17 21:20 54:23 tolerate 68:11 tolerated 41:19 tonight 148:9,17 tool 84:5 top 19:19 58:1,9 64:17 topic 42:16 74:16 75:3 81:3 84:14 86:25 88:21 94:19 total 82:13,16 83:7 87:25 112:14,16 touch 90:2 91:2 touched 140:19 towards 17:23 35:13 95:17 151:2,6 to/take 82:7 trade 1:1 5:9 28:13 39:18 77:4,12,14 78:2,16 80:5,9 87:2 88:14 92:5,13 traffic 58:3 transcript 1:23 13:10 16:13 18:25 20:18 21:21 24:15 26:18 26:22 30:5 31:6 43:10 72:18 73:4 105:9 107:16 119:9 149:13 transcriptions 149:14 transcripts 149:2,6,11 149:23 150:2,10,16 151:7,9 transformed 43:6 transparent 39:16 transparently 49:16 70:14 transpired 114:2 travaux 87:9 treaties 92:25 treatment 112:25 treaty 37:14 39:23	40:1 93:22,23 106:12 131:18 139:2 143:5 trend 58:20 Trevor 1:23,24 tribunals 38:24 Tribunal's 6:13 7:13 19:16 23:10 27:6 29:23 34:5 36:10 42:15 74:15 75:2 78:14 90:3 109:4 111:23 116:3 144:3 true 25:13 54:19,19 77:24 98:15 115:25 117:8 truly 135:17 try 70:5 83:4 93:17 trying 80:19 112:7 114:9 131:7 tucking 75:8 Tuesday 34:16 36:12 50:15 79:22 125:19 turn 3:8,18 13:20 15:5 16:7 18:17 19:15,17 22:15 34:4 37:7 83:6,9 110:12 126:17 138:24 Turning 32:3 44:13 47:17 turns 11:10 17:16 twice 87:3 two 1:5,8,9 8:4 13:2 14:15 17:16 31:7,15 32:4 37:18 42:23 48:21 51:18 76:11 81:9 84:17 88:21 93:12,25 98:2 120:24 121:22 122:3 124:8 133:13 133:23 134:17 135:1,19,20 137:12 143:8 twofold 129:13 type 14:5 18:10 147:17,22 types 47:24 50:9 123:1 typically 19:21	8:18,19 15:12,15 17:17 22:19 25:2 27:19 32:19 33:7 36:21 39:22 40:5 41:9 67:8 74:15 75:3,8 76:5,14 77:18,25 78:2,6 80:13,16 85:24 91:25 92:17 93:25 94:19 96:5,14 97:16 143:14 underestimate 29:10 underestimation 51:20 underlying 85:11 130:23 131:1 138:6 undermine 10:7 understand 27:4 51:22 74:25 76:2 88:12,24 89:4 92:2 107:19 108:15,25 110:18 112:8,14 114:11 119:9,16 120:22 121:5,8 123:12 132:1 134:11 understandable 93:19 understanding 23:13 23:19 77:22 107:23 109:4,9 116:4 119:11,21 136:22 understatement 32:3 understates 7:21 understood 9:1 112:17 125:5 144:24 undertake 132:14 undertaken 42:21 100:13 129:4 130:3 132:15,16 145:23 undertaking 9:12 16:20 45:15 94:18 145:20 151:23 undo 136:5 unfettered 79:15 Union 1:2,15 2:2 4:2 1:5,11,13 2:1,15 3:5 4:11,13,20 5:17 6:3 7:5,6,14 8:6 9:14,20 9:21 10:3,8,15 11:25 12:4,12,17,24 13:4,9 16:21 20:9 20:12 22:15 23:16 24:25 26:7,25 27:3 28:4,7 29:3,16,17 30:10 31:1,14,20 32:4 33:2,9,14 34:10,15,18,23 72:18 77:5 96:17 103:12,22 104:3,11 104:13 105:4,12 106:1,3 123:10 124:25 125:4 126:1 126:11 138:15 141:6 145:19 147:8 148:6 150:6,7,8 151:8,20 Union's 1:4 8:5 16:3	22:3 23:3 28:5,21 35:11 72:16,22 95:17 104:5 125:2 universally 65:6 universe 43:18 124:15 unlawful 38:3 unless 2:11 8:21 24:9 34:22 93:10 101:8 120:19 unlikely 46:4 73:1 102:5 unpack 83:4 unreasonable 8:24 unresponded 116:23 unsubstantiated 33:18 34:2 100:20 100:21 101:5 unsupported 8:25 Unsurprisingly 8:6 Unterhalter 1:12 26:10 82:15 83:23 88:23 112:12 113:14 114:3 123:11,16 124:24 128:20 129:2,22 131:17 141:23 143:9,23 151:15 until 35:7,9,11,12,16 35:19 101:18 149:23 151:9 update 46:11 49:20 50:11 120:23,24 121:1,5 123:14,22 updated 15:7 19:1 29:18 49:8 50:1 121:11,12,14 123:1 123:25 updates 49:5,12 122:17 123:5 updating 42:25 122:12,14 uphold 93:10 urgency 31:16,21 98:10 99:14 urgent 31:13,19 98:13 98:24 99:3 use 7:12 23:22 35:3 58:1 101:15 105:4 139:25 used 9:19 10:19,20 12:21 16:6 19:1 20:7,23 43:24 47:1 47:8 49:20 50:1,17 54:25,25 56:19 57:22 59:24 61:11 65:9 92:25 111:15 121:13 122:20 123:14 131:21 137:12 138:11,14 138:18 useful 59:1 usefully 113:1 uses 61:21 using 118:6 121:25	valuable 57:9 value 58:7 62:6 values 62:1 variant 89:1,4,6 variations 147:3 various 14:21 34:7 95:20 103:14 134:6 134:9 139:17 145:4 vast 89:17 Vaughn 1:23 vein 145:19 verbs 139:15 verified 120:13 verify 125:8 version 87:10 vertical 93:7 Verulam 2:18 very 5:12 7:2 19:10 35:2,3,8,25 63:14 63:21 86:3 88:13 89:24 98:11 99:12 101:14,17,18,23 103:2 105:2 107:11 113:20,22,24 115:17 116:1,24 117:23 118:9 125:10 126:15 132:21 134:13 135:6 136:18 138:20 142:16 143:24 144:12 145:17 148:4 150:14,15 151:10 151:21,23 vessels 3:20 32:24,25 33:15,21,25 99:20 114:15 via 60:16 VICKI 2:25 Vienna 92:11,17 93:20 view 10:7 39:20 96:22 99:13 146:24 150:6 viewed 61:20 views 61:4 vulnerability 121:22 122:1
		U			W
		UK's 2:15 10:10 25:4 29:7 32:9 41:16 42:1 67:21 74:19 75:20 76:5 79:8 80:3,11,17 82:19 83:4 88:3,13 90:7 90:20,22 91:17 92:8 94:13 96:2,4,16 107:8 115:6 135:8 UK-SANDEEL 1:20 ultimate 84:3 ultimately 6:18 unable 59:13 128:11 uncertainties 117:3 uncertainty 73:20 97:23,24 UNCLOS 6:1 84:16 under 1:16,22 3:22 4:10,17 6:6,12 8:8			wait 35:6 waiving 126:8 want 11:3 26:16 76:16 78:17 83:2 86:25 89:4 91:2 92:9 97:23 100:23 125:15 147:20 151:13 wanted 1:6 32:12 84:18 87:1,18,22 91:25 125:18 136:21 149:1 wants 96:11 98:23 warranted 95:1 wasn't 37:2 49:1 87:6 91:18 99:18 101:5 130:6 140:19,21 142:6 water 28:2

waters 2:6,10,16,20 3:21 4:6 6:23 21:12 24:20 25:15 32:9,22 32:25 33:1,9 51:3 55:20 69:21,24,25 70:6 77:11,25 79:8 108:2,8,17,24 109:13,24 110:4,6,7 110:21,24,25 111:5 111:5,5,7,8,16,21 111:22 112:22 113:15,18 114:19 115:6,16,19,20,25 117:6 127:15,21 138:4 water-column 22:10 23:1 62:5 way 27:16 33:6 52:24 55:2 56:12 83:24,25 87:21 95:11 106:7 114:24 117:22 118:7 119:21 122:19 132:4 133:8 134:21 136:8 143:19 144:17 145:6 ways 78:15 135:1 web 47:14,16 98:22 week 126:2 weighed 26:4 29:13 96:8 145:22,25 weighing 8:9 26:5,20 34:4,14,17,21 80:12 80:15 94:16 95:25 96:20 97:2,17,18 144:13 145:20,23 146:10,12,14,23 weighing/balancing 145:13 weight 90:21 91:21 WEIWEI 2:20 welcome 104:4 welcomes 5:19 well 23:1 53:6 59:25 68:6 69:25 74:12,17 75:4 88:14 89:25 103:24 107:14 117:15 121:5 127:23 130:5 140:19 went 19:6 24:21 50:4 71:2 96:17 were 2:14 3:13 9:4 16:4 17:3 21:2 22:22 23:25 24:3,22 25:13 26:3,3 30:22 32:12 35:3 36:18 40:17,21 42:4 44:7 44:21 46:25 47:1,3 47:3,12 49:5,15 51:16 54:23 61:8,9 61:15 69:16 70:11 73:2 76:8 79:2 84:17 88:21 94:22 98:20 99:24 100:20 100:21 103:13 105:25 106:21 115:1 117:3 118:4	122:17,19 123:1,3,6 123:16 132:9 140:9 140:20 142:6,17 143:16 144:5,8,15 weren't 21:25 Westaway 2:17 4:13 2:23 36:7 74:22 75:16,17 89:6 101:10 125:16 139:1,14 140:19 142:13 143:20 144:19 we'll 14:22 we're 61:8 78:21 102:5 111:20 137:1 137:6 149:10 we've 50:13 87:7,24 87:25 99:23 whales 30:7 64:17,18 64:23 124:11,12,14 Whaling 84:17 whatsoever 52:7 while 22:7 51:5 130:17 138:1 WHITE 2:23 whole 33:23 69:20 70:4,8 107:15 108:4 108:13,15,18 109:21 110:2 112:10,19 114:8,18 115:14,15 144:23 wide 7:2 wider 30:15 wide-ranging 57:25 wind 59:24 wish 101:15 119:1 149:14 151:4 wishes 40:8 witness 106:20 wonder 55:7 141:23 wondering 142:3 word 43:12 67:11 72:4 72:19 90:6,7 98:13 98:24 105:4 139:15 140:13,17 142:4,5 wording 139:5 140:7 141:15 143:6 words 26:4 54:20 69:15 92:12 112:21 139:9 142:5 143:13 143:16 144:15 work 10:24 13:11 45:13 110:1 142:10 142:14 149:16 worked 117:2 working 18:23 19:5 44:25 49:19 109:21 120:16 124:20 world 39:18 60:10 63:21 91:18 116:6,6 130:14 143:16 worse 59:19 worth 85:18 wouldn't 81:21 135:21 137:4 143:20 147:8 148:1 150:25 writing 103:24 104:4	112:9,10 113:1 118:19 133:10 137:9 138:1 141:2,5 144:11 145:17 148:9,17 written 36:19,21 37:2 46:22 56:25 57:8,15 61:5,13 65:13 71:11 73:5 76:11 84:16 91:4,4 102:3,5,6,19 102:21,25 106:1 109:18 117:23 119:15 125:13,19 126:1 133:8 148:22 149:15,20,23 150:1 wrong 3:3 11:10 12:5 12:9,13,18,25 13:5 31:25 68:10 70:21 79:15 96:3 105:10 107:25 wrongly 43:1 72:16 80:20 WTO 5:17 6:1 28:9 39:21	102 45:5 106 45:7 11 4:4 64:13 114 14:20 18:25 12 65:4 150:20,21 12th 151:2 125 20:18 13 46:23 52:3 60:4 133 16:12 139 13:9 14 16:13 20:19 30:5 50:25 60:4 98:6,25 100:17 151:9,10 14th 151:2 14.35 107:16 141 21:21 15 13:20 21:5 51:23 151 31:5 16 18:25 87:8 98:6 167 26:18 168 26:22 17 62:12 98:5 99:1,2 100:18 18 30:5 18% 64:25 65:2 18-19 26:22 19 59:21 19% 111:15 1994 27:20 1999 18:7	2020 49:8,13 120:25 121:12,13,14 122:12 123:6 2021 31:10 2023 57:1 61:11 103:10 2024-45 1:4 2025 1:9 1:1 206 21:6 21 73:25 220 13:21 23 22:14,17 62:16 24 4:5 25-26 100:16 25:10-12 81:11 25:13-14 81:16 25:21-23 80:1 26 98:7 269 99:1 27 92:21 271 98:5 28% 64:25 29 4:6	91:10 139:5 495 72:5 74:14 496 4:15,24 5:4 7:8 24:7 25:3 27:23 32:14,19 80:7 95:5 496(1) 24:16 77:18 78:6,9 141:12 496(2) 8:18,21 43:13 71:18 131:22 496(3) 79:13
	5 5 60:5 102:22 148:18 5.16 152:2 513 5:24 46:23 515 5:24 516 5:24 52 4:11 55% 64:24 56% 64:22 564 91:5 566 91:5 58 57:7 58% 12:19 20:6 50:12 70:2 107:20,21 109:4,13,16,25 110:18,23,25 111:1 111:7,14,24 114:5 116:6,14 580 98:7 59 3:8				6 6 61:22 60 3:18 61 61:14 69 45:6 47:15
	7 7 62:8 70 107:16 70:5-7 108:11 739 1:1 74 4:12 742(a) 97:6 75 4:13 75% 61:25				8 8 21:22 62:17 85:23 8:19-23 53:25 81 17:4,4,23 18:1,3,6 82 65:13 83 17:16 88 4:14
	9 9 43:10 62:23 9(a) 88:22 90:2,3 9(b) 90:14 9.2 149:3 9.31 1:2 90 30:5 91 30:23 94 15:4,8 95 87:11				