BEFORE THE ARBITRATION TRIBUNAL

PCA Case No. 2024-45

IN THE MATTER OF AN ARBITRATION

PURSUANT TO ARTICLE 739 OF THE TRADE AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

- between -

THE EUROPEAN UNION

("Complainant")

- and -

THE UNITED KINGDOM OF GREAT BRITAIN AND

NORTHERN IRELAND

("Respondent", and together with the Complainant, the "Parties")

THE UNITED KINGDOM'S REQUEST TO REVIEW PRECISE ASPECTS OF THE ARBITRATION TRIBUNAL'S INTERIM REPORT

10 April 2025

A. INTRODUCTION

1. The United Kingdom ("**the UK**") is grateful to the Arbitration Tribunal for the timely delivery of the Interim Report issued on 27 March 2025 ("**the Interim Report**"). The UK notes that save in respect of one specific aspect relating to the English measure, the Arbitration Tribunal finds no breach of the Trade and Co-operation Agreement ("**the TCA**").

2. Pursuant to Article 745(2) of the TCA, and the Arbitration Tribunal's letter of 27 March 2025, the UK respectfully requests that the Arbitration Tribunal review certain precise aspects of the Interim Report.

3. The primary aspect that the UK requests the Arbitration Tribunal review (in Section B below) is its conclusion that the UK's decision to prohibit sandeel fishing in English waters of the North Sea was inconsistent with the requirement of Article 496(1) of the TCA, read together with Article 494(3)(f), to have regard to the principle of applying a proportionate measure for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties. This finding was made on the basis that there was said to be no evidence on the record that the UK Government specifically considered the rights and interests of the EU during the adjustment period (Interim Report para. 690, and the reasoning at paras. 659-663, 678 and 687-689).

4. In addition, the UK:

    a. requests that the Arbitration Tribunal review a limited number of further discrete issues concerning its reasoning in respect of the UK Government's consideration of the English measure (Section C below);

    b. requests clarifications of certain specific aspects of the Arbitration Tribunal's reasoning in respect of the Best Available Scientific Advice Claim (Section D below); and

    c. includes a table of other references to the Interim Report where it suggests minor corrections or revisions to the text. Where appropriate, textual alterations have been suggested, but the UK appreciates that how the Arbitration Tribunal wishes to

respond to those suggestions is a matter for the Arbitration Tribunal (Section E below).

5. The UK would be grateful if the Arbitration Tribunal could address the matters raised in this request in the Final Report in accordance with Article 745(5) of the TCA.

B. FAILURE TO TAKE INTO CONSIDERATION THE RIGHTS AND INTERESTS OF THE EUROPEAN UNION DURING THE ADJUSTMENT PERIOD

6. The UK understands the Arbitration Tribunal's conclusion to be that consideration of "the rights and interests of a Party during the adjustment period" is distinct from consideration of adverse social and economic impacts of a fisheries management measure implemented during the adjustment period (Interim Report para. 661). In addition to the latter, the former is a matter that the Arbitration Tribunal considers was required to be taken into account in the weighing and balancing exercise (paras. 659, 678) on account of the "systemic importance of stability during the adjustment period" (paras. 688-689).

7. The Arbitration Tribunal finds, however, that none of the decision-making documents relied upon by the UK in respect of the English measure raised Annex 38 or the adjustment period (Interim Report, para. 662) and that "[t]here is no indication in the decision-documents that the 'full rights of access' to fish the sandeel quota or the systemic interest of the Parties in stability during the adjustment period were factors that were properly considered in the weighing and balancing exercise" (para. 678). These rights and interests were, the Arbitration Tribunal finds, not "specifically considered" in respect of the English measure (para. 687). Nor was there consideration of "sufficiently compelling urgency" to justify acting during the adjustment period (i.e. prior to 30 June 2026) in respect of the English measure (*ibid*.).

8. The UK respectfully requests that the Arbitration Tribunal review these findings on the basis that they do not properly reflect the legal or factual position.

9. The UK advances legal arguments in support of its request, before advancing submissions on the factual position.

Legal position

10. The Arbitration Tribunal's conclusion is premised on the proposition that the "rights and interests" as regards stability to be considered in respect of the adjustment period/Annex 38 are separate and distinct from the "social and economic impacts on the fishing and processing industry of a Party" (para. 661), and consequently require separate consideration in the weighing exercise. However:

    a. The preamble to Annex 38 itself refers to the "social and economic benefits of a further period of stability". The UK considers, therefore, that 'stability' in the abstract is not an interest that is protected under Annex 38 of the TCA. Consequently, to the extent that the UK is obliged to have regard to Annex 38 as part of its proportionality assessment, that obligation is discharged by having regard to the relevant social and economic benefits of the status quo.

    b. An assessment of social and economic impacts necessarily has regard to what is being impacted, i.e. the social and economic benefits of the further period of stability. The UK Government's assessment of the social and economic impact of the measure proceeded on an assumption of stability by assuming that absent the measure, the EU's sandeel fishing and processing industry would continue to operate as it previously had. For example, the UK's £41.2m per year calculation of lost revenue to the EU's fishing industry was calculated as against a presumed entitlement on the part of the EU to continue past catches, i.e. a continued period of stability.

    c. The EU appears to have understood the matter in the same way. Its references to the "rights" in Annex 38 were made in relation to submissions on the need for the UK to weigh economic and social impacts.[1]

[1] See, e.g., EU Written Submission, para. 734 under the sub-heading "The UK's failure to balance the degree of contribution to its regulatory objectives and the social and economic impacts" (emphasis added) (cited by the Interim Report at para. 677) and see also e.g. Hearing, 28 January 2025: 167:18 to 168:12 (Dawes) referring to the "nullification of that specific right of the EU, that the UK was required to assess. So that was why the UK has understated the economic and social impacts of the measure" in the course of making the specific submission that potential displacement was "an irrelevant consideration when assessing the economic and social impacts of the measure" (cited by the Interim Report at para. 676). See also EU Responses to Questions, para. 59 ("It was therefore the economic and social impacts associated with the nullification of the EU's right of full access to UK waters of the North Sea to fish sandeel that the UK was required to identify and weigh against the benefits of the measure") cited by the Tribunal at para. 670.

d. Any suggestion that Annex 38 protects an abstract right of "stability and predictability of the agreements made under the TCA" (para. 661) leads to unworkable circularity. The Parties agree that fisheries management measures can be taken under Article 496 during the adjustment period without breaching Annex 38. It follows that such measures adopted in accordance with the TCA would not impact any purported "stability and predictability of the agreements made under the TCA" because such measures are in fact provided for by the TCA itself — something that the Parties have agreed cannot itself impact the stability or predictability of the agreement. To require a decision maker to take into account an impact on "stability and predictability of the agreements made under the TCA" when deciding on measures under Article 496 is therefore effectively to require the decision maker to take into account whether the measure would breach Annex 38. Yet if the measure is adopted in accordance with the requirements of the TCA, it would not breach Annex 38. The analysis therefore becomes circular because in order to adopt a lawful measure, the decision-maker must purportedly take into account whether the measure would breach Annex 38, but the measure would only breach Annex 38 if the breaching of Annex 38 were not taken into account in the making of the decision.

11. For these reasons, the UK submits that to the extent the Arbitration Tribunal is of the view that the proportionality assessment had to have regard to the adjustment period/Annex 38, it could only have been the social and economic benefits of the further period of stability to which the UK was obliged to have regard. The TCA does not protect any abstract interest in 'stability' as such, and the UK's proportionality assessment was not defective for failing expressly to refer to stability, over and above its consideration of the socio-economic impacts that would have continued had matters remained stable.

12. Further, it is established in respect of a 'taking into account' duty that this "'… need not be done explicitly', so long as there is some indication in the determination that the factors have been considered implicitly" (see Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*,[2] para. 7.211). The UK's consideration of the impact on the EU of the English

[2] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Panel Report of 15 November 2019, WT/DS436/RW.

measure in terms of social and economic benefits provides an indication of regard being had to the adjustment period/Annex 38 and the stability of the benefits to which it was directed.

13. Moreover, the Arbitration Tribunal's conclusion on this aspect at para. 689 is that it "cannot conclude that the decision-maker had regard to the principle of applying a proportionate measure". The UK considers that this formulation wrongly puts the onus on the UK to demonstrate compliance. The correct question is whether the Arbitration Tribunal can be satisfied on the information before it that the UK decision-maker in respect of the English measure failed to have regard to the principle of "applying proportionate … measures". Given the factual position (addressed next), the UK respectfully submits that the Arbitration Tribunal could only answer that question in the negative.

Factual position

14. The UK asks the Arbitration Tribunal to revisit its conclusions in respect of three points concerning factual issues:

    a. that regard was had by the UK to the adjustment period/Annex 38 and to its application in the decision-making process for the English measures;

    b. that regard was had to the desirability of taking action prior to 30 June 2026;[3] and

    c. that the adjustment period/Annex 38 was not raised by the EU in its consultation responses or other correspondence: in addressing access issues, the UK Government was responding primarily to what the EU had raised, having been given the opportunity to do so.

15. In respect of point (a), without prejudice to the UK's legal argument at paras. 10-12 above that the proportionality assessment did not require it expressly to refer to the EU's legal rights or interests under Annex 38, the UK's position is that it did have regard to the adjustment period/Annex 38 in the decision-making process.

[3] But see paras. 33 below.

16. Before turning to the evidence, the UK first raises a point of procedural fairness. The UK expresses surprise that this point was the basis for the finding of non-compliance with the TCA in the Interim Report. The UK prepared its case – including the documents that it relied upon – on the understanding that the EU's argument in respect of Annex 38 was limited to the question of whether there had been "impairment" of rights.[4] That was a characterisation the UK rejected – the measures did not 'impair' rights given that, as the EU accepted, a measure would not breach Annex 38 (and thus impair the rights set out therein) if it complied with Article 496 read with Article 494.[5] The UK did not understand the EU to be arguing that the proportionality assessment would be defective if it did not refer specifically to Annex 38 and/or the adjustment period. The EU's argument appears later to have evolved to include the proposition that the UK was required to consider the adjustment period and/or Annex 38 *per se*. That development occurred to a limited extent at the Hearing but in relation to claim 3, not claim 2 concerning proportionality.[6] The argument was then framed in a more general way by the EU in its post-hearing replies to questions.[7] In the EU's post-hearing supplementary submission, the matter was again raised only in connection with claim 3, but for the first time tied explicitly to the weighing and balancing exercise relevant to claim 2.[8]

[4] See esp. EU's Written Submission, paras. 639 and 702.
[5] See EU Written Submission, para. 775.
[6] Hearing, 28 January 2025: 193.13-16 and 21-24 (Gauci in relation to claim 3) ("During that period, when adopting measures such as the sandeel fisheries prohibition, the parties must consider the specific terms and rationale of Annex 38 in view of the further period of stability and the social and economic benefits of that period of stability. …This disregard for the period of further stability, and its economic and social rationale, and to access to waters that is reasonably commensurate with the parties' respective shares, must also be considered"); see also 192.12-20 (Gauci in relation to claim 3) and 203.7-10 (Gauci in relation to claim 3) ("What we do add also in claim 3 is that the rationale behind the adjustment period, and the need for the period that provides for stability, needs also to be taken into consideration"). It is relevant in this respect that the EU accepted that claim 3 was wholly consequential on claim 2 (see Interim Report, paras. 742-743), such that arguments made in relation to claim 3 had no independent force outside of the separate submissions that had been made (and responded to by the UK) in connection with claim 2. As noted at footnote 1 above, it is accepted that Mr. Dawes in relation to claim 2 referred to the "nullification of that specific right of the EU, that the UK was required to assess" but he did so only in the course of making specific submissions about the adequacy of the UK's assessment of the "economic and social impacts of the measure" (Hearing, 28 January 2025: 167:18 to 168:12) and did not refer to a need to refer to the adjustment period and/or Annex 38 in terms.
[7] EU Responses to Questions, para. 14 ("The EU argues that, when determining whether there is a breach of Article 496 TCA, read together with Article 494 TCA, during the adjustment period established by Article 1 of Annex 38 TCA (1 January 2021 until 30 June 2026), the terms and rationale of Annex 38 TCA must be considered").
[8] EU Supplementary Written Submission, paras. 85 and 87 (both relating to claim 3). Para. 85 is cited by the Interim Report at para. 657 when summarising what is said to be the EU's argument on claim 2 that the nature of the rights of the other Party under Annex 38 must be taken into account when deciding on a measure "having regard to" "applying proportionate measures".

17. This surprise is reinforced by reference to the specific questions asked by the Arbitration Tribunal about how the UK had regard to (i) economic and social impacts; (ii) alternatives and (iii) the balancing exercise. However the UK was never asked by the Arbitration Tribunal to identify documents or passages within documents demonstrating its consideration of the adjustment period/Annex 38 or legal rights generally.

18. The UK considers that as a result of this surprise, it has suffered procedural unfairness. This is because the UK did not have the opportunity to consider whether it wished to seek leave to supplement the evidentiary record before the Tribunal with further material. This includes material contained in documents already before the Tribunal but which was redacted for legal privilege. Such consideration may have been able to demonstrate more clearly the consideration that was given to Annex 38 and/or the adjustment period in response to a point that was developed only after all of the evidence had been selected and submitted.

19. Nonetheless, even on the existing record, the UK submits that the Arbitration Tribunal can and should conclude that the UK decision-maker in respect of the English measure was aware of the terms of Annex 38 and the existence of the adjustment period, considered the impact on the social and economic benefits against the background of the legal architecture of Annex 38 and the adjustment period, and had regard to such factors in the overall weighing and balancing. This follows as a matter of self-evident logic and is supported by information on the record. The UK makes two points in this regard.

20. First, despite the UK not having been put specifically to proof on the matter, there is information on the record making it clear that the decision-maker gave consideration to the adjustment period. The Joint Fisheries Statement (**Exhibit R-5**) that underpins fisheries management in the UK and was prepared by the Department for Environment, Food and Rural Affairs, jointly with the devolved authorities, notes at para. 4.2.1.17:

> "The TCA recognises the UK's sovereign control of its waters from 1 January 2021. There is an adjustment period lasting five and a half years from that point to allow time for fleets on both sides to adapt to the new access arrangements. <u>During this period the TCA allows for continued reciprocal access to each other's waters at levels commensurate with each Party's share of fishing opportunities in nearly all stocks and, for NQS, at historic levels.</u> As set out in the TCA, at the end of the adjustment period,

access as well as fishing opportunities will be subject to annual negotiations."

21. The underlined words show a clear recognition of the nature and effect of the adjustment period/Annex 38 in respect of the English measure in this case.[9] In particular, mention is made of the level of access and the time during which those access arrangements apply.

22. Second, it is self-evident that the Minister responsible for fisheries in England (and his officials) was aware of Annex 38, since it provides the legal architecture within which the economic and social impacts that received detailed consideration in this case arose. It is an obvious and significant component of the framework for shared fisheries governance that does not need specific reference. The Minister (and his officials) plainly knew that the adjustment period existed to provide access rights to UK and EU vessels in each other's waters until 30 June 2026 and the nature of the "period of stability" engendered by that. Those basic matters can and should therefore safely be taken to have played a role in the weighing exercise carried out in respect of the English measure. It is because of them that such significant attention was given to the economic and social impacts.

23. Point (b) set out in para. 14 above relates to the conclusion at para. 687 of the Interim Report that "the record does not show any analysis as to why the matter was so urgent that it required action during the adjustment period". The UK considers that this fails to acknowledge the clear recognition by the UK Government of the temporal importance of the English measure.

24. First, as regards the Ministerial Submission (**Exhibit R-77**), the Interim Report notes the view of Birdlife International of "an urgent need to build resilience" (para. 687, referring to para. 17 of the Submission) but gives no consideration to the last sentence of the same paragraph, which states:

[9] See also Dr. Euan Dunn, RSPB, 'Revive our Seas: The case for stronger regulation of sandeel fisheries in UK waters', June 2021 (**Exhibit R-29**), p. 13 ("The EU-UK Trade and Cooperation Agreement (TCA) establishes the objectives and principles under which the UK and the EU will cooperate on the management of fisheries. An adjustment period ending on 30 Jun 2026 maintains mutual access to each other's waters and a phased transfer of quota shares. The share of North Sea sandeels is maintained throughout at c.97% EU and 3% UK. After the adjustment period negotiations on access and share of stocks will be on an annual basis, although multi-annual agreements are also possible"). The Interim Report at para. 84 cites this Exhibit when noting "The United Kingdom states that prior to the implementation of the sandeel fishing prohibition, it had been facing significant concerns from both inside and outside government regarding the impact of sandeel fisheries on the marine ecosystem."

> "An early decision whether to close the fishery in English waters will be valuable as it will give industry notice of the measure as far ahead of the 2024 season as possible and mean that benefits to the ecosystem can begin to accrue from the next sandeel fishing season."

That is a clear indication of why action was being pursued in the adjustment period.

25. Second, the Foreword to the Call for Evidence (**Exhibit C-43**) referred to impacts from climate change, and set out that "urgent action is required to protect stocks and the wider ecosystem from these increasing pressures" (p.4).

26. Third, the English Scientific Report (**Exhibit C-45**) also provided justification for the need to take immediate action, for example:

> "Stock levels have varied considerably and have at times been below the levels considered appropriate for strong recruitment. The frequency of stocks being below the minimum acceptable biomass will likely increase with increasing fishing pressure, particularly when coupled to averse environmental conditions" (p.11).
>
> "A full prohibition of sandeel fishing in UK waters would therefore serve to increase resilience of seabirds (for example, Poloczanska and others, 2004) which also face direct risk from pressures such as climate change (Mitchell and others, 2020) and diseases such as avian flu (Hunter, 2022)" (p.13).
>
> "Environmental variation is a fundamental driver of sandeel recruitment, with conditions likely to worsen under climate change. Future variation (for example, increased bottom temperature) is highly likely to lead to declines in sandeel biomass with subsequent negative impacts for dependent predators (such as kittiwakes). Food availability is very likely to impact the future production of sandeels" (p.46).

27. Fourth (and in addition to the above references), the urgency arising from the impact of highly pathogenic avian influenza (avian flu) on seabirds was recognised in relevant decision-making documents.

    a. The 15 February 2023 Ministerial submission (**Exhibit R-74**) included the statement that "Kittiwakes are already under incredible pressure (red listed species) and are known to be impacted by avian flu" (para. 22).

b. The Government response of 31 January 2024 (**Exhibit R-87**) emphasised that "amidst the ongoing avian flu outbreak and recognising the limited actions government can take to address the virus spread directly, management of the sandeel fishery could be an important step in increasing seabird resilience more widely".

c. The significance of avian flu was also recognised in letters from the UK Government Minister to his EU (**Exhibit C-58**) and Danish (**Exhibit R-83**) counterparts.

28. Finally, the UK recalls that it took action to prohibit sandeel fishing for its own vessels as early as 2021.[10] In a judgment dismissing a challenge to that (ongoing) prohibition, the Court of Session (Outer House) in Scotland observed that "the effect of sandeel fishing on seabird numbers, and thus on the wider maritime ecology, had been a matter of escalating and public concern for at least a decade by 2022" (**RLA-10**, para. 44). The UK sought in this regard to agree with the EU a zero catch on sandeels as part of annual consultations on all fishing opportunities,[11] but with no success. The UK therefore took steps to implement the necessary protections during the adjustment period, utilising the machinery referred to in the preamble of Annex 38 (annual consultations).[12] It was only after it had exhausted that possibility that it implemented the English measure, and did so due to the importance and urgency of protecting sandeel.

29. Point (c) set out at para. 14 above requires consideration of the EU Commissioner's responses to the UK Government's consultation on the English measure. The Commissioner's letter of 30 May 2023 (**Exhibit C-55**) drew attention to the fact that sandeel is an important stock for the EU, the value of the catch and the likely impact if there were to be full closure. However, it did not raise any issue as regards the adjustment period/Annex 38, instead referring to other provisions of the TCA. That is the context in which the question of "access" was addressed in the main body of the Ministerial Submission (**Exhibit R-77**) at para. 27. It is therefore unsurprising that express reference

[10] UK Written Submission. paras. 132-133.
[11] UK Written Submission. para. 132.
[12] Recital 2: "EMPHASISING that the right of each Party to grant vessels of the other Party access to fish in its waters is ordinarily to be exercised in annual consultations following the determination of TACs for a given year in annual consultations".

was not made to the adjustment period/Annex 38 in that part of the Submission (cf. Interim Report para. 662).

30. The Arbitration Tribunal is therefore requested carefully to consider its interim findings of law and fact on this precise aspect and conclude that (i) there is no requirement on a Party under Article 496(1) read with Article 494(3)(f) to have express and separate regard to the adjustment period/Annex 38 but (ii) even if there were such a requirement, the UK Government did consider those matters in relation to the English measure, together with matters that it regarded as giving it sufficient cause to implement the measure during the adjustment period.

C. OTHER ASPECTS OF THE TRIBUNAL'S REASONING ON THE ENGLISH MEASURE AS REGARDS CLAIM 2

Examination of whether a measure is proportionate

31. Para. 640 of the Interim Report suggests that it is appropriate for the Arbitration Tribunal to undertake an exercise "examining whether the measure and the reasons that support it objectively meet the standard of proportionality".

32. This statement, albeit expressed in general terms, could be misinterpreted to mean that the Arbitration Tribunal in examining whether a Party had regard to applying proportionate measures under Articles 496(1) and 494(3)(f), must objectively assess for itself whether the measure is proportionate, which – in the UK's submission – is the wrong standard. It is also not the approach that is adopted by the Arbitration Tribunal at paras. 616 and 626 of the Interim Report (to the latter of which para. 640 refers). In light of this apparent inconsistency, the UK respectfully requests that para. 640 be amended to align with the Tribunal's reasoning at paras. 616 and 626.

The treatment of individual factors or considerations that are to be taken into account in the weighing and balancing exercise

33. The Arbitration Tribunal appears to find that, in at least certain circumstances (which are not identified), it will be necessary for a Party to enquire as to whether one individual

consideration that has a bearing on proportionality and which is required to be taken into account in the weighing and balancing exercise should "yield to another consideration".[13] This is evident from the following statements in the Arbitration Tribunal's conclusion at para. 687:

a. "There was also no consideration given to whether there was a sufficiently compelling urgency such that the value of stability and the rights of the Parties during the adjustment period and enshrined in the TCA should yield to another consideration."

b. "[T]he record does not show any analysis as to why the matter was so urgent that it required action during the adjustment period."

c. "This is not to say the rights of the European Union during the adjustment period should have primacy. Indeed, they should be weighed in light of the regulatory autonomy of a Party to adopt fisheries management measures in accordance with the requirements of the TCA".

34. This would appear to be a finding as to <u>how</u> a Party is <u>obliged to weigh</u> certain individual factors that go into the proportionality mix. This was despite the Arbitration Tribunal noting at para. 678 that "it is not a question of whether less or more weight should be given to the different interests of the Parties. As the Arbitration Tribunal has noted, there is considerable difficulty in weighing and balancing different factors due to the lack of a common metric, problems of commensurability, and the interplay of value judgments as to what weight to be placed on different factors."

35. Moreover, neither of the Parties contended for such an interpretation. Both Parties proceeded on the basis that the assessment to be undertaken is a holistic one, weighing the relevant considerations and coming to a conclusion.[14] Neither Party advanced the notion

[13] Interim Report, para. 687.

[14] See, as regards the EU: Hearing, 28 January 2025, 131.8-14 (Norris): "So we would argue that the weighing and balancing in the framework of proportionality requires <u>a holistic assessment</u> both of the benefits of a policy, which can be assessed by reference to the degree of contribution to an objective, and the costs, which is typically assessed by reference to the degree of impairment to economic and social rights" (emphasis added). See also 34:6-9 (Norris) and 37.22 to 38.1 (Norris). See as regards the UK: e.g. UK Written Submission. para. 351 ("On what

that one individual factor should be weighed against other individual factors, and a conclusion be drawn as to whether one justifies the "yield[ing]" of another. The consequence of the Arbitration Tribunal's finding in this regard is effectively to read in an additional requirement that there needs to be a "sufficiently compelling" justification for the adoption of measures under Article 496 during the adjustment period. Respectfully, this is not consistent with the terms of the TCA, the Parties' submissions or the Arbitration Tribunal's recognition of the complexities involved in the weighing exercise. Accordingly, the UK respectfully requests the Arbitration Tribunal to reconsider this point.

Significance of certain documents to the UK's weighing exercise

36. Para. 654 of the Interim Report agrees with the EU that neither the UK Government's response to the 2023 consultation (**Exhibit R-87**) nor the UK Minister's letter to the Danish Minister of 27 February 2024 (**Exhibit R-85**) "show any weighing and balancing of … considerations".

37. The UK requests the Arbitration Tribunal to reconsider this point. Both of the documents cited clearly set out considerations that were relevant to and went into the weighing exercise, and therefore provide evidence on the record of how they were weighed.

38. In the first place, this is clear as a matter of substance. The consultation response document (**Exhibit R-87**) for example notes that:

> "amidst the ongoing avian flu outbreak and recognising the limited actions government can take to address the virus spread directly, management of the sandeel fishery could be an important step in increasing seabird resilience more widely"

39. That was a matter going to the importance of introducing the measure now.

40. The letter to the Danish Minister (**Exhibit R-85**) concluded in terms that:

is to be weighed, the Parties are agreed that regard is to be had to weighing, broadly speaking, the costs and benefits of the measure"); Hearing, 29 January 2025, 188.18 to 189.17 (Westaway) in particular 189.8-10, 15-17: "Effectively, the UK would say the question is: are the costs out of all proportion to the benefits? … And in the UK's submission, when one looks at the evidence of the costs and the benefits in this case, the answer is: no"

> "… while I acknowledge the impact on the Danish fishing sector, I am satisfied that this decision is neither discriminatory nor disproportionate having regard to the important aim the ban seeks to achieve."

41. That is clear evidence of a weighing up of considerations in light of the factors set out in that letter and the consultation response document.

42. In the second place, the UK's position is that the evidence on the record needs to be taken as a whole to understand the weighing and balancing that was undertaken by the UK Government in respect of the English measure. The documents at **Exhibits R-87** and **R-85** are a relevant part of that record. The fact that the Ministerial Submission (**R-77**) is a "key document", does not mean that it should be considered in isolation or that it is to be treated as the only document relevant to the decision-making process. As the UK submitted, it is not easy to provide evidence of how a decision-maker balances different factors.[15] An holistic approach should be taken, as was common ground between the Parties.

Consideration of partial closure

43. At para. 682 of the Interim Report, the Arbitration Tribunal states that "[a]fter the English consultation and during the decision-making process, the United Kingdom did not give consideration to whether any partial closure might have achieved its objectives."

44. To put this in context, the consultation document (**Exhibit R-61**) considered partial closures on pp.9-10, observing that "evidence suggests greater benefits with the closure of larger areas" and concluding that:

> "Partial closures therefore may reduce the ecosystem benefits of any closures and potentially cause additional problems if the abundance of sandeels in the remaining open area falls below levels critical for successful predator foraging."

45. The consultation asked about the effectiveness of full closure, and any alternative management measures (Question 14c) (p.12). Consultation responses collated by the UK Government (**Exhibit C-75**) included a preference for full closure with 19.6% of

[15] UK's Responses to Questions, p.38.

respondents noting "limited benefits with partial closure" and others stating "concern of displacement fishing" (p.8).

46. Contrary to the suggestion in para. 682 of the Interim Report, there was post-consultation consideration of the effectiveness of a partial closure. The "other options such as a partial closure" raised in the consultation were addressed in the summary review prepared for the UK Government (**Exhibit R-76**) at pp.6-7 and that advice was reflected in the Ministerial Submission (**Exhibit R-77**) (para. 24). It is therefore the case that consideration was given to whether a partial closure might have achieved the English measure's objectives after the consultation and during the decision-making process. It was concluded, among other things, that "a full closure would be the best available option in order to support delivery on our aims" (*ibid.*). The UK requests that the Arbitration Tribunal amend para. 682 to reflect this.

Discounting of adverse impacts

47. Para. 686 of the Interim Report includes the statement that "the adverse impact on the economic interests of the EU fishing industry were in effect discounted on the basis of the argument that EU vessels could either fish for other species or fish for sandeel in EU waters" (underlining added). To the extent that the underlined words represent a conclusion of the Arbitration Tribunal,[16] the UK considers that it is inconsistent with (i) para. 675 of the Interim Report ("it [the adverse social and economic impacts] was a factor that was taken into account") and (ii) paras. 25-26 of the Ministerial Submission (**Exhibit R-77**) which indicate that the impact on EU industry was taken into account, but was attenuated to some degree by being considered in the context of the real-world activities of fishermen. The impact was not disregarded, which is a common meaning of "discounted". Misunderstanding may be avoidable by replacing the words "in effect discounted" with "to some extent reduced" (or similar words). It is to be recalled, moreover, that the economic and social impacts assessment taken was a "worst-case scenario" assessment that "considerably overestimated" impacts because it was based on revenue and not profits.[17] Any reduction in the impacts as a result of potential fishing by EU vessels in other waters

[16] As opposed, for example, a recitation of the EU's case.
[17] See UK Written Submission, para. 396.1.

or of other stocks must be seen in light of that considerable over-estimated worst-case scenario starting point.

D. CLARIFICATIONS SOUGHT REGARDING THE TRIBUNAL'S REASONING IN RESPECT OF THE BEST AVAILABLE SCIENTIFIC ADVICE CLAIM

Clarification regarding 'available advice'

48. At para. 491 (final sentence), the Arbitration Tribunal refers to available advice as extending to advice which "could reasonably have been obtained when a decision is to be taken and which would be likely to improve the quality or value of the advice that exists." The UK is concerned that, read in isolation, para. 491 may be taken to suggest that further advice must be obtained (potentially at great expense and delay) even where it would only make a negligible contribution to the improvement of the quality or value of the advice. The UK considers that such an interpretation would sit uneasily with the Arbitration Tribunal's explanation that there is "an element of reasonableness which should be taken into account" in the assessment of whether advice is "reasonably obtainable" (para. 544). The UK also refers to the Arbitration Tribunal's evaluation of whether changes to the model would have made a "material difference to the results" (para. 543). Consequently, the UK respectfully suggests that para. 491 might be clarified by specifying that available advice extends to advice which "could reasonably have been obtained when a decision is to be taken and which would be likely to materially improve the quality or value of the advice that exists." The UK suggests that it would also be convenient in para. 491 to refer to the "element of reasonableness which should be taken into account" (which is currently referred to in the Interim Report, albeit 53 paragraphs later, at para. 544).

Reference point

49. In respect of the reference point for the calculation of biomass increases, the UK notes the Arbitration Tribunal's statement that the "figures provided by the European Union" (para. 531) mean that the UK's reference point is "likely to overestimate the predicted impact on the biomass of various species" (para. 531). The UK respectfully queries how the Arbitration Tribunal has been able to arrive at such a definite conclusion regarding the

effect of the EU's competing reference point ("likely to overestimate" (para. 531)) in circumstances where the Arbitration Tribunal has stated that it is "not clear to the Arbitration Tribunal how the European Union calculated a 39% reference point" (para. 526), that the "Arbitration Tribunal has no information on how the European Union calculated catches from UK waters" (para. 526) and the Arbitration Tribunal has stated that it is "not able to assess the alternative reference point proposed by the European Union" (para. 533). In this respect, the UK notes the Arbitration Tribunal's emphasis throughout the Interim Report on scientific advice being "transparent, in the sense of being open to scrutiny and corroboration" (para. 485), "scientifically objective" and "evidence-based" (para. 487).

50. The UK does not take issue with the way the Arbitration Tribunal has articulated its conclusion in the second last sentence of para. 533: "While the outcomes may have led to some overestimation of the impact on the biomass of various species …". The UK considers that this phrasing captures the Arbitration Tribunal's substantive reasoning and better reflects the uncertainties articulated by the Arbitration Tribunal in respect of how the EU's reference point has been calculated. The UK's respectfully suggests that this same language should be used consistently throughout the Interim Report, entailing the following changes:

    a. Para. 531 second sentence: "likely to overestimate …", suggested change to "may have led to an overestimation of …".
    b. Para. 533 final sentence: "appear to overestimate …", suggested change to "may have led to an overestimation of …".
    c. Para. 565 second sentence: "likely to be an overestimation …", suggested change to "may have been an overestimation …".
    d. Para. 566 second sentence: "likely to be an overestimation", suggested change to "may have been an overestimation".
    e. Para. 587: "is likely to have overestimated…", suggested change to "may have led to an overestimation …".
    f. Para. 588: "likely some overestimation …", suggested change to "potentially some overestimation …".
    g. Para. 668, first sentence: "likely to be an overestimation", suggested change to "may have been an overestimation".

h. Para. 685, fourth sentence: “were overestimated”, suggested change to “may have been overestimated”.

Seabird data disaggregation

51. The UK notes that the final sentence of para. 547 could be interpreted to suggest that the manner in which the seabird data was presented in the English Scientific Report was an “error”, albeit not one which was “material”. The UK’s understanding of the Arbitration Tribunal’s reasoning in that paragraph is that the Arbitration Tribunal does not identify any error in the underlying science on this point but rather that the Arbitration Tribunal suggests that it might have been of assistance to the decision-maker to have the seabird data presented in a more granular fashion (para. 547, second sentence). The Arbitration Tribunal notes that this point of presentation did not affect the total predicted impact on seabird biomass which was presented in the English Scientific Report (para. 547, third sentence).

52. In circumstances where the Arbitration Tribunal has made no finding that there was anything defective in how the seabird data was calculated, nor anything misleading about how the seabird data was presented in the English Scientific Report, the UK understands the Arbitration Tribunal’s finding to have been that there was no scientific error in respect of this alleged flaw. Consequently, the UK respectfully suggests that the words “of such materiality” be deleted from the final sentence of para. 547.

53. The UK considers that the reference to how the seabird data was presented in para. 557 may also create the impression that the Arbitration Tribunal is suggesting that this was an error or a material error in the scientific advice. That is particularly so given the final sentence of para. 557. The UK respectfully suggests that the second sentence of para. 557 be omitted from that paragraph.

E. FURTHER SUGGESTED CORRECTIONS

54. The below table contains a list of suggested further references to the Interim Report for suggested consideration and review by the Arbitration Tribunal.

Para.	Point	Notes
Page v	List of Defined Terms. Revise entry for "DAERA" as follows: "Northern Ireland Department of Agriculture, Environment, and Rural Affairs".	This is to clarify to which devolved government the department appertains.
8	Lines 1-2. Amend "Partnership Council of the European Union" to "Partnership Council of the European Union and the United Kingdom".	To reflect the joint nature of the body. See for reference TCA Article 7.
17	Lines 1-2. Revise the sentence as follows: "On 9 December 2024, the Parties notified the Arbitration Tribunal that they did not propose to submit any ~~submitted their respective~~ comments on the *Amicus Curiae* Submissions."	This avoids the potential misunderstanding that the Parties had made substantive comments on the *Amicus Curiae* submissions.
43	Line 2. Delete "before they".	Sandeels return to the seabed at night daily over this period: see UK's Written Submission para. 89.3.
51	Line 1. Delete "According to the European Union".	The process of annual consultations is common ground (and is set out in the TCA).
56	Lines 6-7. Replace "size" with "biomass" on two occasions.	
56	Lines 1-4: Revise the sentence as follows: "Since 2011, sandeel fisheries in the Greater North Sea have been managed according to an escapement strategy, ~~pursuant to which maximum fishing levels (termed Fcap)~~ where quotas are set such that a minimum stock size should remain every year (biomass left after fishing, Bescapement) so as not to affect negatively the recruitment of new sandeel the following year and that fishing rates	Minor technical correction as the Fcap values are not set each year.

	should not exceed a maximum value (termed Fcap)."	
70	Lines 3-4. Revise as follows: "Northern Ireland Department of Agriculture, Environment, and Rural Affairs (hereinafter "**DAERA**")".	This is to clarify to which devolved government the department appertains.
82	Lines 4-6. Replace "notes" with "calculates".	This reflects the EU's submissions in its Responses to Questions (para. 8) and Replies to the UK's Responses to Questions (para. 11).
154	Line 3. Delete "those of"	
180	Line 6. Revise text as follows: "as a defence to ~~for~~ a breach …".	
224	Line 7. Replace "the measure must not necessarily conform" with "the measure need not necessarily conform".	This reflects the UK's submissions. See e.g. UK's Written Submission para. 324.3 ("the Parties are not required to adopt measures that conform to those principles").
244 to 246	Para. 244, line 1. Substitute "two key changes" for "one key change". Para. 245, line 1. Delete the word "First," and start the sentence with "The ICES …". Para. 246, line 1. Delete the word "Second" and start the sentence with "Since the …".	As the Arbitration Tribunal noted at para. 514, the calculation of the reference point (described in para. 246) is not a change to the EwE model; it is used to assist in narrowing down which of the outputs of the model were relevant to the question under consideration. Consequently, the UK suggests that paras. 244 to 246 be corrected so that the Arbitration Tribunal is not taken to be suggesting that

		what is described at para. 246 involves any 'change' to the model. The UK suggests this can be done by referring to one 'change' or 'update' in para. 244 and retaining the content in para. 246 but without introducing it as a 'change'.
246	Lines 7-8. Replace "EEZ" with "waters" on two occasions.	To reflect the fact that the calculations included the UK's territorial sea as well as its EEZ.
363	Consider adding to footnote 872 additional reference to the UK's submissions at Hearing, 29 January 2025, 189.8-195.8 (Westaway).	This ensures that the UK's oral submissions on the proportionality of the measures is captured.
461	Lines 4-7. Revise the sentence as follows: "The United Kingdom appears to be arguing that because Article 500(2) provides that any technical and conservation measures agreed by the Parties are without prejudice to Article 496, this indicates that ~~enables~~ a Party may ~~to~~ decide to adopt fisheries management measures under Article 496 and that any such measures should not be regarded as ~~are~~ a derogation from Annex 38." Consider extending reference in footnote 1037 to Hearing, 29 January 2025, 148.10-150.19.	The text here does not reflect the UK's submission, which was that measures taken under Article 496 are not a derogation from Annex 38.
462	Lines 7-8. Revise the sentence as follows: "Third, the interpretation offered by the United Kingdom would mean that ~~read~~ Annex 38 does not have any additional significance when the Parties are determining measures under Article 496 ~~out~~ of the TCA."	The final sentence here does not accurately reflect the UK's submission. It was no part of the UK's submission that Annex 38 does not apply or should be "read out" of the

		TCA, but that it does not impose any additional requirement on the determination of measures by Parties under Article 496.
483	Lines 2-3. Delete the second sentence entirely or alternatively replace it with the following: "The United Kingdom rejects as a blanket proposition that the best available scientific advice excludes any advice not based on the most recent scientific data, noting that experts might consider it desirable to use data other than the most recent if it is of higher quality or involved a larger sample size. It contends that the desirability of particular data will be fact-and circumstance-dependent".	The second sentence does not reflect the UK's submission (referred to in the footnote), which was more nuanced than this para. suggests. In respect of data, the UK did not reject the proposition that scientific advice should be supported by the most recent available data. To the contrary, and as accurately captured in para. 229 of the Interim Report, the UK accepted that if two datasets were otherwise equal, with one being more recent, then the recent data would be the "best" for the purposes of "best available scientific advice" in this context, "unless there were a reasoned justification for preferring the older data", but that such a scenario did not arise on the facts of the present case.
483	Lines 3-4. Revise the sentence as follows: "The United Kingdom ~~rejects the notion~~ contends that the Tribunal should follow the approach of the International Court of Justice in the *Whaling*	The third sentence does not accurately reflect the UK's submission (either as referred to in the footnote or as

	Case in which the Court found it unnecessary to devise specific criteria of "scientific advice" ~~should have any particular characteristics~~".	developed at the hearing), which was not that scientific advice is inherently lacking any particular characteristics, but rather that it would be appropriate for the Tribunal in this case to follow the approach of the International Court of Justice in the *Whaling Case* in which the Court found it unnecessary to devise specific criteria of scientific advice. The UK notes that it expressly accepted that scientific advice must be "systematic or methodical in order to qualify as science" (Hearing, 29 January 2025, 65:14-16 (Juratowitch); UK's Written Submission para. 211).
558	Line 14. Insert "so" after "particularly".	
596	Lines 3-4. Delete ""to heed",[1306]" and the associated footnote.	The UK did not agree that the word "heed" was of material assistance – see UK's Written Submission para. 321.
599	Lines 7-9. Revise the sentence as follows: "The United Kingdom accepts that as a procedural tool, it must make a difference, but not to the extent of necessarily as a matter of law making a difference to the outcome of the decision-making."	This reflects the submission made at Hearing, 30 January 2025: 84.6 (Juratowitch).
602	Line 3. Move quotation marks from "aspirational goals" to just "goals".	This reflects the EU's submission at para. 82 of its

		Reply to the UK's Responses to Questions. The UK used the word "goals", but the characterisation of those as purely "aspirational" is the EU's. NB the same text is correctly quoted at para. 609 of the Interim Report.
616	Line 13. Remove quotation marks from "aspirational goal".	The UK's submission was not made in those terms. See above as regards para. 602.
622	Lines 6-7. Add "To the extent that the Arbitration Tribunal assesses the proportionality of a measure itself," before "The United Kingdom accepts".	
654	Line 4. Replace "attached" with "provided a footnote reference to".	
674	Lines 8-9. Replace "Marine Maritime Organisation" with "Marine Management Organisation"	
741	Lines 2-4. Consider amending the sentence that "The Arbitration Tribunal does not agree that regulatory autonomy gives a Party unfettered freedom to adopt a fisheries management measure that does not meet the requirements of Article 496, read together with Article 494 of the TCA." The UK suggests as a possible alternative: "It is common ground that regulatory autonomy does not give a Party unfettered freedom to adopt a fisheries management measure and that the requirements of Article 496, read together with Article 494 of the TCA, must be met." If this suggestion finds favour with the Arbitration	The Arbitration Tribunal's disagreeing with this proposition may inadvertently give the impression that one or other of the Parties put it forward, which they did not. The UK's position was expressly that its discretion is not unfettered and that there is a duty to comply with Article 496 read together with Article 494, see e.g. UK's Written Submission para. 330, Hearing,

	Tribunal, the first word of the following sentence ("Rather") may be deleted.	29 January 2025: 152.12-18 (Westaway) and 30 January 2025: 79.13-18 (Westaway).