

**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”)**

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**INTERIM REPORT**

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**Arbitration Tribunal**

Dr. Penelope Ridings, MNZM (Chairperson)  
Prof. Hélène Ruiz Fabri (Arbitrator)  
Hon. Justice Mr. David Unterhalter (Arbitrator)

**Registry**

Permanent Court of Arbitration

**27 March 2025**

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### List of Defined Terms

<b>25 Year Plan</b>	<i>A Green Future: Our 25 Year Plan to Improve the Environment</i> , published by the United Kingdom Government in 2018
<b>ALOP</b>	Appropriate level of sanitary or phytosanitary protection
<b><i>Amicus Curiae</i> Submissions</b>	Unsolicited written submissions received from natural persons of a Party or legal persons established in a Party in accordance with Article 751(3) of the Trade and Cooperation Agreement
<b>Call for Evidence</b>	Call for evidence launched by the UK Fisheries Administrations on 22 October 2021 regarding the future management of sandeel and Norway pout
<b>CBD</b>	Convention on Biological Diversity, done at Rio de Janeiro on 15 June 1992
<b>CFP</b>	Common Fisheries Policy (Regulation (EU) No 1380/2013)
<b>DAERA</b>	Department of Agriculture, Environment, and Rural Affairs
<b>DEFRA</b>	Department for Environment Food and Rural Affairs
<b>DEFRA Consultation Document</b>	Document prepared by DEFRA as part of the English Sandeel Consultation entitled “Consultation on Spatial Management Measures for Industrial Sandeel Fishing”
<b>DMA</b>	De Minimis Assessment for Self-Certified Measures in DEFRA regarding Consultation on Spatial Management Measures for Industrial Sandeel Fishing
<b>EEZ</b>	Exclusive Economic Zone
<b>EIP</b>	Environmental Improvement Plan, published in January 2023
<b>English Sandeel Consultation</b>	Public consultation launched on 6 March 2023 by DEFRA regarding the prohibition of sandeel fishing in English waters of the North Sea
<b>EU</b>	European Union
<b>EU’s Responses to Questions</b>	Written Answers of the European Union to the Arbitration Tribunal’s Questions to the Parties, dated 5 February 2025
<b>EU’s Replies to the UK’s Responses to Questions</b>	Comments of the European Union on the Written Response of the United Kingdom to the Arbitration Tribunal’s Questions to the Parties, dated 10 February 2025
<b>EU’s Supplementary Submission</b>	Supplementary Written Submission of the European Union, dated 10 February 2025

<b>EU's Written Submission</b>	Written submission of the European Union, dated 9 December 2024
<b>EwE</b>	Ecopath with Ecosim
<b>FAO</b>	Food and Agriculture Organization
<b>FAO Code of Conduct</b>	FAO Code of Conduct for Responsible Fisheries
<b>GATT 1994</b>	General Agreement on Tariffs and Trade 1994, done at Marrakesh on 15 April 1994
<b>GES</b>	Good Environmental Status
<b>ICES</b>	International Council for the Exploration of the Sea
<b>ICES Divisions</b>	Fishing zones known as ICES (statistical) areas into which ICES divides the seas
<b>ICES Technical Service</b>	Technical service published by ICES on 28 November 2023 in response to the joint request from the European Union and United Kingdom regarding ecosystem considerations in the provision of single-stock advice for forage fish species
<b>ICES WGSAM</b>	ICES Working Group on Multispecies Assessment Methods
<b>ICJ</b>	International Court of Justice
<b>ITLOS</b>	International Tribunal for the Law of the Sea
<b>Natural England/Cefas/JNCC Advice</b>	Document prepared by Natural England, Cefas and JNCC as part of the English Sandeel Consultation entitled "What are the ecosystem risks and benefits of full prohibition of industrial sandeel fishing in the UK waters of the North Sea (ICES Subarea 4)?"
<b>OSPAR Convention</b>	Convention for the Protection of the Marine Environment of the North-East Atlantic, done at Paris on 22 September 1992
<b>PCA</b>	Permanent Court of Arbitration
<b>Request for Arbitration</b>	Request for the establishment of an Arbitration Tribunal pursuant to Article 739 of the Trade and Cooperation Agreement, dated 25 October 2024
<b>Rules of Procedure</b>	Annex 48 to the Trade and Cooperation Agreement
<b>Sandeel Management Areas</b>	Seven Areas ICES has divided the Greater North Sea into since 2011 (1r, 2r, 3r, 4, 5r, 6, and 7r) in respect of the management of sandeel
<b>Scottish Consultation Document</b>	Document prepared by the Scottish Government as part of the Scottish Sandeel Consultation entitled "Consultation on proposals to close fishing for sandeel in all Scottish waters"



<b>Scottish SEA</b>	Document prepared by the Scottish Government as part of the Scottish Sandeel Consultation entitled “Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters”
<b>Scottish Order</b>	Sandeel (Prohibition of Fishing) (Scotland) Order 2024
<b>Scottish Partial Impact Assessment</b>	Document prepared by the Scottish Government as part of the Scottish Sandeel Consultation entitled “Partial Business and Regulatory Impact Assessment”
<b>Scottish Sandeel Consultation</b>	Public consultation launched by the Scottish Government on 21 July 2023 regarding the prohibition of sandeel fishing in all Scottish waters
<b>Scottish Scientific Review</b>	Document prepared by the Scottish Government as part of the Scottish Sandeel Consultation entitled “Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment”
<b>SMS</b>	Stochastic Multispecies Model
<b>SPS Agreement</b>	Agreement on the Application of Sanitary and Phytosanitary Measures, done at Marrakesh on 15 April 1994
<b>STECF</b>	European Commission’s Scientific, Technical and Economic Committee for Fisheries
<b>TBT Agreement</b>	Agreement on Technical Barriers to Trade, done at Marrakesh on 15 April 1994
<b>TCA</b>	Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland concluded on 30 December 2020
<b>UKMS</b>	The United Kingdom’s published marine strategy
<b>UK’s Replies to the EU’s Responses to Questions</b>	Replies of the United Kingdom to the Responses by the European Union to Questions posed by the Tribunal, dated 10 February 2025
<b>UK’s Responses to Questions</b>	Responses of the United Kingdom to Questions Posed by the Tribunal, dated 5 February 2025
<b>UK’s Written Submission</b>	Written submission of the United Kingdom, dated 9 January 2025
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982
<b>UNFSA</b>	United Nations Fish Stocks Agreement, done at New York on 14 December 1995

<b>United Kingdom or UK</b>	United Kingdom of Great Britain and Northern Ireland
<b>VCLT</b>	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
<b>WTO</b>	World Trade Organization

## **I. INTRODUCTION**

### **A. THE PARTIES AND THEIR REPRESENTATIVES**

1. The Parties in the present arbitration are the European Union (also referred to as the “EU”) and the United Kingdom of Great Britain and Northern Ireland (hereinafter the “United Kingdom” or the “UK”).
2. The Parties’ Agents, Representatives, and Counsel are:

#### **The European Union**

Represented by:

##### **Agents**

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**B. OVERVIEW OF THE DISPUTE**

3. A dispute has arisen between the Parties under the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one side, and the United Kingdom of Great Britain and Northern Ireland, on the other side, concluded on 30 December 2020 (hereinafter the “TCA”).

**II. PROCEDURAL HISTORY**

**A. REQUESTS FOR CONSULTATIONS AND THE ESTABLISHMENT OF AN ARBITRATION TRIBUNAL**

4. On 16 April 2024, the European Union requested consultations with the United Kingdom pursuant to Article 739 of the TCA concerning the United Kingdom’s decision to prohibit the fishing of sandeel in the English waters of the North Sea and in all Scottish waters. The consultations concluded without a mutually agreed solution.
5. On 25 October 2024, the European Union commenced these proceedings by serving on the United Kingdom a request for the establishment of an arbitration tribunal under Article 739 of the TCA (hereinafter the “**Request for Arbitration**”).

**B. CONSTITUTION OF THE ARBITRATION TRIBUNAL, APPOINTMENT OF THE PCA AS REGISTRY, AND INITIAL PROCEDURAL STEPS**

6. On 4 November 2024, the Parties jointly requested the Permanent Court of Arbitration (hereinafter the “PCA”) to serve as registry in the present arbitration.
7. On 6 November 2024, the PCA confirmed to the Parties its willingness and availability to serve as registry.
8. On 13 November 2024, following discussions with the United Kingdom, the co-chair of the Partnership Council of the European Union notified in writing Dr. Penelope Jane Ridings, MNZM (Chairperson), Prof. Hélène Ruiz Fabri and Hon. Justice Mr. David Unterhalter of their appointments as arbitrators in accordance with Rule 8 of Annex 48 to the TCA (hereinafter the “**Rules of Procedure**”). Their contact details are:

**Dr. Penelope Jane Ridings, MNZM**  
E-mail: [pjr@peneloperidings.com](mailto:pjr@peneloperidings.com)

**Professor Dr. Hélène Ruiz Fabri**  
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**Hon. Justice Mr. David Unterhalter**

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9. On 18 November 2024, the Arbitration Tribunal was established with the communication to the Parties of the acceptance of Dr. Penelope Jane Ridings, MNZM, in accordance with Article 740(6) of the TCA.
10. On the same date, the Arbitration Tribunal convened by videoconference an initial organisational meeting in accordance with Rule 11 of the Rules of Procedure, in which the Members of the Arbitration Tribunal, the Agents, Counsel, and Representatives of the Parties, and the Registry participated and at which the terms of the Arbitration Tribunal's appointment and certain procedural matters, including the timetable of the arbitration, were discussed.
11. On 22 November 2024, the Arbitration Tribunal convened by videoconference a further organisational meeting, in which the Members of the Arbitration Tribunal, the Agents, Counsel, and Representatives of the Parties, and the Registry participated, to finalise the terms of the Arbitration Tribunal's appointment and the discussion of certain procedural matters.
12. On the same date, the Arbitration Tribunal issued Procedural Order No. 1, which *inter alia* set the procedural timetable of the arbitration and recorded the Parties' agreement that the hearing was to take place at the Peace Palace in The Hague and that the Arbitration Tribunal might receive unsolicited written submissions from natural persons of a Party or legal persons established in a Party (hereinafter "***Amicus Curiae Submissions***"), in accordance with Article 751(3) of the TCA.
13. On 27 November 2024, the Terms of Appointment were executed.

**C. *AMICUS CURIAE* SUBMISSIONS AND APPOINTMENT OF ASSISTANTS TO THE MEMBERS OF THE ARBITRATION TRIBUNAL**

14. Between 18 November 2024 and 28 November 2024, eleven *Amicus Curiae* Submissions were received by the Arbitration Tribunal, from the following legal persons (in alphabetical order):
  - (a) Blue Marine Foundation and BLOOM Association;
  - (b) ClientEarth;
  - (c) Danish Fishers Producer Organisation;
  - (d) Danish Pelagic Producers Organisation;
  - (e) European Fishmeal and Fish oil Producers;
  - (f) Green Alliance;



21. On 7 January 2025, the Registry received a letter for the attention of the Arbitration Tribunal from counsel for Blue Marine Foundation and BLOOM Association applying “for leave to appear before the Tribunal at the hearing [...] in order to make oral submissions.”
22. On the same day, the Arbitration Tribunal invited the Parties’ comments on the letter from counsel for Blue Marine Foundation and BLOOM Association. The Parties provided their respective comments on 14 January 2025.
23. On 16 January 2025, the Registry informed counsel for Blue Marine Foundation and BLOOM Association of the Arbitration Tribunal’s decision to decline its application “for leave to appear before the Tribunal at the hearing [...] in order to make oral submissions.”

#### **D. WRITTEN SUBMISSIONS OF THE PARTIES**

24. The European Union filed its written submission dated 9 December 2024 (hereinafter the “**EU’s Written Submission**”), along with exhibits C-1 to C-74 and legal authorities CLA-1 to CLA-78.
25. The United Kingdom filed its written submission dated 9 January 2025 (hereinafter the “**UK’s Written Submission**”), along with exhibits R-1 to R-293 and legal authorities RLA-1 to RLA-27.
26. On 23 January 2025, invoking paragraph 4.1 of Procedural Order No. 1 and Rule 5 of the Rules of Procedure, the United Kingdom submitted to the Arbitration Tribunal certain corrections to the UK’s Written Submission and further requested that its legal authority RLA-10 be substituted with an alternate version.
27. On 24 January 2024, the Arbitration Tribunal invited the European Union’s comments on the letter from the United Kingdom regarding certain corrections to the UK’s Written Submission. The European Union confirmed that it had no comments on the same day.
28. On the same day, the Arbitration Tribunal informed the Parties that it had taken note of the United Kingdom’s corrections to the UK’s Written Submission and further that it had granted the United Kingdom’s request to substitute its legal authority RLA-10.

#### **E. HEARING**

29. On 16 January 2024, the Arbitration Tribunal convened by videoconference a pre-hearing organisational meeting in accordance with paragraph 9.2 of Procedural Order No. 1, in which the Members and Assistants of the Arbitration Tribunal, the Agents, Counsel, and Representatives of

the Parties, and the Registry participated, to discuss certain administrative and logistical arrangements for the hearing.

30. On 17 January 2024, the Arbitration Tribunal issued Procedural Order No. 2, which *inter alia* set the daily schedule for the hearing and recorded the Parties' agreement that the entire hearing would be open to the public except for selected portions of the hearing that might be held in closed session when necessary to protect confidential information.
31. On 27 January 2025, the Arbitration Tribunal provided the Parties with a list of questions inviting them to respond to these in their oral submissions or in writing after the hearing.
32. The hearing was held from 28 January 2025 to 30 January 2025, at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. The following persons attended the hearing:

For the European Union:

*Agents*

Mr. Anthony Dawes  
Ms. Daniela Gauci  
Dr. Bernhard Hofstötter  
Ms. Josephine Norris  
Dr. Laura Puccio

*European Commission*

Ms. Sofia Cota Franco (DG Mare)  
Ms. Camille Gallouze (DG Mare)  
Mr. Norman Graham (DG Mare)  
Ms. Marouso Kyriakou (DG Mare)  
Mr. Paul Susman (DG Mare)  
Ms. Eva Maria Carballeria Fernandez (DG Mare)  
Ms. Francesca Massida (remote)  
Ms. Rositsa Pencheva (remote)

*DTU Orbit*

Prof. Dr. Anna Rindorf

*EU Delegation to UK*

Ms. Noura Rouissi

For the United Kingdom:

*Counsel*

Mr. Ben Juratowitch KC (Essex Court Chambers)  
Ms. Camille Boileau (Essex Court Chambers)  
Mr. Ned Westaway (FTB Chambers)  
Ms. Emma Rowland (Pupil barrister, FTB Chambers)  
Ms. Catherine Drummond (3 Verulam Buildings)  
Mr. Pablo Bentes (Baker McKenzie)  
Dr. Weiwei Zhang (Baker McKenzie)  
Mr. Claude Chase (Baker McKenzie)

*UK Government Agents*

Mr. Alex Cooke  
Mr. Steven Fuller

*UK Government*

Mr. Oliver Burrows  
Mr. Niall Macentee  
Ms. Connie Cramp  
Mr. Matt Robson  
Ms. Zoe Compston  
Ms. Maggie Ng  
Ms. Catherine White  
Mr. Matthew Neat  
Ms. Ruby Koopman  
Mr. Michael Dowell  
Ms. Vicki Castro-Spokes  
Ms. Imogen Cessford



Dr. Ewen Bell  
Dr. Jacob Bentley  
Ms. Jenna Pattison (remote)  
Dr. Rob Cook (remote)  
Dr. Mark Duffy (remote)  
Mr. Iain Glasgow (remote)  
Mr. Andrew Robertson (remote)  
Ms. Rachel Luke (remote)  
Mr. James Purtill (remote)  
Dr. Declan Tobin (remote)  
Ms. Lucy Pugh (remote)

*Scottish Government*  
Mr. Allan Gibb CBE  
Ms. Lauren Reid

Ms. Helen Bain (remote)  
Ms. Emma Stevenson (remote)

## Arbitration Tribunal

Dr. Penelope Jane Ridings MNZM (Chairperson)  
Prof. Hélène Ruiz Fabri  
Hon. Justice Mr. David Unterhalter

## Assistant to Prof. Ruiz Fabri

Prof. Edoardo Stoppioni

### Permanent Court of Arbitration:

Dr. Levent Sabanogullari  
Mr. José Luis Aragón Cardiel  
Ms. Anabel Blanco  
Dr. Stefan Schäferling  
Ms. Isabella Keith  
Ms. Khadija Ahmed

**Court Reporter:**

Mr. Trevor McGowan

**F. SUPPLEMENTARY WRITTEN SUBMISSIONS OF THE PARTIES**

33. Having considered the Parties' positions on the further procedure expressed at the hearing, on 30 January 2025, the Arbitration Tribunal provided the Parties with additional questions inviting them to file their responses to the questions posed by the Arbitration Tribunal to the Parties, including the questions of 27 January 2025, oral questions posed during the hearing, and the additional questions, by 5 February 2025. It further invited the Parties to file their replies to each other's responses by 10 February 2025 in addition to any supplementary written submissions pursuant to paragraph 9.6 of Procedural Order No. 1.
34. On 5 February 2025, the Parties each submitted their responses to the Arbitration Tribunal's questions (the **"EU's Responses to Questions"** and the **"UK's Responses to Questions"**, respectively).
35. On 10 February 2025, the Parties submitted their replies to the other Party's responses to the Arbitration Tribunal's questions (the **"EU's Replies to the UK's Responses to Questions"** and the **"UK's Replies to the EU's Responses to Questions"**, respectively). On the same date, the European Union submitted a Supplementary Written Submission (the **"EU's Supplementary Written Submission"**). The United Kingdom did not submit a supplementary written submission.

**G. INTERIM REPORT**

36. On 19 February 2025, the Arbitration Tribunal informed the Parties in accordance with Article 745(1) of the TCA that, due to the complexity of the dispute and the volume of the Parties' submissions, the Arbitration Tribunal considered that it would not be able to meet the 100-day deadline for the delivery of the interim report and notified the Parties that it would deliver the Interim Report to the Parties at the latest by 28 March 2025.
37. On 27 March 2025, the Arbitration Tribunal delivered its Interim Report to the Parties.

**III. FACTUAL BACKGROUND**

38. This section summarises the factual background of the dispute based on the Parties' submissions. It is not intended to be exhaustive of all the events and circumstances set out by the Parties in their submissions nor their diverging views thereon.

**A. THE MANAGEMENT OF SANDEEL STOCKS IN THE NORTH SEA**

**1. Key Terms**

39. The following are certain key terms, which should be understood to have the same meaning throughout this Interim Report:

- (a) **Fisheries displacement** refers to a change in fishing practice following a restriction on previous practices.<sup>1</sup> It includes spatial displacement to a new fishing area (or intensification of fishing effort in areas where the restriction does not apply) and/or target displacement where vessels fish other stocks in the same area.<sup>2</sup>
- (b) **Maximum sustainable yield**, or “**MSY**”, refers to the highest theoretical equilibrium yield that can be continuously taken on average from a fish stock under existing environmental conditions without significantly affecting its reproduction process.<sup>3</sup>
- (c) **Recruitment**, or “**R**”, is the amount of fish added to the exploitable stock each year due to growth and/or migration into the fishing area, *e.g.*, the number of fish that grow to become vulnerable to the fishing gear in one year would be the recruitment to the fishable stock that year.<sup>4</sup> In other words, recruitment may be understood as the number of individuals in a population that reach a specified stage of an organism’s life cycle.<sup>5</sup>
- (d) A **total allowable catch**, or “**TAC**”, is defined in the TCA as the maximum quantity of a stock (or stocks) of a particular description that may be caught over a given period.<sup>6</sup>
- (e) “**Waters**” is defined in the TCA as follows:
  - (i) in respect of the [European] Union, by way of derogation from Article 774(1), the EEZs of the Member States and their territorial seas;

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<sup>1</sup> UK’s Written Submission, para. 87.7; *see also* Scottish Government, ‘Good Practice Guidance for assessing fisheries displacement by other licensed marine activities, A303088-S00-REPT-002-A02’, June 2022, p. 13 (**Exhibit C-10**).

<sup>2</sup> UK’s Written Submission, para. 87.7; EU’s Written Submission, para. 46.

<sup>3</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L 354/22, Article 4(7) (**Exhibit CLA-5**); Section 52 of the Fisheries Act 2020 (**Exhibit CLA-6**).

<sup>4</sup> EU’s Written Submission, para. 36, *referring to* ICES Glossary, “R”, p. 1 (**Exhibit C-5**).

<sup>5</sup> UK’s Written Submission, para. 87.15; *see also* Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 199 (**Exhibit C-20**).

<sup>6</sup> Article 495(1)(d) of the TCA.

- (ii) in respect of the United Kingdom, its EEZ and its territorial sea, excluding for the purposes of Articles 500 and 501 and Annex 38 the territorial sea adjacent to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man[.]<sup>7</sup>

## 2. Sandeel as a Species in the Greater North Sea

40. Sandeel are small eel-like fish that feed on plankton.<sup>8</sup> They belong to the *Ammodytes* genus of the *Ammodytidae* family<sup>9</sup> and are considered to be a type of forage or “prey” fish, as they are preyed upon by other fish, marine mammals, and seabirds.<sup>10</sup> Accordingly, sandeel form an important trophic link between zooplankton and higher predator species.<sup>11</sup> As a high-energy, lipid-rich prey, the availability of sandeel appears to be linked to better body condition of certain predators, including fish and marine mammal predators.<sup>12</sup>
41. The sandeel fishery in the North Sea mainly focuses on the lesser sandeel (*Ammodytes marinus*).<sup>13</sup>
42. In varying degrees depending on the season, sandeel may largely be found in the water column or buried in the sandy substrata of the seabed.<sup>14</sup> In particular, sandeel forage actively during the day between April and August, burrowing into the sediment at night.<sup>15</sup> They rarely emerge from

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<sup>7</sup> Article 495(1)(g) of the TCA.

<sup>8</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 200 (**Exhibit C-20**); Fishbase, Food items reported for *Ammodytes marinus* (**Exhibit R-104**).

<sup>9</sup> Lynam *et al.*, ‘Spatial patterns and trends in abundance of larval sandeels in the North Sea: 1950–2005’ (2013) Vol. 70(3) ICES Journal of Marine Science 540, p. 540 (**Exhibit C-18**).

<sup>10</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 200 (**Exhibit C-20**).

<sup>11</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 200 (**Exhibit C-20**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**).

<sup>12</sup> Engelhard *et al.*, ‘Forage fish, their fisheries, and their predators: who drives whom?’ (2014) Vol. 71(1) ICES Journal of Marine Science 90, p. 94 (**Exhibit C-19**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 73 (**Exhibit C-50**).

<sup>13</sup> ICES, ‘Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea)’, in *ICES Advice on fishing opportunities, catch, and effort Greater North Sea Ecoregion* (February 2024), p. 1 (**Exhibit C-14**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**).

<sup>14</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 200 (**Exhibit C-20**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**).

<sup>15</sup> ICES, ‘Report of the Benchmark Workshop on Sandeel (WKSand 2016)’, 31 October 2016 - 4 November 2016, p. 248 (**Exhibit C-27**).

the seabed between September and March (*i.e.*, during the overwintering period), except to spawn on the sand in December and January.<sup>16</sup> After hatching, sandeel larvae are present in the water between January and May, when the juveniles then settle onto the sandy seabed.<sup>17</sup> During the settlement period from May to June, juvenile sandeel adopt adult behaviour, including the formation of pelagic (*i.e.*, present in the water column) feeding schools to forage during daylight and nocturnal burying into the sandbank sediment.<sup>18</sup> Sandeel usually mature in July, at which time they join a stock primarily composed of fish below the age of two.<sup>19</sup> Thus, an important aspect of sandeel's life cycle is their life-long attachment to a sand bank.<sup>20</sup>

43. The sandeel fishery in the North Sea is seasonal and permitted only between 1 April and 31 July, when sandeel feed in pelagic schools and before they return to the seabed at night. Only adult sandeel aged 1 year or over may be targeted.<sup>21</sup> Once caught, sandeel are processed by fishmeal factories to produce oil and fishmeal that is used, for example, in animal feed and aquaculture.<sup>22</sup> As explained in further detail below, sandeel are a shared stock (*i.e.*, “fish [...] that are found in

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<sup>16</sup> Boulcott & Wright, ‘Critical timing for reproductive allocation in a capital breeder: evidence from sandeels’ (2008) Vol. 3(1) Aquatic Biology 31, p. 32 (**Exhibit C-24**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**); Régnier, Gibb, & Wright, ‘Importance of trophic mismatch in a winter-hatching species: evidence from lesser sandeel’ (2017) Vol. 567 Marine Ecology Progress Series 185, p. 186 (**Exhibit R-10**).

<sup>17</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 200 (**Exhibit C-20**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**); Henriksen *et al.*, ‘Temperature and body size affect recruitment and survival of sandeel across the North Sea’ (2021) Vol. 78(4) ICES Journal of Marine Science 1409, p. 1410 (**Exhibit R-11**).

<sup>18</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**); Henriksen *et al.*, ‘Temperature and body size affect recruitment and survival of sandeel across the North Sea’ (2021) Vol. 78(4) ICES Journal of Marine Science 1409, p. 1410 (**Exhibit R-11**).

<sup>19</sup> MacDonald, *et al.*, ‘Trends in Sandeel Growth and Abundance off the East Coast of Scotland’ (2019) Vol. 6:201 Frontiers in Marine Science, p. 5 (**Exhibit C-26**).

<sup>20</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**).

<sup>21</sup> Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194, [2024] OJ (L series), Recital 56, Article 15 (**Exhibit CLA-8**).

<sup>22</sup> Andersen & Nielsen, ‘The economics of the Danish sandeel fishery and fishmeal and fish oil factories’, Department of Food and Resource Economics, University of Copenhagen, IFRO Commissioned Work No. 2024/16, July 2024, pp. 4, 10 (**Exhibit C-25**); Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 7 (**Exhibit C-45**).

the waters of the Parties”),<sup>23</sup> for which the European Union and United Kingdom agree on shares of total fishing quota per year.<sup>24</sup> Denmark, Norway, Sweden and Germany participate in the sandeel fishery in the North Sea, with Denmark being the primary holder of the EU-allocated sandeel quota.<sup>25</sup>

44. Sandeel comprise a substantial proportion of the diet of certain marine mammals (e.g., minke whale, harbour seal, and grey seal), seabirds (e.g., sandwich tern, shag, great skua, puffin, guillemot, and kittiwake), and predatory fish (e.g., saithe, horse-mackerel, starry ray, whiting, grey gurnard, and haddock).<sup>26</sup> Sandeel constitute different percentages of the overall diets of these predators, with toothed whales, haddock, and whiting being among the species that rely most heavily on sandeel.<sup>27</sup> According to the European Union, the removal of sandeel from the North Sea by predatory fish alone greatly exceeds that of fisheries, seabirds, and marine mammals combined.<sup>28</sup>
45. Unlike other forage fish, sandeel display a strong site attachment, patchy distribution, and high habitat specificity for coarse sandy sediments, where they spend a considerable part of their non-feeding periods buried.<sup>29</sup> The exchange of sandeel between sandy habitat patches after they have settled is low.<sup>30</sup> The United Kingdom asserts that due to the strong attachment of sandeel to the

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<sup>23</sup> Article 495(1)(c) of the TCA.

<sup>24</sup> See Section III.A.3 below.

<sup>25</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 16 (**Exhibit C-50**); Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 3 (**Exhibit C-45**).

<sup>26</sup> Engelhard *et al.*, ‘Forage fish, their fisheries, and their predators: who drives whom?’ (2014) Vol. 71(1) ICES Journal of Marine Science 90, p. 95 (**Exhibit C-19**).

<sup>27</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 22-23 (**Exhibit C-45**).

<sup>28</sup> EU’s Written Submission, para. 82, *citing* Engelhard *et al.*, ‘Forage fish, their fisheries, and their predators: who drives whom?’ (2014) Vol. 71(1) ICES Journal of Marine Science 90, p. 95 (**Exhibit C-19**).

<sup>29</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 1 (**Exhibit C-50**), *citing* Wright, Jensen, & Tuck, ‘The influence of sediment type on the distribution of the Lesser Sandeel, *Ammodytes marinus*’ (2000) Vol. 44 Journal of Sea Research 243 (**Exhibit R-12**); Holland *et al.*, ‘Identifying sandeel *Ammodytes marinus* sediment habitat preferences in the marine environment’ (2005) Vol. 303 Marine Ecology Progress Series. 269 (**Exhibit R-13**); Tien *et al.*, ‘Burrow distribution of three sandeel species relates to beam trawl fishing, sediment composition and water velocity, in Dutch coastal waters’ (2017) Volume 127 Journal of Sea Research 194 (**Exhibit R-14**); Langton, Boulcott, & Wright, ‘A verified distribution model for the lesser sandeel *Ammodytes marinus*’ (2021) Vol. 667 Marine Ecology Progress Series 145 (**Exhibit R-15**).

<sup>30</sup> Rindorf, Henriksen, & Van Deurs, ‘Scale-specific density dependence in North Sea sandeel’ (2019) Vol. 619, Marine Ecology Progress Series 97, p. 100 (**Exhibit C-21**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’,

sandbank in which they initially settled, among other factors, it may take several years after a local depletion for recovery through repopulation to occur.<sup>31</sup>

46. Unlike other sandeel predators, seabirds face a number of constraints when it comes to searching for their prey.<sup>32</sup> By way of example, chick-rearing seabirds require sufficient sandeel to be available within a limited feeding range during their breeding season in spring and summer, when they must travel between their nests on the coast and feeding areas to hunt, and feed their chicks.<sup>33</sup>
47. The United Kingdom highlights that certain of the seabirds whose breeding colonies are sandeel-dependent, including the black-legged kittiwake and Atlantic puffin, are vulnerable or endangered.<sup>34</sup> Further, these two species have been identified as particularly sensitive to changes in sandeel abundance based on various other factors, including diving ability, foraging range, and proportion of sandeel in their diet.<sup>35</sup>
48. The European Union asserts that there is a limited spatial overlap between the feeding range of chick-rearing seabirds for which sandeel comprise a substantial proportion of their diet and the

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July 2023, pp. 1, 5 (**Exhibit C-50**), *citing* Jensen *et al.*, ‘Inferring the location and scale of mixing between habitat areas of lesser sandeel through information from the fishery’ (2011) Vol. 68(1) ICES Journal of Marine Science 43 (**Exhibit C-23**); Gauld, ‘Movements of lesser sandeels (*Ammodytes marinus* Raitt) tagged in the northwestern North Sea’ (1990) Vol. 46(3) Journal du Conseil Permanent International pour l’Exploration de la Mer 229 (**Exhibit R-17**); Wright *et al.*, ‘Integrating the scale of population processes into fisheries management, as illustrated in the sandeel, *Ammodytes marinus*’ (2019) Vol. 76(6) ICES Journal of Marine Science 1453 (**Exhibit R-18**).

<sup>31</sup> See UK’s Written Submission, paras 91-93, 109.1, *citing* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 1, 5-8 (**Exhibit C-50**); Gibb *et al.*, ‘Connectivity in the early life history of sandeel inferred from otolith microchemistry’ (2017) Vol. 119 Journal of Sea Research 8, pp. 8, 14 (**Exhibit R-21**).

<sup>32</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 36-37, 41-42, 45 (**Exhibit C-50**).

<sup>33</sup> Markones, Dierschke, & Garthe, ‘Seasonal differences in at-sea activity of seabirds underline high energetic demands during the breeding period’ (2010) Vol. 151 Journal of Ornithology 329, p. 330 (**Exhibit C-38**).

<sup>34</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 12-13 (**Exhibit C-45**); OSPAR, ‘Status Assessment 2023 – Black-legged Kittiwake’ (**Exhibit R-30**); IUCN Red List, ‘*Fratrula arctica*, Atlantic Puffin’, 2018 (**Exhibit R-31**).

<sup>35</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 40 (**Exhibit C-50**).

sandeel fishery.<sup>36</sup> In the European Union’s submission, from among this specific subset of seabird species, the only two species declining in abundance are kittiwakes and shag.<sup>37</sup>

### 3. Sandeel Management within the Greater North Sea

49. Heading Five of Part Two of the TCA, on “Fisheries”, sets out the framework for the joint management of the Parties’ shared fish stocks, like sandeel, in their waters, as identified in Annex 35. Pursuant to Article 498 of the TCA, the European Union and the United Kingdom hold annual consultations with the objective of agreeing TACs for Annex 35 stocks, including sandeel.
50. When agreeing TACs, the European Union and the United Kingdom rely on scientific advice provided by an intergovernmental marine science organisation known as the International Council for the Exploration of the Sea (hereinafter “**ICES**”).<sup>38</sup> Per the United Kingdom, in addition to ICES scientific advice, the regulation of sandeel fishing in the Greater North Sea, and in particular the setting of TACs, is also informed by other sources.<sup>39</sup>
51. According to the European Union, for Annex 35 stocks for which ICES issues its scientific advice between June and October, the European Union and the United Kingdom hold consultations in November, with the objective of reaching agreement on TACs for those stocks by 10 December. In turn, for Annex 35 stocks for which ICES issues its scientific advice between November and May, the European Union and the United Kingdom hold in-year consultations to agree on TACs for stocks after the issuing of the relevant advice and before the opening of the relevant fishery season(s). This is the case for sandeel in the North Sea, for which ICES typically issues its scientific advice in the second half of February and the Parties hold consultations in March.<sup>40</sup>
52. For the purposes of providing scientific advice, ICES divides the seas into fishing zones known as ICES (statistical) areas (hereinafter “**ICES Divisions**”) as shown below:<sup>41</sup>

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<sup>36</sup> EU’s Written Submission, para. 79.

<sup>37</sup> EU’s Written Submission, para. 80, *citing* Dierschke *et al.*, ‘Marine Bird Abundance’, in OSPAR Commission, *OSPAR, 2023: The 2023 Quality Status Report for the North-East Atlantic* (2023) (**Exhibit C-41**).

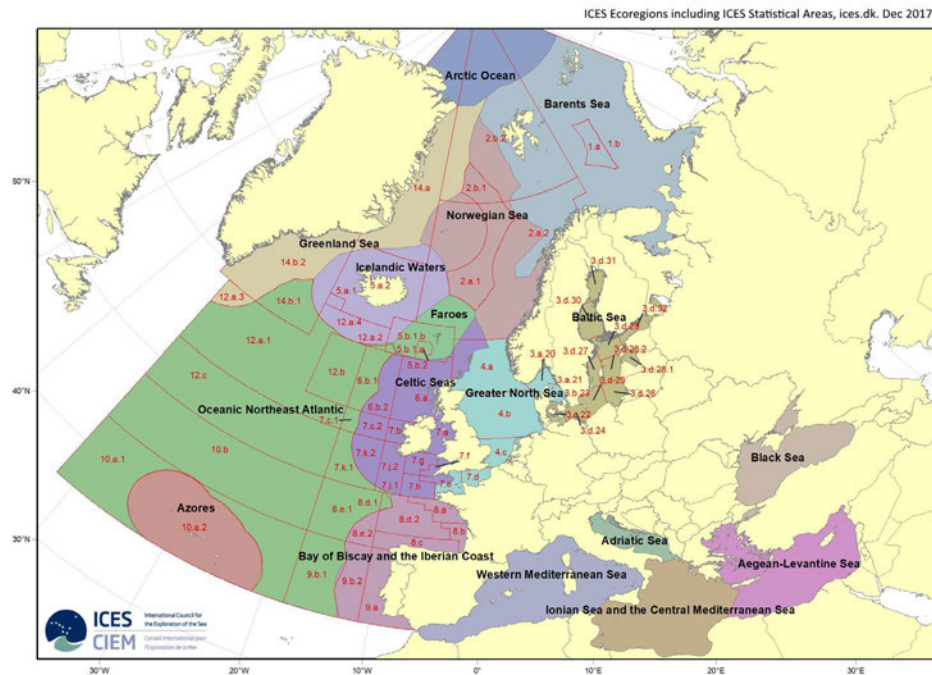
<sup>38</sup> EU’s Written Submission, paras 38, 40.

<sup>39</sup> UK’s Written Submission, paras 116, 123.

<sup>40</sup> EU’s Written Submission, paras 43-44.

<sup>41</sup> ICES Ecoregions including ICES Statistical Areas, December 2017 (**Exhibit C-9**).



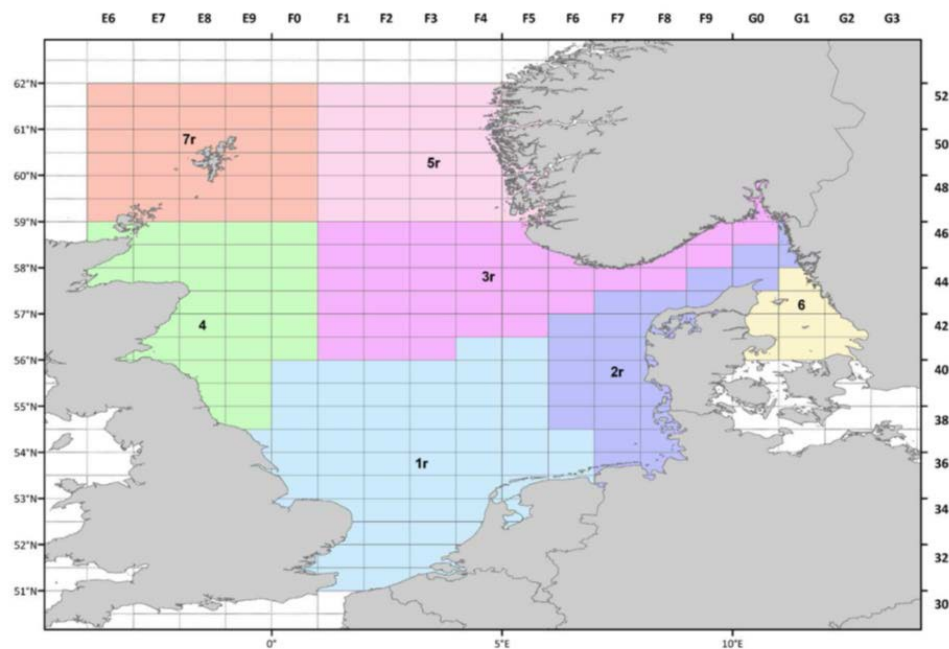


53. The English waters of the North Sea are located within ICES Divisions 4b, 4c, 7d and 7e, while the Scottish waters of the North Sea are located within ICES Divisions 4a and 4b.<sup>42</sup>
54. Further, specifically in respect of producing advice on sandeel, since 2011, ICES has divided the Greater North Sea into seven areas (1r, 2r, 3r, 4, 5r, 6, and 7r) (hereinafter the “**Sandeel Management Areas**”),<sup>43</sup> as shown in the figure below:<sup>44</sup>

<sup>42</sup> See ICES Ecoregions including ICES Statistical Areas, December 2017 (**Exhibit C-9**).

<sup>43</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 8 (**Exhibit C-45**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 13-14 (**Exhibit C-50**).

<sup>44</sup> Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194 [2024] OJ (L series), Annex III, Appendix (**Exhibit CLA-8**).



55. The English waters of the North Sea are located within Sandeel Management Areas 1r, 3r and 4, while the Scottish waters of the North Sea are located within Sandeel Management Areas 3r, 4, 5r and 7r.<sup>45</sup> Prior to the implementation of the sandeel fishing prohibition, sandeel fishing took place in five out of the seven areas (1r, 2r, 3r, 4 and 6).<sup>46</sup>
56. Since 2011, sandeel in the Greater North Sea has been managed according to an escapement strategy, pursuant to which maximum fishing levels (termed  $F_{cap}$ ) are set such that a minimum stock size should remain every year (biomass left after fishing,  $B_{escapement}$ ) so as not to affect negatively the recruitment of new sandeel the following year.<sup>47</sup> For this purpose, ICES employs two biomass-based biological reference points related to the risk of impaired reproductive capacity. The first,  $B_{lim}$ , is the size of spawning stock below which there is a high risk of reduced recruitment; and the second,  $B_{pa}$ , is a precautionary size of spawning stock that builds

<sup>45</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 14 (**Exhibit C-50**).

<sup>46</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 16 (**Exhibit C-50**).

<sup>47</sup> ICES Technical Service, 'Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species', 28 November 2023, pp. 2, 4 (**Exhibit C-22**); ICES, 'Advice on fishing opportunities', in *Report of the ICES Advisory Committee*, 2023, p. 4 (**Exhibit C-36**).

in a safety margin above  $B_{lim}$  to account for uncertainty in ICES stock estimates.<sup>48</sup> ICES often sets the minimum stock size at the precautionary level (*i.e.*,  $B_{escapement} = B_{pa}$ ).<sup>49</sup>

57. According to the European Union, since the introduction of the escapement strategy, the biomass of adults in Sandeel Management Areas 1r and 4, which are adjacent to the coast of Great Britain, has been above  $B_{lim}$  in every year since 2010 apart from 2014, when it was below  $B_{lim}$  in Sandeel Management Area 1r.<sup>50</sup>
58. The United Kingdom, however, points out that:<sup>51</sup>
- (a) in respect of Sandeel Management Area 4, ICES estimated the spawning stock was below  $B_{pa}$  in 2015, 2019, 2022, 2023 and 2024;<sup>52</sup>
  - (b) in respect of Sandeel Management Area 1r, ICES estimated the spawning stock was below  $B_{pa}$  in 2015, 2021 and 2022, and below  $B_{lim}$  in 2014, 2019 and 2020;<sup>53</sup> and

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<sup>48</sup> ICES, 'Advice on fishing opportunities', in *Report of the ICES Advisory Committee*, 2023, p. 4 (**Exhibit C-36**); ICES Technical Service, 'Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species', 28 November 2023, pp. 2, 7 (**Exhibit C-22**).

<sup>49</sup> ICES, 'Advice on fishing opportunities', in *Report of the ICES Advisory Committee*, 2023, Figure 3 (**Exhibit C-36**); *see also* ICES Advice, 'Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank)', 26 September 2017, p. 1 (**Exhibit C-30**) (noting that " $B_{pa} = MSY B_{escapement}$ ").

<sup>50</sup> EU's Written Submission, para. 72, *citing* ICES, 'Herring Assessment Working Group for the Area South of 62° N (HAWG)' (2024) Vol. 6(24) ICES Scientific Reports (**Exhibit C-37**).

<sup>51</sup> *See* UK's Written Submission, para. 122.

<sup>52</sup> *See* ICES, 'Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2020) (**Exhibit R-66**); ICES, 'Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2022) (**Exhibit R-67**); ICES, 'Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2023) (**Exhibit R-68**); ICES, 'Sandeel (*Ammodytes* spp.) in divisions 4.a–b, Sandeel Area 4 (northern and central North Sea)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2024) (**Exhibit C-14**).

<sup>53</sup> *See* ICES, 'Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2016) (**Exhibit C-28**); ICES, 'Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (September 2017) (**Exhibit C-30**); ICES, 'Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2019) (**Exhibit C-34**); ICES, 'Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2020) (**Exhibit R-65**); ICES, 'Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank)', in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2021) (**Exhibit C-33**); ICES, 'Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North

- (c) in respect of Sandeel Management Area 3r, ICES estimated the spawning stock was below  $B_{lim}$  in 2013, and below  $B_{pa}$  in 2014.<sup>54</sup>
59. ICES advice in respect of this escapement strategy is “consistent with the maximum sustainable yield approach, the aim of which is to have high stock sizes producing pretty good yields.”<sup>55</sup> In other words, ICES’ approach has the objective of pursuing “the highest yield over the long term”, integrated with a precautionary approach that aims to maintain populations within safe biological limits.<sup>56</sup>
60. Although ICES advice
- includes a provision to keep the stocks above a given precautionary level, there is no analysis of whether this precautionary level is sufficient to provide adequate food levels for individual predator populations. Such an analysis would need to take account of the interplay between ICES advice, national management measures, and the dynamics of a given predator population.<sup>57</sup>
61. Sandeel stock size is highly dependent on successful annual recruitment.<sup>58</sup> This is because sandeel experience high levels of natural fluctuation,<sup>59</sup> which is driven by both top-down processes, including natural mortality, and bottom-up processes, such as food availability and environmental variation.<sup>60</sup> In particular, sandeel are highly sensitive to variations in ocean temperature.<sup>61</sup> Further,
- 
- Sea, Dogger Bank)’, in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2022) (**Exhibit C-29**).
- <sup>54</sup> See ICES Advice, ‘Sandeel (*Ammodytes* spp.) in divisions 4.a–b and Subdivision 20, Sandeel Area 3r (northern and central North Sea, Skagerrak)’, 23 February 2017 (**Exhibit R-69**); ICES ‘Sandeel (*Ammodytes* spp.) in divisions 4.a–b and Subdivision 20, Sandeel Area 3r (northern and central North Sea, Skagerrak)’ 29 February 2024 (**Exhibit C-13**) (but still above the precautionary threshold in 2024).
- <sup>55</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 1 (**Exhibit C-22**).
- <sup>56</sup> ICES, ‘Advice on fishing opportunities’, in *Report of the ICES Advisory Committee*, 2023, p. 1 (**Exhibit C-36**); see also ICES Glossary (**Exhibit C-5**).
- <sup>57</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 1 (**Exhibit C-22**).
- <sup>58</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 *Marine Ecology Progress Series* 199, p. 200 (**Exhibit C-20**).
- <sup>59</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. i (**Exhibit C-45**).
- <sup>60</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 24 (**Exhibit C-50**).
- <sup>61</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 12-13 (**Exhibit C-45**); Scottish Government, ‘Review of Scientific Evidence on the

a correlation has been shown between sandeel larval abundance and zooplankton abundance, suggesting that sandeel recruitment is sensitive to the synchronisation of the period of hatching with the peak in specific zooplankton abundance.<sup>62</sup>

62. The United Kingdom highlights that high levels of sandeel natural fluctuation mean their abundance<sup>63</sup> and biomass<sup>64</sup> can vary significantly on a yearly basis, even without the added pressure of fishing mortality.
63. Further, being a short-lived species, there is a marked interannual variability of the recruitment of new sandeel, meaning that a larger sandeel stock size can result in a lower recruitment and stock size the following year, and *vice versa*.<sup>65</sup> For instance, in 2016 and 2022, ICES advised that there should be zero catches of sandeel in Sandeel Management Area 1r, whereas in 2017 and 2023, ICES advised that there could be significant catches of sandeel in that same area.<sup>66</sup>

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Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 8-10 (**Exhibit C-50**).

- <sup>62</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 3 (**Exhibit C-22**).
- <sup>63</sup> UK’s Written Submission, para. 96, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 21 (**Exhibit C-50**); Poloczanska *et al.*, ‘Fishing vs. natural recruitment variation in sandeel as a cause of seabird breeding failure at Shetland: a modelling approach’ (2004) Vol. 61 ICES Journal of Marine Science 788 (**Exhibit R-27**); *see also* UK’s Written Submission, para. 115, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 6, 11 (**Exhibit C-45**); DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 18 (**Exhibit C-44**).
- <sup>64</sup> UK’s Written Submission, para. 120, *referring to* ICES, ‘Advice on fishing opportunities’, in *Report of the ICES Advisory Committee*, 2023, p. 4 (**Exhibit C-36**); UK’s Written Submission, para. 96, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 25-26 (**Exhibit C-50**).
- <sup>65</sup> Arnott & Ruxton, ‘Sandeel recruitment in the North Sea: demographic, climatic and trophic effects’ (2002) Vol. 238 Marine Ecology Progress Series 199, p. 208 (**Exhibit C-20**).
- <sup>66</sup> ICES, ‘Sandeel (*Ammodytes* spp.) in Divisions 4b and 4c, SA 1 (Central and South North Sea, Dogger Bank)’, in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2016) (**Exhibit C-28**); ICES, ‘Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank)’, in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (February 2022) (**Exhibit C-29**); ICES ‘Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank)’, in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (September 2017) (**Exhibit C-30**); ICES, ‘Sandeel (*Ammodytes* spp.) in divisions 4.b–c, Sandeel Area 1r (central and southern North Sea, Dogger Bank)’, in *ICES Advice on fishing opportunities, catch and effort Greater North Sea Ecoregion* (March 2023) (**Exhibit C-31**).

## B. DOMESTIC LEGAL FRAMEWORKS

### 1. UK: Legal Framework

64. The Marine Strategy Regulations 2010 set out the duty to develop a single marine strategy for the UK's marine area and a target to achieve "Good Environmental Status" (hereinafter "**GES**"), which is generally defined as ecologically diverse and dynamic oceans and seas that are clean, healthy and productive.<sup>67</sup> In particular, Regulation 5(2) requires that "[t]he marine strategy must apply an ecosystem-based approach to the management of human activities".<sup>68</sup>
65. The United Kingdom's published marine strategy (hereinafter, "**UKMS**"), is updated cyclically in consultation with the Devolved Administrations and currently consists of three parts.<sup>69</sup> Notably, when Part One of the UKMS was first published in 2012, it recognised that "fishing has contributed to a reduction in sandeel availability and quality[,]"<sup>70</sup> while the 2019 update observed that "breeding seabird populations are not consistent with GES" and that "[t]his may be the result of lower availability of small fish (e.g., sandeels, sprat and herring)."<sup>71</sup>
66. In England and Wales in 2017, the Conservation of Habitats and Species Regulations 2017<sup>72</sup> and the Conservation of Offshore Marine Habitats and Species Regulations 2017<sup>73</sup> provided for the designation of protected habitats and the protection of wild and migratory birds, marine mammals and certain other species at favourable conservation status.

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<sup>67</sup> UK's Written Submission, para. 22, *referring to* UK Statutory Instruments, The Marine Strategy Regulations 2010, available at [www.legislation.gov.uk/ukSI/2010/1627/contents](http://www.legislation.gov.uk/ukSI/2010/1627/contents) (last accessed 27 March 2025); Commission Decision (EU) 2017/848 of 17 May 2017 laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment, and repealing Decision 2010/477/EU, available at [eur-lex.europa.eu/eli/dec/2017/848/oj/eng#:~:text=Commission%20Decision%20\(EU\)%202017%2F,\(Text%20with%20EEA%20relevance.%20\)](http://eur-lex.europa.eu/eli/dec/2017/848/oj/eng#:~:text=Commission%20Decision%20(EU)%202017%2F,(Text%20with%20EEA%20relevance.%20)) (last accessed 27 March 2025).

<sup>68</sup> UK Statutory Instruments, The Marine Strategy Regulations 2010, available at [www.legislation.gov.uk/ukSI/2010/1627/regulation/5](http://www.legislation.gov.uk/ukSI/2010/1627/regulation/5) (last accessed 27 March 2025).

<sup>69</sup> UK's Written Submission, para. 25.

<sup>70</sup> HM Government, 'Marine Strategy Part One: UK Initial Assessment and Good Environmental Status', December 2012, para. 214, p. 69 (**Exhibit R-2**).

<sup>71</sup> DEFRA, 'Marine Strategy Part One: UK updated assessment and Good Environmental Status', October 2019, pp. 68-69 (**Exhibit C-69**).

<sup>72</sup> Conservation of Habitats and Species Regulations 2017, available at [www.legislation.gov.uk/ukSI/2017/1012/contents](http://www.legislation.gov.uk/ukSI/2017/1012/contents) (last accessed 27 March 2025).

<sup>73</sup> Conservation of Offshore Marine Habitats and Species Regulations 2017, available at [www.legislation.gov.uk/ukSI/2017/1013/contents](http://www.legislation.gov.uk/ukSI/2017/1013/contents) (last accessed 27 March 2025).

67. With respect to environmental targets, in 2018 the UK Government published for England *A Green Future: Our 25 Year Plan to Improve the Environment* (hereinafter the “**25 Year Plan**”), which set goals relevant to the marine environment, including, by way of example, ensuring seafloor habitats are productive and sufficiently extensive to support healthy, sustainable ecosystems.<sup>74</sup>
68. Through the Fisheries Act 2020,<sup>75</sup> the United Kingdom sought to establish a new domestic framework for fisheries management.<sup>76</sup> Among other things, the Fisheries Act 2020 extended powers in the Marine and Coastal Access Act 2009 to allow for the regulation of fishing activity to protect the marine environment both in the inshore and offshore zones. Prior to the implementation of the UK Fisheries Act 2020, the United Kingdom had been a party to the EU Common Fisheries Policy (Regulation (EU) No 1380/2013) of 2013 (hereinafter the “**CFP**”).<sup>77</sup>
69. Section 1 of the Fisheries Act 2020 establishes eight objectives, which are intended to underpin fisheries management—namely (a) the sustainability objective, (b) the precautionary objective, (c) the ecosystem objective, (d) the scientific evidence objective, (e) the bycatch objective, (f) the equal access objective, (g) the national benefit objective, and (h) the climate change objective.
70. These foregoing objectives are also central to the Joint Fisheries Statement prepared in November 2022 by the UK Department for Environment Food and Rural Affairs (hereinafter “**DEFRA**”), Welsh Government, Scottish Government, and Department of Agriculture, Environment, and Rural Affairs (hereinafter “**DAERA**”), which, among other things, emphasises the ecosystem-based and precautionary approaches to fisheries management.<sup>78</sup>

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<sup>74</sup> HM Government, ‘A Green Future: Our 25 Year Plan to Improve the Environment’, 2018, p. 26 (**Exhibit R-1**).

<sup>75</sup> Fisheries Act 2020 (**Exhibit CLA-6**).

<sup>76</sup> See UK Parliament, Speech of Lord Gardiner of Kimble introducing the Fisheries Bill in the House of Lords at Second Reading (Hansard, 11 February 2020, col 2167-2171), available at [hansard.parliament.uk/Lords/2020-02-11/debates/F1D340E5-8EB8-4B77-ABD3-0A83120A349C/FisheriesBill\(HL\)](https://hansard.parliament.uk/Lords/2020-02-11/debates/F1D340E5-8EB8-4B77-ABD3-0A83120A349C/FisheriesBill(HL)) (“This Bill takes and reforms the EU’s sustainable fishing objectives and commits to a new, ambitious set of UK objectives, which are in the Bill”) (last accessed 27 March 2025).

<sup>77</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L 354/22, Article 16(1) (**Exhibit CLA-5**).

<sup>78</sup> Defra, Welsh Government, Scottish Government, DAERA, ‘Joint Fisheries Statement’, November 2022, paras 4.1.10-4.1.11 (**Exhibit R-5**).

71. Finally, in furtherance of the 25 Year Plan, the UK Government enacted the Environment Act 2021, which provides for environmental targets, and a statutory Environmental Improvement Plan (hereinafter the “EIP”), published in January 2023, which also applies an ecosystem-based approach.<sup>79</sup> Further, along with the EIP, the Environmental Targets (Biodiversity) (England) Regulations 2023 also set out targets on species’ extinction risk and species’ abundance.<sup>80</sup>

## 2. Scotland: Legal Framework

72. There are relevant aspects of the framework governing England and Wales that also apply in Scotland, including the Sea Fish (Conservation) Act 1967, Sea Fisheries (Wildlife Conservation) Act 1992, Conservation (Natural Habitats, &c.) Regulations 1994, Marine Strategy Regulations 2010, Conservation of Offshore Marine Habitats and Species Regulations 2017, Fisheries Act 2020, and Joint Fisheries Statement of 2022.<sup>81</sup>
73. By way of example, with respect to conservation measures, Section 1 of the Sea Fisheries (Wildlife Conservation) Act 1992 requires Scottish Ministers and relevant public authorities to “have regard to the conservation of marine flora and fauna” in making decisions.<sup>82</sup>
74. Nonetheless, in the United Kingdom, responsibility for fisheries is largely devolved to the nations.<sup>83</sup> Accordingly, because the management of fishing within Scottish waters is largely a devolved matter, the Scottish legal framework is distinct from that of the United Kingdom.<sup>84</sup>
75. Thus, there are certain materials that apply in Scotland only, including the Marine (Scotland) Act 2010 and the National Marine Plan published in 2015.<sup>85</sup>

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<sup>79</sup> Environmental Improvement Plan 2023: First revision of the 25 Year Environment Plan (Defra), 2023, p. 177 (**Exhibit R-6**) (the text refers to sandeel and Norway pout management on p. 179).

<sup>80</sup> UK’s Written Submission, para. 42.

<sup>81</sup> See UK’s Written Submission, para. 49.

<sup>82</sup> UK’s Written Submission, para. 56.

<sup>83</sup> EU’s Written Submission para. 167; UK’s Written Submission, para. 4.

<sup>84</sup> UK’s Written Submission, para. 48, *referring to* Scotland Act 1998 s 30(1), Sch 5 (**Exhibit RLA-1**); *see also* EU’s Written Submission, para. 167 (noting that “[f]isheries are a devolved competence in the UK” and “[f]or this reason, the UK gave effect to the sandeel fishing prohibition through different legal instruments governing English waters of the North Sea and all Scottish waters respectively.”).

<sup>85</sup> UK’s Written Submission, para. 52.



76. Scotland has also recognised the ecosystem importance of sandeel by adding them in 2014 as a Scottish priority marine feature in Scotland's seas.<sup>86</sup>

77. Further in December 2020, the Scottish Government published a Fisheries Management Strategy 2020-2030, which promotes an "ecosystem-based approach" to managing Scotland's sea fisheries and noted a focus, among other things, on "restricting fishing activity and prohibiting fishing for species which are integral components of the marine food web, such as sandeels."<sup>87</sup>

**C. THE PARTIAL PROHIBITION OF SANDEEL FISHING IN UK WATERS OF THE NORTH SEA PRIOR TO THE SANDEEL FISHING PROHIBITION**

78. On 8 June 2000, by way of Council Regulation (EC) No 1298/2000, the European Union (which then included the United Kingdom) prohibited sandeel fishing in an area within English waters of ICES Division 4b and Scottish waters of ICES Divisions 4a and 4b, that falls within Sandeel Management Area 4.<sup>88</sup> The closure was introduced in response to an observed decline in the breeding success of seabirds.<sup>89</sup>

79. Recital 2 to Regulation (EC) No 1298/2000 reads:

Recent scientific advice indicates that quantities of sandeels within an area off the northeast coast of England and the east coast of Scotland are currently insufficient to support both fisheries upon them and the requirements of various species for which sand eels are a major component of their diet and that a closure of fisheries for sandeels in this area is therefore required.<sup>90</sup>

80. Article 1(2) of the same Regulation fixed the following restrictions on fishing for sandeel:

[...]

1. During the years 2000, 2001 and 2002, it shall be prohibited to land or retain on board sand eels caught within the geographical area bounded by the east coast of England and Scotland, and a line sequentially joining the following coordinates:
  - the east coast of England at latitude 55° 30\_N,
  - latitude 55° 30\_N, longitude 1° 00\_W,
  - latitude 58° 00\_N, longitude 1° 00\_W,

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<sup>86</sup> See Nature Scot, Priority Marine Features in Scotland's Seas – The List, 2020, available at [www.nature.scot/doc/priority-marine-features-scotlands-seas-list](http://www.nature.scot/doc/priority-marine-features-scotlands-seas-list) (last accessed 27 March 2025).

<sup>87</sup> Scottish Government, 'Scotland's Fisheries Management Strategy 2020 – 2030', 2020, p. 10 (**Exhibit R-9**).

<sup>88</sup> EU's Written Submission, paras 83-84, *citing* Council Regulation (EC) No 1298/2000 of 8 June 2000 amending for the fifth time Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [2000] OJ L 148/1 (**Exhibit CLA-9**).

<sup>89</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 48 (**Exhibit C-50**).

<sup>90</sup> Council Regulation (EC) No 1298/2000 of 8 June 2000 amending for the fifth time Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [2000] OJ L 148/1, Recital 2 (**Exhibit CLA-9**).

— latitude 58° 00\_N, longitude 2° 00\_W,  
— the east coast of Scotland at longitude 2° 00\_W.

2. Before 1 March 2001 and again before 1 March 2002, the Commission will report to the Council on the effects of the provision contained in paragraph 1. On the basis of the said reports, the Commission may propose appropriate amendments to the conditions indicated in paragraph 1.<sup>91</sup>

[...]

81. The 2000 prohibition on sandeel fishing was established again in 2002,<sup>92</sup> 2009,<sup>93</sup> 2011,<sup>94</sup> and 2013.<sup>95</sup> As of 2019, the same prohibition was established in Part C of Annex V to Regulation (EU) 2019/1241<sup>96</sup> and, following its withdrawal from the European Union, the United Kingdom retained that prohibition as part of its domestic law.<sup>97</sup>
82. The extent of the 2000 prohibition is reflected in the figure below by the grey hatched area, and covers about 27% of fishing grounds historically targeted by the fishery in Sandeel Management

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<sup>91</sup> Council Regulation (EC) No 1298/2000 of 8 June 2000 amending for the fifth time Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [2000] OJ L 148/1, Article 1(2) (**Exhibit CLA-9**).

<sup>92</sup> Council Regulation (EC) No 2341/2002 of 20 December 2002 fixing for 2003 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required [2002] OJ L 356/12, Article 9, Annex V, point 10 (**Exhibit CLA-10**).

<sup>93</sup> Council Regulation (EC) No 43/2009 of 16 January 2009 fixing for 2009 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required [2009] OJ L 22/1, Article 13, Annex III, point 4 (**Exhibit CLA-11**); Council Regulation (EC) No 1288/2009 of 27 November 2009 establishing transitional technical measures from 1 January 2010 to 30 June 2011 [2009] OJ L 347/6, Article 1(1) (**Exhibit CLA-12**).

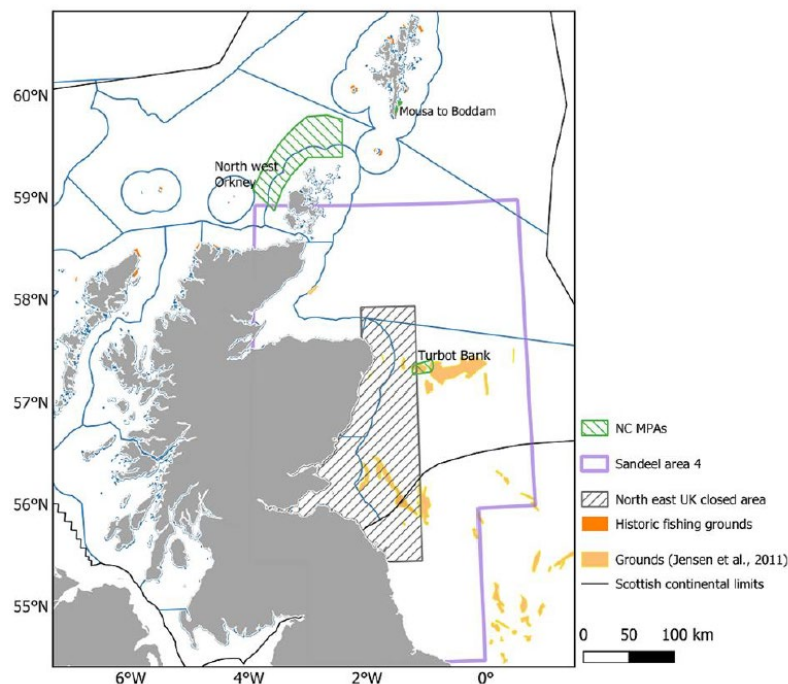
<sup>94</sup> Regulation (EU) No 579/2011 of the European Parliament and of the Council of 8 June 2011 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1288/2009 establishing transitional technical measures from 1 January 2010 to 30 June 2011 [2011] OJ L 165/1, Article 2(1)(a) (**Exhibit CLA-56**).

<sup>95</sup> Regulation (EU) No 227/2013 of the European Parliament and of the Council of 13 March 2013 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1434/98 specifying conditions under which herring may be landed for industrial purposes other than direct human consumption [2013] OJ L 78/1, Article 1(10) (**Exhibit CLA-13**).

<sup>96</sup> Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 [2019] OJ L 198/105, Annex V, Part C (**Exhibit CLA-15**).

<sup>97</sup> EU's Written Submission, para. 90.

Area 4.<sup>98</sup> According to the United Kingdom, this area constituted approximately 8.78% of UK waters of the North Sea.<sup>99</sup> The European Union notes that if the closed area in Sandeel Management Area 1r is also taken into account, the 2000 prohibition extends approximately to 11% of UK waters of the North Sea.<sup>100</sup>



83. As such, the sandeel fishing prohibition forming the basis for the European Union’s claims in this Arbitration was enacted in addition to the pre-existing prohibition in part of English and Scottish waters.<sup>101</sup>

#### **D. PUBLIC CONSULTATIONS PRECEDING THE SANDEEL FISHING PROHIBITION**

84. 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

<sup>98</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 18-19, Figure 12 (**Exhibit C-50**).

<sup>99</sup> UK’s Responses to Questions, p. 3.

<sup>100</sup> EU’s Responses to Questions, para. 8; EU’s Replies to the UK’s Responses to Questions, para. 11.

<sup>101</sup> EU’s Written Submission, para. 91.

impact of sandeel fisheries on the marine ecosystem.<sup>102</sup> In line with this, the United Kingdom has declined to allocate any of its own sandeel fishing quota under the TCA since 2021.<sup>103</sup>

85. Three public consultations were conducted in the United Kingdom before the sandeel fishing prohibition was implemented: a call for evidence launched by the UK Fisheries Administrations (DEFRA, Scottish Government, Welsh Government and DAERA) on 22 October 2021;<sup>104</sup> a public consultation launched by DEFRA on 6 March 2023;<sup>105</sup> and a public consultation launched by the Scottish Government on 21 July 2023.<sup>106</sup>
86. In addition, on 28 November 2023, ICES issued a Technical Service in response to a joint request from the European Union and United Kingdom regarding ecosystem considerations in the provision of single-stock advice for forage fish species.<sup>107</sup>

#### 1. UK Fisheries Administrations Joint Call for Evidence

87. On 22 October 2021, the UK Fisheries Administrations launched a joint “Call for Evidence on the future management of Sandeels and Norway pout” (hereinafter the “**Call for Evidence**”).<sup>108</sup>
88. The foreword to the document expressed ongoing concerns regarding the health of North Sea sandeel stocks in light of changing environmental conditions, combined with the continued removal of sandeel (and Norway pout) through industrial fishing methods.<sup>109</sup> It explained that, “[d]espite the introduction of management measures aimed at increasing the resilience to the stocks, there is limited evidence of either the recovery of the relevant stocks or the wider ecosystem as a result of these measures.”<sup>110</sup>

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<sup>102</sup> UK’s Written Submission, paras 130-131, *referring to, e.g.*, Dr. Euan Dunn, RSPB, ‘Revive our Seas: The case for stronger regulation of sandeel fisheries in UK waters’, June 2021 (**Exhibit R-29**).

<sup>103</sup> UK’s Written Submission, para. 132, *referring to* Sunbeam Fishing Ltd v Secretary of State for Environment, Food and Rural Affairs [2023] CSOH 16; 2023 SLT 369, paras 10-12 (**Exhibit RLA-10**).

<sup>104</sup> See Section III.D.1 below.

<sup>105</sup> See Section III.D.2 below.

<sup>106</sup> See Section III.D.3 below.

<sup>107</sup> See Section III.D.4 below.

<sup>108</sup> DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021 (**Exhibit C-43**).

<sup>109</sup> DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021, p. 4 (**Exhibit C-43**).

<sup>110</sup> DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021, p. 4 (**Exhibit C-43**).

89. While noting the restrictions already in place to protect sandeel stocks in UK waters, the Call for Evidence sought evidence on the necessity of additional management measures.<sup>111</sup>
90. In particular, the Call for Evidence sought “to understand any benefits of further restrictions on fishing for sandeels within UK waters,” including “a ban on sandeel fishing in UK waters,” among others.<sup>112</sup>
91. Per the United Kingdom, most of the 36 respondents to the Call for Evidence were in favour of implementing new management measures.<sup>113</sup>
92. Regarding other forage fish, since 2021, the United Kingdom has declined to allocate any of its own 23% quota for Norway pout, and is continuing to consider measures in respect of this species of fish.<sup>114</sup> Further, since 2024 the United Kingdom has been considering “ecosystem-based management approaches” for sprat.<sup>115</sup> The Parties have not briefed the Arbitration Tribunal on whether the United Kingdom is considering new management measures for herring.<sup>116</sup>

## 2. DEFRA English Sandeel Consultation

93. DEFRA ran a public consultation from 6 March 2023 to 30 May 2023 to gather views on proposed management measures, including the prohibition of sandeel fishing, in English waters of the North Sea (hereinafter the “**English Sandeel Consultation**”). The consultation produced (i) a document prepared by DEFRA itself in March 2023 entitled “Consultation on Spatial Management Measures for Industrial Sandeel Fishing”<sup>117</sup> (hereinafter the “**DEFRA Consultation Document**”)

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<sup>111</sup> DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021, p. 8 (**Exhibit C-43**).

<sup>112</sup> DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021, p. 8 (**Exhibit C-43**).

<sup>113</sup> UK’s Written Submission, para. 136, *referring to* DEFRA, Call for evidence outcome: Summary of responses, 18 March 2022 (**Exhibit R-71**).

<sup>114</sup> DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021, p. 4 (**Exhibit C-43**); UK’s Written Submission, para. 422.1, n. 851; Hearing, 29 January 2025, 82:12-15 (Juratowitch).

<sup>115</sup> UK’s Written Submission, para. 422.1, *citing* Report: The importance of sprat to the wider marine ecosystem in the North Sea and English Channel (ICES Subarea 4 and Divisions 7.d–e), 28 March 2024 (**Exhibit R-128**); EU’s Responses to Questions, para. 20.

<sup>116</sup> EU’s Responses to Questions, para. 21.

<sup>117</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023 (**Exhibit R-61**).

together with (ii) a De Minimis Assessment dated 1 February 2023<sup>118</sup> (hereinafter the “**DMA**”), and (iii) a document prepared by Natural England, Cefas and JNCC published on 7 March 2023 and entitled “What are the ecosystem risks and benefits of full prohibition of industrial sandeel fishing in the UK waters of the North Sea (ICES Subarea 4)?”<sup>119</sup> (hereinafter the “**Natural England/Cefas/JNCC Advice**”).

**(a) DEFRA Consultation Document and DMA**

94. The DEFRA Consultation Document and DMA set out the issue and the rationale for government intervention. Recognising the importance of sandeel as forage fish to the marine ecosystem of the North Sea, the DEFRA Consultation Document and DMA noted that they are a key food source for “threatened and vulnerable species in the wider marine environment.”<sup>120</sup>
95. While the DEFRA Consultation Document and DMA also identified other categories of possible further management measures—including, (i) technical measures such as gear configuration or increased mesh sizes, (ii) a prohibition of sandeel fishing for part of the fishing season, and (iii) a voluntary prohibition of the sandeel fishery<sup>121</sup>—the DMA indicated that either a full or partial closure of industrial sandeel fishing within English waters of the North Sea was the preferred option.<sup>122</sup> The full closure would see a full prohibition of industrial sandeel fishing within the English waters of Sandeel Management Areas 1r, 3r, and 4, whereas the partial closures being considered were of the English waters of Sandeel Management Areas 4 and 3r or, alternatively, Sandeel Management Area 1r alone.<sup>123</sup> The objective of the prohibition would be “[t]o increase

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<sup>118</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023 (**Exhibit C-44**). As explained by the United Kingdom, “De Minimis Assessments are produced to support policy formulation [...] and act as a focus for external comment during any consultation.” As further explained by the United Kingdom, the DMA was wrongly dated 1 February 2022, *see* UK’s Written Submission, n. 226.

<sup>119</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023 (**Exhibit C-45**).

<sup>120</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, p. 4 (**Exhibit R-61**); DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 1 (**Exhibit C-44**).

<sup>121</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, pp. 9-10 (**Exhibit R-61**); DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, paras 14-25 (**Exhibit C-44**).

<sup>122</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 2, para. 13 (**Exhibit C-44**).

<sup>123</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023,

the biomass of sandeel stocks and therefore increase the food availability for higher trophic level predators such as seabirds within the wider ecosystem”.<sup>124</sup>

96. In particular, the DMA summarised the ecosystem benefits of the proposal of full closure, as follows:<sup>125</sup>

Impact type	Impact	Summary of ecosystem impact
Benefit	Increased sandeel resilience	Fluctuations in sandeel stocks are largely driven by extraneous factors (e.g., hydroclimatic factors). Even if fishery exploitation rates are low, the risk of stock collapse exists. However, the risk of collapse increases with increasing exploitation pressure. Reducing exploitation by prohibiting fishing in English waters may increase sandeel resilience.
Benefit	Increased seabird resilience	Increased population resilience for seabirds for which increased sandeel availability can positively impact on reproductive success (e.g., kittiwakes).
Benefit	Increased occurrence of marine mammals within English waters	Previous studies have linked the abundance of sandeels to the distributions of marine mammals in the North Sea. Therefore, if management actions led to an increase of sandeels in the English waters, we might expect to observe an increased occurrence of marine mammals in English waters.
Benefit	Improved condition of other commercial fish	Predatory fish have flexible diets and are likely to compensate for declines in sandeel availability. However, increased sandeel availability and consumption has been shown to positively correlate with the body condition of some commercial fish (e.g., whiting, haddock, and plaice) which relates to growth, reproduction, and survival chances.
Benefit	Progress towards Good Environmental Status (GES)	Several substantiated links have been made between the abundance of sandeels and the survival and breeding success of birds, mammals, and commercial fish, linking to the targets and indicators of the UKMS and GES descriptors (D1, D3, D4).

97. As touched on above, the UK Marine Strategy Regulations 2010 require the United Kingdom to take action to maintain GES in its seas as of 2020.<sup>126</sup> The DEFRA Consultation Document explained, however, that frequent and widespread breeding failures had been observed in 35% of

pp. 9-10 (**Exhibit R-61**); DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 2, para. 13 (**Exhibit C-44**).

<sup>124</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para. 10 (**Exhibit C-44**).

<sup>125</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, Table 3 (**Exhibit C-44**).

<sup>126</sup> See para. 64 above.

seabird species in the Greater North Sea.<sup>127</sup> These declines in seabird breeding abundance and extensive breeding failures were largely attributed to the reduced availability of small fish on which seabirds feed.<sup>128</sup>

98. The DEFRA Consultation Document and DMA recognised that the proposed prohibition of sandeel fishing would disproportionately affect EU vessels and the EU fishmeal and fish oil sectors, in particular those from Denmark,<sup>129</sup> while noting that the cost to UK registered vessels and UK businesses would be “relatively low.”<sup>130</sup> Indeed, it specified that “[o]ver 99% of the total UK and EU value of sandeel landed from English waters has historically been landed by EU vessels,”<sup>131</sup> while estimating “the net present cost over the 10-year appraisal period to non-UK vessels [...] to be £354 million.”<sup>132</sup>

**(b) Natural England/Cefas/JNCC Advice**

99. Natural England, Cefas (Centre for Environment, Fisheries and Aquaculture Science), and JNCC (Joint Nature Conservation Committee) provide advice and interpret data pertaining to the natural environment.<sup>133</sup> The Natural England/Cefas/JNCC Advice was requested by DEFRA in light of the Call for Evidence, and pertained to the ecosystem risks and benefits of a full prohibition of industrial sandeel fishing in the UK waters of the North Sea.<sup>134</sup>

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<sup>127</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, p. 5 (**Exhibit R-61**).

<sup>128</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, p. 5 (**Exhibit R-61**).

<sup>129</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, paras 65-66, Annex 1 (**Exhibit C-44**); DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, p. 7 (**Exhibit R-61**).

<sup>130</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para. 73 (**Exhibit C-44**).

<sup>131</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para. 65 (**Exhibit C-44**).

<sup>132</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, Annex 1 (**Exhibit C-44**).

<sup>133</sup> Gov.UK, Natural England (**Exhibit C-46**); Gov.UK, Centre for Environment Fisheries and Aquaculture Science (**Exhibit C-47**); Gov.UK, Joint Nature Conservation Committee (**Exhibit C-48**).

<sup>134</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. i (**Exhibit C-45**).



100. In commenting on sandeel dynamics, the Natural England/Cefas/JNCC Advice concluded that increased fishing pressure would likely increase the potential for sandeel stocks being below the minimum acceptable biomass, especially when coupled with adverse environmental conditions.<sup>135</sup>
101. Based on a review of the existing scientific literature, the Natural England/Cefas/JNCC Advice noted, among other things, that historically, “spatially restricted closures to sandeel fishing [...] have been linked to increases in the local sandeel population sizes”<sup>136</sup> and that “[o]f the multiple species of seabirds studied, the links between sandeels and blacklegged kittiwakes appears to be one of the strongest.”<sup>137</sup>
102. The Natural England/Cefas/JNCC Advice also identified links between sandeel abundance and the conditions of various marine mammals, including harbour seals, grey seals, and harbour porpoises.<sup>138</sup>
103. “To better understand the potential ecosystem benefits and risks[,]” the Natural England/Cefas/JNCC Advice also presented two models intended “to simulate the full prohibition of sandeel fishing in UK waters of the North Sea”<sup>139</sup>: an “Ecopath with Ecosim” (hereinafter “**EwE**”) model of the North Sea and an “ensemble model”.<sup>140</sup> The European Union’s submission focuses almost exclusively on the EwE model. The EwE model was initially built by other scientists in 2007 and then updated using data up to 2013.<sup>141</sup> In 2015, the updated EwE model

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<sup>135</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 11 (**Exhibit C-45**).

<sup>136</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 11 (**Exhibit C-45**).

<sup>137</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 13 (**Exhibit C-45**).

<sup>138</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 12, 15 (**Exhibit C-45**).

<sup>139</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 21 (**Exhibit C-45**).

<sup>140</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 21-34 (**Exhibit C-45**).

<sup>141</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’,

was reviewed and granted Key Run status by the ICES Working Group for Multispecies Assessment Methods (hereinafter “ICES WGSAM”), which status, in general terms, indicates that the model is agreed and accepted as a quality assured source by ICES.<sup>142</sup> That EwE model was finally updated for the Natural England/Cefas/JNCC Advice using data up to 2020, by “bringing simulations to 2020 by updating the underlying time series data (Driver time series: fishing effort and mortality and Calibration time series: catch and biomass).”<sup>143</sup>

104. The results of the updated EwE model indicate that, over a period of around ten years, prohibiting sandeel fishing in UK waters “may reduce sandeel exploitation to somewhere between 5% and 13%, which is estimated to lead to increase in seabird biomass in the North Sea between 4% and 8%,”<sup>144</sup> and to an increase in seal biomass of between two and five percent.<sup>145</sup> The model also showed, *inter alia*, that the prohibition would have “limited impacts on the biomasses of toothed whales and baleen whales as their consumption in the model was compensated by increased consumption of other prey (such as whiting and mackerel).”<sup>146</sup>
105. The Natural England/Cefas/JNCC Advice was reviewed and then approved for publication on 8 November 2022 by the UK Fisheries Science Advisory Panel, which is an expert consultative forum consisting of fisheries specialists from England, Scotland, Wales and Northern Ireland.<sup>147</sup>

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7 March 2023, p. 21 (**Exhibit C-45**); UK’s Written Submission, paras 238-239; EU’s Responses to Questions, para. 105; Hearing, 29 January 2025, 110:16-22, 113:10-11 (Boileau).

<sup>142</sup> UK’s Written Submission, paras 238-239; EU’s Responses to Questions, para. 105; Hearing, 29 January 2025, 112:1-113:11 (Boileau).

<sup>143</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 21 (**Exhibit C-45**); UK’s Written Submission, paras 238-239; EU’s Responses to Questions, para. 105; Hearing, 29 January 2025, 113:11-114:15 (Boileau).

<sup>144</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. i, 25 (**Exhibit C-45**).

<sup>145</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 27, 29 (**Exhibit C-45**).

<sup>146</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 29 (**Exhibit C-45**).

<sup>147</sup> UK Fisheries Science Advisory Panel: Advice Output Sheet, ‘Review the joint evidence-based advice provided by NE/Cefas/JNCC entitled: What are the ecosystem risks and benefits of full prohibition of industrial sandeel fishing in the UK waters of the North Sea (ICES Area IV)’, 8 November 2022 (**Exhibit R-73**).

**(c) Responses to the Consultation Process**

106. The English Sandeel Consultation received 340 responses from various stakeholders.<sup>148</sup> Of these, 95.5% supported a full spatial closure of sandeel fishing in the North Sea, with the majority disagreeing with the proffered options for a partial closure of English waters or with the implementation of alternative management measures.<sup>149</sup>
107. Both the European Union, through the relevant EU Commissioner, and Denmark, through the Danish Ministry of Food, Agriculture and Fisheries, provided responses to the consultation that opposed the imposition of a full spatial closure.<sup>150</sup> The Danish response annexed an economic summary<sup>151</sup> and a review of the Natural England/Cefas/JNCC Advice prepared by the Danish scientific institute DTU Aqua.<sup>152</sup>
108. Natural England, Cefas and JNCC prepared a summary review of the scientific elements of the consultation responses on 19 June 2023 and provided it to DEFRA.<sup>153</sup>
109. Further, the consultation responses and available scientific advice were considered in a Ministerial Submission dated 14 September 2023.<sup>154</sup> The submission recommended a full prohibition of sandeel fishing in English waters of the North Sea, noting that this would be “the first opportunity taken to introduce significant fisheries measures based on ecosystem advice” and that “[t]here are currently no known alternative management interventions that could produce the same potential beneficial effect as closing the sandeel fishery.”<sup>155</sup>

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<sup>148</sup> DEFRA, ‘Summary of responses to Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 31 January 2024, p. 4 (**Exhibit R-75**).

<sup>149</sup> DEFRA, ‘Summary of responses to Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 31 January 2024, pp. 6-10 (**Exhibit R-75**).

<sup>150</sup> Letter of Directorate-General for Maritime Affairs and Fisheries of the European Commission to DEFRA in response to the English sandeel consultation, 30 May 2023 (**Exhibit C-55**); Letter from the Ministry of Food, Agriculture and Fisheries of Denmark to DEFRA, 26 May 2023 (**Exhibit R-78**).

<sup>151</sup> Annex I to the Letter from the Ministry of Food, Agriculture and Fisheries of Denmark to DEFRA, 26 May 2023: Economic Overview (**Exhibit R-79**).

<sup>152</sup> Annex II to Letter from the Ministry of Food, Agriculture and Fisheries of Denmark to DEFRA, 26 May 2023: Scientific Review by DTU Aqua, 12 May 2023 (**Exhibit R-81**).

<sup>153</sup> Natural England/Cefas/JNCC, ‘Summary review of the evidence presented by respondents to the consultation to prohibit industrial fishing in UK waters’ (**Exhibit R-76**).

<sup>154</sup> Ministerial Submission, 14 September 2023 (**Exhibit R-77**).

<sup>155</sup> Ministerial Submission, 14 September 2023, paras 15-16 (**Exhibit R-77**).

110. Both the Natural England, Cefas and JNCC review and the Ministerial Submission also considered the responses received from the European Union and Denmark to the consultation process.<sup>156</sup>

### 3. Scottish Government Public Consultation

111. The Scottish Government launched a public consultation that ran from 21 July 2023 to 13 October 2023, regarding the prohibition of sandeel fishing in all Scottish waters (hereinafter the “**Scottish Sandeel Consultation**”), which produced four documents, entitled (i) “Consultation on proposals to close fishing for sandeel in all Scottish waters”<sup>157</sup> (hereinafter the “**Scottish Consultation Document**”), (ii) “Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment”<sup>158</sup> (hereinafter the “**Scottish Scientific Review**”), (iii) “Partial Business and Regulatory Impact Assessment”<sup>159</sup> (hereinafter the “**Scottish Partial Impact Assessment**”), and (iv) “Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters”<sup>160</sup> (hereinafter the “**Scottish SEA**”).

#### (a) *Scottish Consultation Document*

112. While explicitly identifying the “preferred option” as the prohibition of sandeel fishing in all Scottish waters,<sup>161</sup> the Scottish Consultation Document stated that the aims of the consultation were to “seek effective protection of sandeel, as a contribution to the wider marine ecosystem,” “provide the opportunity for wider ecosystem benefits to a range of species, including commercial fish species, seabirds and marine mammals,” and “complement [...] existing sandeel management measures.”<sup>162</sup>

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<sup>156</sup> Natural England/Cefas/JNCC, ‘Summary review of the evidence presented by respondents to the consultation to prohibit industrial fishing in UK waters’ (**Exhibit R-76**); Ministerial Submission, 14 September 2023, paras 19-27 (**Exhibit R-77**).

<sup>157</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023 (**Exhibit C-49**).

<sup>158</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023 (**Exhibit C-50**).

<sup>159</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023 (**Exhibit C-51**).

<sup>160</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023 (**Exhibit C-52**).

<sup>161</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 23-25, 31 (**Exhibit C-49**).

<sup>162</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 3 (**Exhibit C-49**).

113. The Scottish Consultation Document noted that restrictions in sandeel fishing could lead to an increase in their abundance, which could “thereby provid[e] benefits to other North Sea top predators, including key whitefish species, seabirds and marine mammals.”<sup>163</sup> In particular, it specified that this is an important mechanism for achieving resilience in seabird populations.<sup>164</sup>
114. While highlighting the unpredictable extent to which the foregoing benefits could be realised “due to variation in sandeel abundance and availability which is driven by fishing mortality and, to a large extent, by natural mortality which is influenced by prevailing environmental conditions (including climate change) and predation,” the Scottish Consultation Document concluded by noting that, subject to the outcome of the public consultation, it proposed closing the fishing for sandeel in all Scottish waters from the 2024 fishing season onwards.<sup>165</sup>
115. The Scottish Consultation Document recognised that EU businesses would essentially be the ones impacted by any management measures introduced in all Scottish waters.<sup>166</sup>

**(b) *Scottish Scientific Review***

116. Following a review of the available scientific evidence, the Scottish Scientific Review highlighted the difficulty in predicting the effect that fishery closures might have on the development of sandeel stock, explaining that “it involves complex interactions between multiple drivers of both sandeel and predator dynamics.”<sup>167</sup> It noted that “factors such as environmental change (temperature effects, regime shifts) and top-down processes (trophic regulation by marine predators)”, which impact sandeel “natural mortality,” “played a more prominent role than fishing mortality in shaping sandeel abundance in Scottish waters”.<sup>168</sup>
117. The Scottish Scientific Review found a “negative relationship between presence of a sandeel fishery and kittiwake breeding success, but limited evidence of a negative relationship for the

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<sup>163</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 23 (**Exhibit C-49**).

<sup>164</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 16, 24 (**Exhibit C-49**).

<sup>165</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 16, 24 (**Exhibit C-49**).

<sup>166</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 23 (**Exhibit C-49**).

<sup>167</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 74 (**Exhibit C-50**).

<sup>168</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 24-25, 36, 55 (**Exhibit C-50**).

other seabird species studied.”<sup>169</sup> Further, it similarly noted the difficulties in establishing a causal relationship between industrial sandeel fishing and seabird demography,<sup>170</sup> especially because the latter is also influenced by lag effects and interannual fluctuations.<sup>171</sup> In particular, it noted that the spatial availability of prey such as sandeel, rather than their mere abundance, plays a key role in the breeding success and foraging practices of certain seabirds like kittiwake.<sup>172</sup> Nonetheless, it concluded that “maximising abundance and availability of sandeel stocks as prey for seabirds in Scotland remains a key mechanism by which resilience in seabird populations might be achieved.”<sup>173</sup>

118. Regarding the significance of a sandeel fishing prohibition for marine mammals and predatory fish, the Scottish Scientific Review highlighted the same difficulties in identifying a cause-and-effect relationship,<sup>174</sup> but considered it “a reasonable assumption that any increase in sandeel abundance that might result from a reduction in fisheries pressure might be beneficial to several populations of marine mammals.”<sup>175</sup> In line with this, and like the Natural England/Cefas/JNCC Advice, the Scottish Scientific Review identified links between sandeel abundance and the condition of various marine mammals.<sup>176</sup>

### **(c) Scottish Partial Impact Assessment**

119. Like the DEFRA Consultation Document, the Scottish Partial Impact Assessment identified three additional categories of possible further management measures—that is, (i) a prohibition of sandeel fishing in Sandeel Management Area 4 only, (ii) a prohibition of sandeel fishing for part

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<sup>169</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 50 (**Exhibit C-50**).

<sup>170</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 55, 46 (**Exhibit C-50**).

<sup>171</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 46 (**Exhibit C-50**).

<sup>172</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 51, 53, 55 (**Exhibit C-50**).

<sup>173</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 56 (**Exhibit C-50**).

<sup>174</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 35, 74 (**Exhibit C-50**).

<sup>175</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 74 (**Exhibit C-50**).

<sup>176</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 73 (**Exhibit C-50**).

of the fishing season, and (iii) a voluntary prohibition of the sandeel fishery—but concluded that a full prohibition on sandeel fishing in all Scottish waters was the preferred option.<sup>177</sup>

120. In addition, the Scottish Partial Impact Assessment likewise acknowledged that EU vessels, primarily those from Denmark, “w[ould] face the largest cost” of a complete sandeel fishery closure “as they are the main catchers of sandeel in Scottish waters,” while estimating the net present cost of the measure over a 10-year appraisal period to non-UK vessels as GBP 32.8 million.<sup>178</sup>

**(d) *Scottish SEA***

121. The Scottish SEA identified the same four categories of possible further management measures as the Scottish Partial Impact Assessment, and similarly noted that the prohibition of sandeel fishing in all Scottish waters was the preferred option.<sup>179</sup> It concluded by stating that the contemplated extension of the existing sandeel fishery closure to all Scottish waters “has the potential to result in environmental benefits for a range of marine species including sandeel, seabirds, marine mammals and predatory fish.”<sup>180</sup>

**(e) *Responses to the Consultation Process***

122. The Scottish Sandeel Consultation received 494 written representations from individuals and organisations, as well as 9,815 campaign submissions.<sup>181</sup> In summarising the responses, the Scottish Government noted that “[t]here was overwhelming support for [its] preferred option to close fishing for sandeel in all Scottish waters, with 97% in support and 3% in opposition.”<sup>182</sup>
123. Many of the respondents failed to offer views on alternative or complementary measures, with some suggesting that such alternatives would be incompatible with the goal of increasing sandeel

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<sup>177</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 8-9, 11-12, 14 (**Exhibit C-51**).

<sup>178</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 13 (**Exhibit C-51**).

<sup>179</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, pp. 26, 86-87 (**Exhibit C-52**).

<sup>180</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, p. 90 (**Exhibit C-52**).

<sup>181</sup> Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, p. 2 (**Exhibit R-96**).

<sup>182</sup> Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, p. 3 (**Exhibit R-96**).

stock resilience.<sup>183</sup> Among the alternatives that were suggested were to set TACs at zero and adoption of the “Norwegian model (including real-time monitoring and adaptative management) of sandeel stock management.”<sup>184</sup>

124. As with the English Sandeel Consultation, both the European Union, through the relevant EU Commissioner, and the Danish Minister for Food, Agriculture and Fisheries, responded by opposing the imposition of a full spatial closure.<sup>185</sup> In particular, they emphasised the monetary and non-monetary impacts of a closure of Scottish waters to sandeel fishing on EU vessels, industry and interests.<sup>186</sup>
125. The outcome of the consultation was the subject of a Ministerial Submission dated 26 January 2024, which addressed all key matters raised during the process and concluded that “the recommended approach is appropriate and proportionate given the current evidence base and the precautionary principle, which we consider remains aligned with the TCA”.<sup>187</sup>
126. The Final Business and Regulatory Impact Assessment was published by the Scottish Government on 31 January 2024, together with a Policy Note.<sup>188</sup> The Policy Note described the purpose of the Scottish sandeel fishing prohibition as “to prohibit fishing for sandeel in all Scottish waters with the aim of bringing about wider environmental and ecosystem benefits, which include potential benefits to sandeel, seabirds, marine mammals, and other fish species.”<sup>189</sup>

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<sup>183</sup> Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, p. 3 (**Exhibit R-96**).

<sup>184</sup> Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, p. 3 (**Exhibit R-96**).

<sup>185</sup> Letter from Directorate-General for Maritime Affairs and Fisheries of the European Commission to the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands in response to the Scottish sandeel consultation, 1 August 2023 (**Exhibit C-57**); Letter from Danish Minister for Food, Agriculture and Fisheries to Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands, 9 October 2023 (**Exhibit R-97**).

<sup>186</sup> Letter from Directorate-General for Maritime Affairs and Fisheries of the European Commission to the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands in response to the Scottish sandeel consultation, 1 August 2023 (**Exhibit C-57**); Letter from Danish Minister for Food, Agriculture and Fisheries to Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands, 9 October 2023 (**Exhibit R-97**).

<sup>187</sup> Ministerial Submission, 26 January 2024, para. 9 (**Exhibit R-98**).

<sup>188</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024 (**Exhibit C-66**); Marine Directorate, Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36, January 2024 (**Exhibit C-65**).

<sup>189</sup> Marine Directorate, Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36, January 2024, para. 4 (**Exhibit C-65**).



#### 4. ICES Technical Service

127. In March 2023, the European Union and United Kingdom engaged in fisheries consultations regarding fishing opportunities for sandeel in 2023.<sup>190</sup> During the course of said consultations, the delegations agreed to submit a joint request to ICES for information on the relationship between ecosystem considerations and the provision of single stock advice for forage fish species.<sup>191</sup>
128. The European Union and United Kingdom's joint request was submitted to ICES on 5 June 2023, and asked it "to clarify and describe how ecosystem considerations are factored in and applied in the provision of single stock advice for forage fish species. Particular reference should be made to the handling of predator-prey interactions and what considerations/provisions are made for the rebuilding of sensitive higher trophic level species such as certain seabirds."<sup>192</sup>
129. ICES responded to the joint request through a Technical Service published on 28 November 2023<sup>193</sup> (hereinafter the "**ICES Technical Service**"). Generally, a technical service involves "the provision of scientific information, or a process that produces scientific information, for the use of managers and policy-makers."<sup>194</sup> While technical services "do not constitute ICES approved advice," they may include scientific recommendations and are characterised by scientific objectivity and integrity, quality assurance, and transparency.<sup>195</sup>
130. The ICES Technical Service, which contains two separate experts' responses to the Parties' joint request, began by explaining that, while ICES factors in and applies certain ecosystem considerations, it does not analyse specifically whether the forage fish biomass meets particular predator requirements.<sup>196</sup> Accordingly, it explained that "a large part of the question of whether

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<sup>190</sup> Written Record of fisheries consultations on 09 to 13 March 2023 between the United Kingdom and the European Union about sandeels in 2023 (**Exhibit C-3**).

<sup>191</sup> Written Record of fisheries consultations on 09 to 13 March 2023 between the United Kingdom and the European Union about sandeels in 2023 (**Exhibit C-3**).

<sup>192</sup> ICES – Joint request from UK and EU, 'Ecosystem considerations in the provision of single species advice for forage fish species', 5 June 2023, p. 1 (**Exhibit C-53**).

<sup>193</sup> ICES Technical Service, 'Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species', 28 November 2023 (**Exhibit C-22**).

<sup>194</sup> ICES, Technical Guidelines – Technical Services, 16 December 2016, p. 1 (**Exhibit C-54**).

<sup>195</sup> ICES, Technical Guidelines – Technical Services, 16 December 2016, p. 1 (**Exhibit C-54**).

<sup>196</sup> ICES Technical Service, 'Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species', 28 November 2023, p. 1 (**Exhibit C-22**).

management is supporting ecosystem functions should occur at the level of national regulations”.<sup>197</sup>

131. The ICES Technical Service noted that seabirds, in particular terns and kittiwakes, are the most sensitive predators to changes in sandeel abundance.<sup>198</sup> It went on to explain that it is the local abundance of sandeel at particular times of the year, rather than throughout the North Sea as a whole, that appears to be of significance because “[n]esting seabirds in particular will be restricted in their feeding range.”<sup>199</sup> While sandeel are also an important source of food for other predators, such as seals, minke whales, and other fish, the evidence for their dependence is more limited, at least in part because these other predators can forage over a wider area.<sup>200</sup>
132. With respect to the impact of fishing on sandeel stock, the ICES Technical Service stated that ICES advice on quotas should ensure healthy levels of the stock and that the state-of-the-art spatial management system in use should “suffic[e] to ensure that local depletions can be reversed by recruitment from elsewhere in the management region”.<sup>201</sup> Nonetheless, it again clarified that local ecosystem requirements depended on national regulations, such as “using permanent or timed closures or setting restricted quotas in given areas.”<sup>202</sup> The ICES Technical Service ultimately also suggested that it would make sense to evaluate the degree to which closures of fishing areas could be targeted to maximise benefits while minimising costs, as analysing trade-offs for different fishery scenarios would be important to reaching informed decisions.<sup>203</sup>

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<sup>197</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 1, 7 (**Exhibit C-22**).

<sup>198</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 8 (**Exhibit C-22**).

<sup>199</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 2, 3, 7 (**Exhibit C-22**).

<sup>200</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 3 (**Exhibit C-22**).

<sup>201</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 2 (**Exhibit C-22**).

<sup>202</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 1, 2, 7 (**Exhibit C-22**).

<sup>203</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 7, 10 (**Exhibit C-22**).

133. The Parties agree that ICES' stock assessment advice for Sandeel Management Area 4 did not take into account the existing partial closures in that area, as ICES provides its advice at the broader level of Sandeel Management Area 4.<sup>204</sup>
134. The ICES Technical Service was considered by and informed the Scottish Government's published response to the consultation.<sup>205</sup> Notably, the Scottish Government interpreted the ICES Technical Service as "support[ing] the justification for a bespoke approach to sandeel management at a national level when considering the wider ecosystem and ensuring that local food availability is preserved for predator populations."<sup>206</sup>

**E. CORRESPONDENCE BETWEEN THE PARTIES PRIOR TO THE SANDEEL FISHING PROHIBITION**

135. On 30 May 2023 and 1 August 2023, the Directorate-General for Maritime Affairs and Fisheries of the European Commission sent letters respectively to DEFRA<sup>207</sup> and the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands<sup>208</sup> expressing its concerns regarding the compatibility with the TCA of a prohibition of sandeel fishing in the English waters of the North Sea and in all Scottish waters.
136. On 30 January 2024, the UK Secretary of State Environment, Food & Rural Affairs sent a letter to the European Commissioner for the Environment, Oceans and Fisheries, notifying the UK Government's intention to prohibit sandeel fishing in the English waters of the North Sea "effective by 26 March 2024" and pointing to the ICES Technical Service and materials published alongside the English Sandeel Consultation as support.<sup>209</sup>

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<sup>204</sup> EU's Responses to Questions, paras 9-10; EU's Replies to the UK's Responses to Questions, paras 12-13; Hearing, 29 January 2025, 44:17-45:6 (Juratowitch); UK's Responses to Questions, pp. 3-4.

<sup>205</sup> Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, p. 4 (**Exhibit R-96**).

<sup>206</sup> Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, p. 4 (**Exhibit R-96**).

<sup>207</sup> Letter of Directorate-General for Maritime Affairs and Fisheries of the European Commission to DEFRA in response to the English sandeel consultation, 30 May 2023 (**Exhibit C-55**).

<sup>208</sup> Letter from Directorate-General for Maritime Affairs and Fisheries of the European Commission to the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands in response to the Scottish sandeel consultation, 1 August 2023 (**Exhibit C-57**).

<sup>209</sup> Letter from UK Secretary of State Environment, Food & Rural Affairs to the European Commissioner for the Environment, Oceans and Fisheries, 30 January 2024 (**Exhibit C-58**).

137. The decision to prohibit sandeel fishing in English waters of the North Sea was announced publicly on 31 January 2024, along with a formal government response to the consultation, which also considered the ICES Technical Service.<sup>210</sup>
138. On 2 February 2024, the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands sent a letter to the Directorate-General for Maritime Affairs and Fisheries of the European Commission, notifying it of the Scottish Government's intention to prohibit sandeel fishing in all Scottish waters as of 26 March 2024 and indicating that the decision had considered the advice in the ICES Technical Service.<sup>211</sup>
139. On 8 February 2024, the United Kingdom formally notified the European Union of the sandeel fishing prohibition pursuant to Article 496(3) of the TCA.<sup>212</sup> In the letter containing the notification, the United Kingdom noted that the prohibition was supported by the ICES Technical Service, the results of the English Sandeel Consultation, including the Natural England/Cefas/JNCC Advice, as well as the results of the Scottish Sandeel Consultation, including the Scottish Scientific Review.<sup>213</sup>

#### **F. THE SANDEEL FISHING PROHIBITION**

140. The sandeel fishing prohibition was given effect on 26 March 2024 through different legal instruments.
141. In the English waters of the North Sea, the sandeel fishing prohibition was implemented through variations to licences granted to fishing vessels by the Marine Maritime Organisation, in accordance with the Fisheries Act 2020.<sup>214</sup> Such variations are set down in statutory guidance.<sup>215</sup>

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<sup>210</sup> DEFRA, 'Consultation outcome: Government response', updated 31 January 2024 (**Exhibit R-87**).

<sup>211</sup> Letter from the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands to the Directorate-General for Maritime Affairs and Fisheries of the European Commission, 2 February 2024 (**Exhibit C-59**).

<sup>212</sup> United Kingdom notification of the sandeel fishing prohibition to the European Union pursuant to Article 496(3) of the TCA, 8 February 2024 (**Exhibit C-60**).

<sup>213</sup> United Kingdom notification of the sandeel fishing prohibition to the European Union pursuant to Article 496(3) of the TCA, 8 February 2024, p. 2 (**Exhibit C-60**).

<sup>214</sup> Marine Management Organisation, Statutory guidance – Variation issued: Tuesday 26 March 2024 (updated 29 November 2024) (**Exhibit CLA-14**); *see also* Marine Management Organisation, Statutory guidance – Fishing vessel licence variations, last updated 29 November 2024 (**Exhibit C-63**) (explaining that "[v]ariations occur to reflect changes in quota limits and closures or openings of sea areas").

<sup>215</sup> Marine Management Organisation, Statutory guidance – Fishing vessel licence variations, last updated 29 November 2024 (**Exhibit C-63**).

The statutory guidance setting out the variations relevant to the sandeel fishing prohibition provides, in relevant part:

1.1 Sandeel Closure To All Vessels In Waters Of ICES Area 4

Affecting all Over 10m and 10m & Under licence categories – A (11), A (Islands) (12), A (Pelagic) (17), B (31), C (41), A (10m & Under) (91), A (10m & Under Limited) (94) & A (10m & Under [PO]).

1.2 In Over 10m Schedules:

10.4 - From 26 March 2024 the fishing of sandeel within English waters of ICES Area 4 (North Sea) is prohibited by all vessels.

1.3 In 10m & Under Schedules:

5.7 - From 26 March 2024 the fishing of sandeel within English waters of ICES Area 4 (North Sea) is prohibited by all vessels.<sup>216</sup>

142. In all Scottish waters, the prohibition was implemented through the Sandeel (Prohibition of Fishing) (Scotland) Order 2024<sup>217</sup> (hereinafter the “**Scottish Order**”), which was adopted pursuant to Section 5(1)(a) of the Sea Fish (Conservation) Act 1967.<sup>218</sup> Section 1 of the Scottish Order specifies that it “comes into force on 26 March 2024,” while Section 2 provides that “[f]ishing for sandeel is prohibited within the Scottish zone.”<sup>219</sup>
143. Even though the sandeel fishing prohibition was implemented through different legal instruments, the European Union challenges it as a single measure.<sup>220</sup> First, the European Union maintains that the sandeel TACs set down in Annex 35 to the TCA are negotiated by the United Kingdom and the European Union, rather than by England or Scotland separately.<sup>221</sup> Second, it argues that the various consultation documents make clear that the objective was to identify a common approach that would apply both in the English waters of the North Sea and in all Scottish waters,<sup>222</sup> and,

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<sup>216</sup> Marine Management Organisation, Statutory guidance – Variation issued: Tuesday 26 March 2024 (updated 29 November 2024) (**Exhibit CLA-14**).

<sup>217</sup> The Sandeel (Prohibition of Fishing) (Scotland) Order 2024, in force 26 March 2024 (**Exhibit CLA-4**).

<sup>218</sup> Sea Fish (Conservation) Act 1967, c. 84 (**Exhibit CLA-17**). Section 5A confirms that the power to make an order may be used to restrict fishing for environmental purposes.

<sup>219</sup> The Sandeel (Prohibition of Fishing) (Scotland) Order 2024, in force 26 March 2024 (**Exhibit CLA-4**).

<sup>220</sup> EU’s Written Submission, paras 153, 166.

<sup>221</sup> EU’s Written Submission, para. 168; Hearing, 28 January 2025, 33:13-16 (Norris).

<sup>222</sup> EU’s Written Submission, paras 169-170, *citing* DEFRA, ‘Call for Evidence on future management of Sandeels and Norway pout’, 22 October 2021 (**Exhibit C-43**); Marine Directorate, Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36, January 2024 (**Exhibit C-65**); Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023 (**Exhibit C-45**).

indeed, the two prohibitions were presented to the public simultaneously.<sup>223</sup> Finally, the European Union highlights that, though the legal instruments giving effect to the prohibition differ, they have the same legal implications and the same temporal scope,<sup>224</sup> with the impact primarily being felt by the same operators—namely, Danish vessels and the Danish fishmeal and fish oil sector.<sup>225</sup>

144. The European Union acknowledges that the United Kingdom’s fisheries policy generally pursues sustainability objectives.<sup>226</sup> Further, based on the legal instruments through which the sandeel fishing prohibition was implemented, as well as the English and Scottish consultation documents, the European Union understands that the objectives of the prohibition are “to increase the biomass of sandeel stocks with the aim of bringing about wider environmental and ecosystem benefits, which include potential benefits to sandeel, seabirds, marine mammals, and other fish species.”<sup>227</sup>
145. According to the European Union, while the Arbitration Tribunal is not bound by either Party’s characterisation of the measure at issue, the starting point for its consideration of the challenged measure should be the manner in which the European Union, as the Complainant, has characterised the measure in its written submissions.<sup>228</sup> In the view of the European Union, the singular nature of the measure implies that the Arbitration Tribunal should conduct a holistic assessment, bearing in mind that there is a significant overlap in the evidence relied upon in

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<sup>223</sup> EU’s Written Submission, para. 175, *referring to* DEFRA, ‘Nature recovery to be accelerated as the government delivers on measures to protect land and sea’, 31 January 2024 (**Exhibit C-67**); Scottish Government, ‘Sandeel fishing to be banned in Scottish waters’, 31 January 2024 (**Exhibit C-68**).

<sup>224</sup> EU’s Written Submission, para. 171.

<sup>225</sup> EU’s Written Submission, paras 172-174, *citing* DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, Annex 1 (**Exhibit C-44**); Marine Directorate, Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36, January 2024 (**Exhibit C-65**); Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024 (**Exhibit C-66**).

<sup>226</sup> EU’s Written Submission, paras 176-179, *referring to* Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008) (**Exhibit CLA-18**); DEFRA, ‘Marine Strategy Part One: UK updated assessment and Good Environmental Status’, October 2019 (**Exhibit C-69**); DEFRA, ‘Marine Strategy Part Two: UK updated monitoring Programmes’, October 2022 (**Exhibit C-70**); Section 52 of the Fisheries Act 2020 (**Exhibit CLA-6**); DEFRA Press Release, “Flagship Fisheries Bill becomes law”, 24 November 2020, (**Exhibit C-71** incorrectly cited as **Exhibit CLA-71**); DEFRA, Welsh Government, Scottish Government, Department of Agriculture, Environment, and Rural Affairs, ‘Joint Fisheries Statement’, November 2022 (**Exhibit C-35**).

<sup>227</sup> EU’s Written Submission, paras 180-186, *citing* Marine Directorate, Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36, January 2024 (**Exhibit C-65**); DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023 (**Exhibit C-44**); Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023 (**Exhibit C-49**).

<sup>228</sup> Hearing, 28 January 2025, 33:23-34:3 (Norris); EU’s Responses to Questions, para. 3.

respect to the English and the Scottish parts of the measure.<sup>229</sup> It would then be for the United Kingdom to address any aspect of the measure that may be inconsistent with the TCA to bring itself into compliance.<sup>230</sup>

146. The United Kingdom, in turn, recalls that the Scottish and English Governments each took their own advice and enacted their own prohibition for their own waters, and invites the Arbitration Tribunal to be sensitive to the fact that this process reflected the devolution arrangements within the United Kingdom.<sup>231</sup> Accordingly, the United Kingdom submits that both parts of the challenged measure need to be considered, albeit where evidence is relevant to both, it may be considered for both.<sup>232</sup>

#### **G. RELIEF REQUESTED BY THE EUROPEAN UNION**

147. The European Union requests that the Arbitration Tribunal issue a ruling in accordance with Article 745 of the TCA, finding that:

- i. the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(c) TCA;
- ii. the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(f) TCA; and
- iii. the UK is in breach of its obligation to grant full access to its waters to fish in accordance with Article 2(1)(a) of Annex 38 TCA.<sup>233</sup>

#### **H. RELIEF REQUESTED BY THE UNITED KINGDOM**

148. The United Kingdom requests the Arbitration Tribunal "to dismiss each of the EU's three claims."<sup>234</sup>

### **IV. THE PARTIES' SUBMISSIONS**

149. In the following, the Arbitration Tribunal provides a summary of the Parties' written and oral submissions on the various claims. The summaries are intended to provide context and are without

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<sup>229</sup> EU's Responses to Questions, para. 3; EU's Replies to the UK's Responses to Questions, paras 7-8; EU's Supplementary Written Submission, para. 36.

<sup>230</sup> EU's Responses to Questions, paras 5-6.

<sup>231</sup> Hearing, 29 January 2025, 30:13-31:7 (Juratowitch); UK's Responses to Questions, pp. 2-3.

<sup>232</sup> UK's Responses to Questions, p. 2.

<sup>233</sup> EU's Written Submission, para. 782.

<sup>234</sup> UK's Written Submission, para. 430.

prejudice to the Parties' submissions, which the Arbitration Tribunal has considered in full in its analysis and decision.

**A. THE APPLICABLE LEGAL FRAMEWORK**

150. The Parties agree that Article 4(1) of the TCA provides the applicable interpretative approach for the TCA, namely the customary rules of treaty interpretation as reflected in the Vienna Convention on the Law of Treaties (hereinafter the “VCLT”).<sup>235</sup> Both Parties note that in accordance with Article 31(3)(c) of the VCLT, this includes taking into account relevant rules of international law applicable in the relations between them, such as the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”), the rules of which, the Parties agree, are of particular relevance for the interpretation of Heading Five of Part Two of the TCA.<sup>236</sup>
151. The Parties also agree that each Party has the burden of proving the facts relied upon to support its claim or defence,<sup>237</sup> that a measure is presumed consistent with the requirements of the TCA unless it is shown otherwise,<sup>238</sup> and that the European Union has to establish its claims that the sandeel fishing prohibition breaches the United Kingdom's commitments under the TCA.<sup>239</sup>
152. In addition to this shared understanding, the Parties each add further observations on the applicable legal framework.

**1. Submissions of the European Union**

**(a) *The General Interpretative Approach under the TCA***

153. First, noting in particular the references made in Articles 513, 515, and 516 of the TCA to the agreements of the World Trade Organization (hereinafter the “WTO”) and WTO case law, the European Union highlights that these are part of the relevant rules of international law applicable to the relations between the Parties and are therefore of particular relevance.<sup>240</sup>

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<sup>235</sup> EU's Written Submission, paras 190, 193-199; UK's Written Submission, para. 193.

<sup>236</sup> EU's Written Submission, paras 200-201, 210-211; UK's Written Submission, para. 193.

<sup>237</sup> EU's Written Submission, paras 392-393; UK's Written Submission, para. 194.

<sup>238</sup> EU's Responses to Questions, para. 25; EU's Replies to the UK's Responses to Questions, para. 45; Hearing, 30 January 2025, 37:9-12 (Juratowitch); UK's Responses to Questions, p. 6.

<sup>239</sup> EU's Responses to Questions, para. 26; Hearing, 30 January 2025, 37:12-17 (Juratowitch).

<sup>240</sup> EU's Written Submission, paras 198-211; Hearing, 30 January 2025, 5:17-6:2 (Norris).



154. Further, while recognising that there is no obligation to interpret provisions of the TCA in accordance with the domestic law of either Party, and that the interpretation of the TCA by the courts of one Party are not binding on those of the other,<sup>241</sup> the European Union states “that domestic law may nonetheless provide additional relevant context within the meaning of customary international law rules of [t]reaty interpretation.”<sup>242</sup> It adds that domestic law may be particularly relevant where a term that, prior to the adoption of the TCA had been accorded a meaning in the relations, between the Parties, has been construed in a similar way under both Parties’ domestic law.<sup>243</sup>
155. Concerning the object and purpose of the TCA, the European Union considers two objectives to inform the interpretation of the provisions at issue in this dispute, namely the principles of cooperation and regulatory autonomy.<sup>244</sup> Underlining the importance of the principle of cooperation, the European Union refers to various provisions of the TCA, including Articles 404(3), 493, 494(1), 496(3), 498, 499, 507 and 508 of the TCA,<sup>245</sup> as well as the duty of cooperation forming a “fundamental principle of public international law [...] intrinsic to inter alia UNCLOS”.<sup>246</sup> At the same time, the European Union continues, the TCA reflects the importance attributed by the Parties to regulatory autonomy, as reflected in the Preamble, Articles 1, 493, 494(3)(f), and 496(1) of the TCA.<sup>247</sup>

**(b) *Heading Five of Part Two of the TCA on Fisheries***

156. In addition, the European Union highlights provisions and aspects specific to Heading Five of Part Two of the TCA, which it considers particularly relevant to the dispute by outlining the overarching objectives and principles the Parties intended to inform all aspects of their cooperation on fisheries under Heading Five of Part Two of the TCA (i) and elaborating on the framework for fisheries management (ii).<sup>248</sup>

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<sup>241</sup> EU’s Written Submission, paras 191-192, *citing* Article 4(2) and (3) of the TCA.

<sup>242</sup> EU’s Written Submission, para. 213; *see also* EU’s Responses to Questions, paras 76-78; *see also* Hearing, 30 January 2025, 6:8-11 (Norris) (concerning the interpretation of legal concepts by the Parties’ apex courts).

<sup>243</sup> EU’s Responses to Questions, para. 78.

<sup>244</sup> EU’s Written Submission, para. 221.

<sup>245</sup> EU’s Written Submission, paras 222-229.

<sup>246</sup> EU’s Written Submission, para. 223.

<sup>247</sup> EU’s Written Submission, paras 230-236.

<sup>248</sup> EU’s Written Submission, paras 237-344.

(i) *Objectives and Principles of Heading Five of Part Two of the TCA*

157. The European Union claims that Article 494 of the TCA contains the objectives and principles the Parties seek to pursue and abide by concerning the framework on fisheries under the TCA.<sup>249</sup> While the European Union considers the objectives to be aspirational, it describes the principles as guiding or delimiting the pursuit of the Parties' objectives.<sup>250</sup>
158. According to the European Union, the objective contained in Article 494(1) of the TCA is cooperation between the Parties in the management of shared fish stocks with a view to environmentally sustainable and economically and socially beneficial fishing.<sup>251</sup> Article 494(2) of the TCA, the European Union adds, identifies as a separate objective that shared stocks should be exploited "at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield."<sup>252</sup>
159. Article 494(3) of the TCA, the European Union continues, contains nine mandatory principles intended to guide the design and delimit the application of any measure taken in pursuit of the objectives described in Articles 494(1) and (2) of the TCA.<sup>253</sup> In the same vein, the European Union maintains that these principles are intended to inform and guide the interpretation of the corresponding obligation, in this precise instance, in Article 496 TCA.<sup>254</sup> The European Union notes that the term "shall have regard" clearly indicates that consideration of all relevant principles is mandatory.<sup>255</sup> The European Union considers that there is no hierarchy between the various principles and certain principles may interact with each other, which may entail an exercise of reconciliation between them.<sup>256</sup> Nonetheless, of the nine principles, the European Union opines that the following four are of particular relevance to the present dispute:

- i. Article 494(3)(a) TCA refers to 'applying the precautionary approach to fisheries management';

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<sup>249</sup> EU's Written Submission, para. 243.

<sup>250</sup> EU's Written Submission, para. 246.

<sup>251</sup> EU's Written Submission, paras 247-250.

<sup>252</sup> EU's Written Submission, para. 251, *citing* Article 494(2) of the TCA.

<sup>253</sup> EU's Written Submission, paras 254-256.

<sup>254</sup> EU's Responses to Questions, para. 39.

<sup>255</sup> EU's Written Submission, para. 256; *see also* EU's Replies to the UK's Responses to Questions, paras 68-71 (explaining its understanding that a "principle" may provide a framework against which compliance may be measured).

<sup>256</sup> EU's Responses to Questions, para. 40; EU's Replies to the UK's Responses to Questions, paras 89-90, 93; Hearing, 28 January 2025, 25:13-19 (Norris).

- ii. Article 494(3)(c) TCA refers to ‘basing conservation and management decisions for fisheries on the best available scientific advice, principally that provided by the International Council for the Exploration of the Sea (ICES)’;
- iii. Article 494(3)(e) TCA refers to ‘taking due account of and minimising harmful impacts of fishing on the marine ecosystem and of the need to preserve marine biological diversity’; and
- iv. Article 494(3)(f) TCA provides that among the principles to which the Parties ‘shall have regard’ is ‘applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties’.<sup>257</sup>

160. The European Union disputes the United Kingdom’s contention that the *travaux préparatoires* of the TCA support the United Kingdom’s interpretation that the Article 494(3) principles are in the nature of objectives, goals or standards.<sup>258</sup> Per the European Union, to the extent the *travaux préparatoires* are considered relevant, they “show precisely that Article 494(3) of the TCA is intended to ensure that meaningful limits are placed on the exercise of regulatory autonomy when deciding on fisheries management measures.”<sup>259</sup>

*(ii) Fisheries Management Pursuant to Article 496 of the TCA*

161. Next, the European Union elaborates on the functioning of fisheries management pursuant to Article 496 of the TCA. First, the European Union examines what qualifies as a “fisheries management” measure under Article 496 of the TCA. It explains that, while “fisheries management” is not a defined term under the TCA, provisions such as Article 495(1)(b), 498(4)(d), and 508(1)(d) of the TCA indicate that the Parties chose to define fisheries management measures primarily by reference to the purpose that is pursued and that they considered a broad range of means to be apt for achieving that purpose.<sup>260</sup> By reference to the wording of Article 496(1) of the TCA, the European Union concludes that the provision governs any measure decided upon in pursuit of the objectives mentioned in Articles 494(1) and (2) of the TCA.<sup>261</sup> The European Union further states that the approach of defining a fisheries management measure by the objective of the measure is also consistent with relevant rules of international law,

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<sup>257</sup> EU’s Written Submission, para. 259; *see also* EU’s Replies to the UK’s Responses to Questions, para. 72.

<sup>258</sup> EU’s Replies to the UK’s Responses to Questions, paras 74-86.

<sup>259</sup> EU’s Replies to the UK’s Responses to Questions, para. 86.

<sup>260</sup> EU’s Written Submission, paras 268-273. Article 495(1)(b) of the TCA reads: “‘precautionary approach to fisheries management’ means an approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment”. Article 498(4)(d) of the TCA reads: “Annual consultations may also cover, inter alia: [...] (d) measures for fisheries management, including, where appropriate, fishing effort limits”. Article 508(1)(d) of the TCA provides: “The Specialised Committee on Fisheries may in particular: [...] (d) consider measures for fisheries management and conservation, including emergency measures and measures to ensure selectivity of fishing”.

<sup>261</sup> EU’s Written Submission, paras 273-276.

such as the FAO Code of Conduct for Responsible Fisheries (hereinafter the “**FAO Code of Conduct**”).<sup>262</sup>

162. Second, the European Union notes each Party’s right to decide on any measures applicable to its waters under Article 496(1) of the TCA, reflects the importance of regulatory autonomy.<sup>263</sup> The European Union states that waters of the Parties are defined in Article 495(1)(g) of the TCA, for the European Union, as the Exclusive Economic Zones (hereinafter “**EEZs**”) of its Member States and their territorial seas, and for the United Kingdom as its EEZ and territorial sea, excluding for the purposes of Articles 500 and 501 and Annex 38 the territorial sea adjacent to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man.<sup>264</sup> However, the European Union stresses that the regulatory autonomy afforded to the Parties for measures within their waters is subject to certain constraints:<sup>265</sup> The measures must be in pursuit of the objectives defined in Articles 494(1) and (2) of the TCA,<sup>266</sup> they must have regard to the principles in Article 494(3) of the TCA,<sup>267</sup> and they must be conducted pursuant to and in accordance with principles of international law, including UNCLOS.<sup>268</sup> In this regard, the European Union recalls by reference to various provisions that UNCLOS seeks to balance the sovereign rights of coastal States and the rights of other States to access any surplus resources.<sup>269</sup> The European Union also stresses that during the adjustment period provided for in Annex 38 to the TCA, Article 496 of the TCA cannot be read in isolation and that the context of the adjustment period, including the economic and social impacts resulting during the adjustment period, must be taken into consideration when interpreting and applying the legal framework of Articles 494 and 496 of the TCA.<sup>270</sup>
163. Third, the European Union addresses the importance of basing fisheries management measures on the best available scientific advice,<sup>271</sup> and such measures not being applied to the vessels of

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<sup>262</sup> EU’s Written Submission, paras 277-282, *referring to* Articles 2(b), 6, 7.1.1 and 7.2.1 of the FAO Code of Conduct (**Exhibit CLA-33**).

<sup>263</sup> EU’s Written Submission, paras 283-285.

<sup>264</sup> EU’s Written Submission, para. 286.

<sup>265</sup> EU’s Written Submission, para. 287; Hearing, 28 January 2025, 22:5-21 (Norris).

<sup>266</sup> EU’s Written Submission, para. 288.

<sup>267</sup> EU’s Written Submission, paras 289-292.

<sup>268</sup> EU’s Written Submission, paras 293-294.

<sup>269</sup> EU’s Written Submission, paras 296-301, *referring to* Articles 61(2) and (4) and 62(2) and (4) of UNCLOS.

<sup>270</sup> EU’s Responses to Questions, paras 80-81; EU’s Replies to the UK’s Responses to Questions, paras 165-166.

<sup>271</sup> EU’s Written Submission, paras 302-315; for further details *see* Section IV.B.2(a) below.

the other Party unless they also apply to the Party's own vessels as prescribed by Article 496(2) of the TCA.<sup>272</sup>

164. Fourth, the European Union highlights that according to Articles 496(1) and 494(3)(a) of the TCA, the Parties must have regard to the precautionary approach to fisheries management, which Article 495 of the TCA defines as “an approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment”.<sup>273</sup> The European Union draws attention to the interplay of Articles 496(2) and 494(3)(c) of the TCA and notes that the United Kingdom itself recognised that “the best available science is linked to the precautionary principle as it is the state of scientific knowledge that will inform, for example, whether particular prudence and caution are demanded with respect to a proposed course of action.”<sup>274</sup> According to the European Union, both the FAO Code of Conduct and the United Nations Fish Stocks Agreement (hereinafter the “UNFSA”) also demonstrate the connection between the precautionary approach and relying on the best available scientific advice.<sup>275</sup> While the European Union considers that the precautionary approach should only be applied if the best available scientific advice leaves room for uncertainty, it does not consider that the precautionary approach can function as a fallback in the situation where a Party omits to base its measure on scientific advice it could reasonably have obtained.<sup>276</sup>
165. Thus, the European Union concludes that while Article 496 of the TCA provides a legal basis for each of the Parties to decide on measures applicable in its waters, such measures must pursue one or both of the objectives of Article 494 of the TCA and the Parties must ensure these measures are based on the best available scientific advice and are non-discriminatory.<sup>277</sup> The European

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<sup>272</sup> EU's Written Submission, paras 316-325; for further details *see* para. 329 below.

<sup>273</sup> EU's Written Submission, paras 326-329. The European Union considers the precautionary approach is a manifestation of the precautionary principle. *See* EU's Responses to Questions, para. 45; EU's Replies to the UK's Responses to Questions, paras 100-102; Hearing, 28 January 2025, 19:22-24 (Norris).

<sup>274</sup> EU's Written Submission, paras 330-335, *citing* ITLOS, *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law* (hereinafter “*Advisory Opinion on Climate Change*”), Written Statement of the United Kingdom, 16 June 2023, para. 89.b, (**Exhibit C-73**).

<sup>275</sup> EU's Written Submission, paras 336-338, *referring to* Articles 6.5, 7.5.4, and 7.5.5 of the FAO Code of Conduct (**Exhibit CLA-33**) Articles 6(3)(a), 6(5), 6(6), and 6(7) of the UNFSA (**Exhibit CLA-28**).

<sup>276</sup> EU's Responses to Questions, para. 44; EU's Replies to the UK's Responses to Questions, paras 94, 98-99; Hearing, 30 January 2025, 11:14-20 (Norris).

<sup>277</sup> EU's Written Submission, paras 339-342.

Union adds that each Party must also have regard to the principles referred to in Article 494(3) of the TCA.<sup>278</sup>

**(c) *Burden of Proof***

166. While the Parties agree that the European Union bears the burden of establishing the sandeel fishing prohibition breached the United Kingdom’s commitments under the TCA, the European Union maintains that the burden of proof may shift to the United Kingdom to the extent it asserts that its measure is justified under other provisions of the TCA or advances a defence.<sup>279</sup> Thus, the European Union considers that it must establish a *prima facie* case, or a presumption, that what it claims is correct, and the burden then shifts to the United Kingdom to adduce sufficient evidence to rebut that presumption.<sup>280</sup>
167. The European Union supports its position by reference to the findings of the WTO Appellate Body in the *Wool Shirts and Blouses* case, which the European Union points out relied on general principles of international law, including the position expressed by the International Court of Justice (hereinafter “ICJ”).<sup>281</sup> In this regard, the European Union notes the TCA’s reference in Article 516 to principles applicable under WTO law, which should be considered to inform the standard in these proceedings.<sup>282</sup> The European Union also argues that its interpretation of the burden of proof is supported by the structure of Heading Five of Part Two of the TCA because it “require[s] a Party deciding on a fisheries management measure to show that this right has been exercised in conformity with the limitations that circumscribe that right.”<sup>283</sup>

**2. Submissions of the United Kingdom**

168. The United Kingdom adds its own preliminary observations on the applicable legal framework, both regarding what it considers to be the correct approach to interpreting the TCA (a) as well as concerning relevant obligations and standards under other rules of international law (b).

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<sup>278</sup> EU’s Written Submission, para. 343.

<sup>279</sup> EU’s Responses to Questions, paras 26-27.

<sup>280</sup> EU’s Responses to Questions, para. 29.

<sup>281</sup> EU’s Responses to Questions, para. 28, *referring to* WTO, Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (hereinafter “*US – Wool Shirts and Blouses*”), WT/DS33/AB/, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323; EU’s Replies to the UK’s Responses to Questions, paras 42-43, 47.

<sup>282</sup> EU’s Replies to the UK’s Responses to Questions, para. 53.

<sup>283</sup> EU’s Replies to the UK’s Responses to Questions, para. 48(c).

**(a) Interpretation of the TCA**

169. The United Kingdom submits that Article 742(a) of the TCA obliges the Arbitration Tribunal to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity of the measures at issue with, the covered provisions”.<sup>284</sup>
170. The United Kingdom argues that an important principle for the Arbitration Tribunal to consider is the Parties’ regulatory autonomy, guaranteed under a number of provisions of the TCA.<sup>285</sup> Accordingly, the United Kingdom elaborates that it is not the role of the Arbitration Tribunal to form its own view as to what level of environmental protection either Party to the TCA should be pursuing.<sup>286</sup> In support of this stance, it refers to findings of the Appellate Body of the WTO and the ICJ, who in allegedly similar contexts held that “determination of the appropriate level of protection is a *prerogative* of the [WTO] Member concerned,”<sup>287</sup> and that the ICJ “need not pass judgment on the scientific merit or importance of [Japan’s whaling programme’s] objectives [...]. Nor is it for the Court to decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives.”<sup>288</sup>
171. The United Kingdom disagrees with the European Union on the extent to which Annex 38 to the TCA constrains a Party’s regulatory autonomy. In its view, Article 496 of the TCA read with Article 494 of the TCA qualifies the interpretation and application of Annex 38, rather than the other way around.<sup>289</sup> According to the United Kingdom, irrespective of whether the Parties are in the adjustment period or not, each Party has the right to take measures under Article 496 of the TCA read with Article 494 of the TCA.<sup>290</sup>
172. Specifically regarding the relationship between Articles 494 and 496 of the TCA, the United Kingdom asserts that Article 494(3) of the TCA requires the Parties to “have regard to” the various

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<sup>284</sup> UK’s Written Submission, para. 195, *citing* Article 742(a) of the TCA.

<sup>285</sup> UK’s Written Submission, paras 196-197, *citing* Recital 7 to the TCA, Articles 1, 390(1), 391(1), 391(5), 494(1), 494(3)(f), 496(1), and 770 of the TCA, and Recital 1 to Annex 38 to the TCA.

<sup>286</sup> UK’s Written Submission, para. 198.

<sup>287</sup> UK’s Written Submission, para. 198, *citing* WTO, Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 199 (**Exhibit RLA-11**) [emphasis in the original].

<sup>288</sup> UK’s Written Submission, para. 198, *citing* *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226 at p. 258, para. 88 (**Exhibit RLA-12**).

<sup>289</sup> UK’s Responses to Questions, pp. 16-17.

<sup>290</sup> UK’s Responses to Questions, p. 17.

principles set out therein.<sup>291</sup> Article 496(1) of the TCA equally obliges the Parties to “hav[e] regard to” the principles referred to in Article 494(3) of the TCA when deciding on measures applicable to their waters in pursuit of the objectives in Articles 494(1) and (2) of the TCA.<sup>292</sup> Article 496(2) of the TCA, on the other hand, requires that a Party “shall base the measure referred to in paragraph 1 on the best available scientific advice”, thereby creating a more demanding obligation than “having regard to”.<sup>293</sup> As one of the principles listed in Article 494(3) of the TCA is “basing conservation and management decisions for fisheries on the best available scientific advice, principally that provided by [ICES,]” the United Kingdom concludes that the TCA contains both an obligation in Article 496(1) to have “regard to” basing decisions on the best available scientific advice pursuant to Article 494(3)(c) of the TCA, and a more demanding obligation under Article 496(2) of the TCA to “base” any measure on the best available scientific advice.<sup>294</sup> According to the United Kingdom, where no breach of the latter obligation is established, there necessarily will also not exist a breach of the former.<sup>295</sup>

173. Regarding the meaning that should be ascribed to the term “principles” in the *chapeau* to Article 494(3) of the TCA, the United Kingdom maintains that the word confirms there is no requirement that the chosen measures must conform to the principles, as the language is not of obligations, but rather of principles to be applied in the decision-making context.<sup>296</sup> Per the United Kingdom, the *travaux* to the TCA support its interpretation that the factors reflected in the Article 494(3) “principles” are merely in the nature of objectives, goals or standards.<sup>297</sup> Further, the United Kingdom considers that there is no hierarchical order among the principles and that the weight to give to each is a matter essentially for the Parties’ discretion.<sup>298</sup>
174. Finally, the United Kingdom rejects the European Union’s suggestion that the Parties’ domestic law constitutes context for the purpose of interpreting the TCA.<sup>299</sup> In the view of the United Kingdom, according to the customary rule reflected in Article 31 of the VCLT and Article 4(1)

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<sup>291</sup> UK’s Written Submission, para. 199.

<sup>292</sup> UK’s Written Submission, para. 200.

<sup>293</sup> UK’s Written Submission, para. 201.

<sup>294</sup> UK’s Written Submission, para. 202.

<sup>295</sup> UK’s Written Submission, para. 202.

<sup>296</sup> Hearing, 30 January 2025, 90:2-13 (Westaway); UK’s Responses to Questions, pp. 7-8.

<sup>297</sup> UK’s Responses to Questions, pp. 7-8.

<sup>298</sup> Hearing, 30 January 2025, 90:14-91:24 (Westaway).

<sup>299</sup> UK’s Written Submission, para. 342; Hearing, 30 January 2025, 92:2-93:23 (Westaway); UK’s Responses to Questions, pp. 15-16.



of the TCA, domestic law has no role to play in the interpretation of a treaty unless the parties to the treaty have subsequently agreed on the interpretation by reference to domestic law or domestic law constitutes subsequent practice of the parties in implementing the treaty such that it establishes their agreement as to its interpretation, neither of which is the case for the TCA.<sup>300</sup>

**(b) Relevant Rules of International Law Apart from the TCA**

175. The United Kingdom sets out several obligations and standards under international law applicable to both Parties that inform its actions at a domestic level, including the sandeel fishing prohibition.<sup>301</sup>
176. It refers to UNCLOS as the framework for the governance of oceans and seas, including living resources within them, outlining the regime on the territorial sea and EEZ and summarising the regime for the protection and preservation of the marine environment.<sup>302</sup>
177. Apart from UNCLOS, the United Kingdom also addresses the Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter the “**OSPAR Convention**”).<sup>303</sup> As the primary treaty on regional cooperation to protect the marine environment of the North Sea, the United Kingdom states that the OSPAR Convention obliges the Parties to “‘take the necessary measures to protect the maritime area against the adverse effects of human activities’ including so as ‘to conserve marine ecosystems’.”<sup>304</sup> The United Kingdom notes that pursuant to the OSPAR Convention, the OSPAR Commission promotes a strong articulation of the ecosystem approach and the precautionary principle.<sup>305</sup> It further recalls the OSPAR Commission’s North-East Atlantic Environment Strategy 2030, which calls for urgent action on marine biodiversity and ecosystems.<sup>306</sup>

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<sup>300</sup> UK’s Written Submission, para. 342; Hearing, 30 January 2025, 92:3-93:1 (Westaway); UK’s Responses to Questions, pp. 15-16.

<sup>301</sup> UK’s Written Submission, paras 58-86.

<sup>302</sup> UK’s Written Submission, paras 59-67, *referring to* Articles 2(1), 3, 17, 19(2)(i), 56, 57, 58, 61, 62, 192, 193, and 197 of UNCLOS (**Exhibit CLA-23**).

<sup>303</sup> UK’s Written Submission, paras 68-73.

<sup>304</sup> UK’s Written Submission, para. 70, *citing* Article 2(1)(a) of the OSPAR Convention (**Exhibit RLA-2**).

<sup>305</sup> UK’s Written Submission, para. 72, *referring to* OSPAR Commission, Ecosystem Approach (**Exhibit RLA-3**); OSPAR Commission, Precautionary Principle (**Exhibit RLA-4**); Ministerial Meeting of the OSPAR Commission, Bergen (23-24 September 2010), Bergen Statement, paras 8, 23, 24 (**Exhibit RLA-5**).

<sup>306</sup> UK’s Written Submission, para. 73, *citing* OSPAR Commission, Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2030, pp. 3, 4 (**Exhibit RLA-6**).

178. Further, the United Kingdom observes that the Convention on Biological Diversity (hereinafter “**CBD**”) recognises the sovereign right of States to exploit their own resources pursuant to their own environmental policies and, *inter alia*, requires each State, as far as possible and appropriate, to regulate or manage biological resources important for the conservation of biological diversity and to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.<sup>307</sup> The United Kingdom highlights that the Conference of the Parties of the CBD has endorsed a concept of the ecosystem approach, describing it as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way”.<sup>308</sup> Additionally, the United Kingdom recalls the adoption of the Kunming-Montreal Global Biodiversity Framework by the Conference of the Parties of the CBD, which sets a number of biodiversity targets to be achieved by 2030 and 2050, to be implemented applying the ecosystem approach.<sup>309</sup> According to the United Kingdom, its commitment to honouring these targets is recognised in the United Kingdom’s Environmental Improvement Plan 2023.<sup>310</sup>
179. Finally, the United Kingdom states that, through Article 404(2)(a) of the TCA, the Parties have committed to acting consistently with the FAO Code of Conduct.<sup>311</sup> The United Kingdom stresses that the FAO Code of Conduct provides for the conservation of aquatic ecosystems and that fisheries management measures should “not only ensure the conservation of target species but also of species belonging to the same ecosystem or associated with or dependent upon the target species.”<sup>312</sup> Article 7 of the FAO Code of Conduct, in turn, requires States to “apply the precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment.”<sup>313</sup>

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<sup>307</sup> UK’s Written Submission, para. 77, *referring to* Articles 3 and 8 of the CBD (**Exhibit RLA-7**).

<sup>308</sup> UK’s Written Submission, para. 79, *citing* CBD Conference of the Parties, Decision V/6 Ecosystem Approach, Annex, para. 1 (**Exhibit RLA-8**).

<sup>309</sup> UK’s Written Submission, para. 81, *referring to* CBD Conference of the Parties, Kunming-Montreal Global Biodiversity Framework, Annex, Section C(7)(m) (**Exhibit RLA-9**).

<sup>310</sup> UK’s Written Submission, para. 82, *referring to* Environmental Improvement Plan 2023: First revision of the 25 Year Environment Plan (Defra), 2023, pp. 37-38 (**Exhibit R-6**).

<sup>311</sup> UK’s Written Submission, para. 83.

<sup>312</sup> UK’s Written Submission, para. 85, *citing* Article 6.2 of the FAO Code of Conduct (**Exhibit CLA-33**).

<sup>313</sup> UK’s Written Submission, para. 86, *citing* Article 7.5.1 of the FAO Code of Conduct (**Exhibit CLA-33**).

**(c) *Burden of Proof***

180. The United Kingdom rejects the European Union’s proposition that it has a *prima facie* burden to establish its claims of breach of the TCA, which, once met, shifts to the United Kingdom to show that its measures were justified.<sup>314</sup> Per the United Kingdom, as the Party alleging that another State has breached a treaty obligation, the European Union bears the burden of establishing its own claims.<sup>315</sup> Two nuances to this principle may arise when a respondent relies on an exception to a rule as a defence for a breach of that rule and when a party encounters difficulties in discharging its burden of proof on matters of fact because of the particular circumstances of the case.<sup>316</sup> The United Kingdom maintains that neither circumstance is relevant in the instant matter.<sup>317</sup>
181. The United Kingdom further argues that the European Union’s reliance on WTO jurisprudence and, in particular, on the *Wool Shirts and Blouses* case, is misplaced.<sup>318</sup> Among other reasons, the United Kingdom explains that this is because the relevant treaty frameworks are different and the discussion of the burden of proof in the *Wool Shirts and Blouses* case occurred in a materially different context.<sup>319</sup>

**B. BEST AVAILABLE SCIENTIFIC ADVICE CLAIM**

182. The European Union submits that the sandeel fishing prohibition is inconsistent with the United Kingdom’s obligations under Articles 496(1) and (2) of the TCA, read together with Article 494(3)(c) of the TCA, because it is not “based” on the “best available scientific advice”.<sup>320</sup>
183. The United Kingdom disputes the European Union’s contentions.<sup>321</sup>

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<sup>314</sup> Hearing, 30 January 2025, 36:11-37:8 (Juratowitch).

<sup>315</sup> Hearing, 30 January 2025, 37:12-17, 40:4-9 (Juratowitch).

<sup>316</sup> Hearing, 30 January 2025, 37:18-39:13 (Juratowitch).

<sup>317</sup> Hearing, 30 January 2025, 39:14-16 (Juratowitch).

<sup>318</sup> Hearing, 30 January 2025, 39:17-40:3 (Juratowitch); UK’s Replies to the EU’s Responses to the Questions, pp. 2-3.

<sup>319</sup> Hearing, 30 January 2025, 39:17-40:3 (Juratowitch); UK’s Replies to the EU’s Responses to the Questions, pp. 2-3.

<sup>320</sup> EU’s Written Submission, paras 398-512.

<sup>321</sup> UK’s Written Submission, paras 203-317.

## 1. Relevant Provisions of the TCA

184. Article 494 of the TCA, contained within Part Two, Heading Five, “Fisheries”, Chapter 1, “Initial Provisions”, and titled “Objectives and principles”, provides in full:

1. The Parties shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States as exercised by the Parties.
2. The Parties share the objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield.
3. The Parties shall have regard to the following principles:
  - (a) applying the precautionary approach to fisheries management;
  - (b) promoting the long-term sustainability (environmental, social and economic) and optimum utilisation of shared stocks;
  - (c) basing conservation and management decisions for fisheries on the best available scientific advice, principally that provided by the International Council for the Exploration of the Sea (ICES);
  - (d) ensuring selectivity in fisheries to protect juvenile fish and spawning aggregations of fish, and to avoid and reduce unwanted bycatch;
  - (e) taking due account of and minimising harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity;
  - (f) applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties;
  - (g) ensuring the collection and timely sharing of complete and accurate data relevant for the conservation of shared stocks and for the management of fisheries;
  - (h) ensuring compliance with fisheries conservation and management measures, and combating illegal, unreported and unregulated fishing; and
  - (i) ensuring the timely implementation of any agreed measures into the Parties' regulatory frameworks.

185. Article 496 of the TCA, contained within Part Two, Heading Five, “Fisheries”, Chapter 2, “Conservation and Sustainable Exploitation”, and titled “Fisheries management”, provides in full:

1. Each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3).
2. A Party shall base the measures referred to in paragraph 1 on the best available scientific advice.

A Party shall not apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the same measures to its own vessels. The second subparagraph is without prejudice to obligations of the Parties under the Port State Measures Agreement, the North East Atlantic Fisheries Commission Scheme of Control and Enforcement, the Northwest Atlantic Fisheries Organisation Conservation and Enforcement Measures, and Recommendation 18-09 by the International Commission for the Conservation of Atlantic Tunas on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

The Specialised Committee on Fisheries may amend the list of pre-existing international obligations referred to in the third subparagraph.

3. Each Party shall notify the other Party of new measures as referred to in paragraph 1 that are likely to affect the vessels of the other Party before those measures are applied, allowing sufficient time for the other Party to provide comments or seek clarification.

## 2. Submissions of the European Union

### (a) *The Applicable Legal Standard under the TCA*

186. The European Union submits that the wording of the obligation in Article 496(2) of the TCA to “base the measures referred to in [Article 496(1)] on the best available scientific advice” demonstrates the central importance of the “best available scientific advice”.<sup>322</sup> In construing the meaning of “base” in this context, the European Union begins by considering the ordinary meaning of the term, which it submits has the effect that Articles 496(2) and 494(3)(c) of the TCA require that “conservation and fisheries management decisions taken pursuant to [the best available scientific] advice are ‘placed on a foundation’ of [that advice].”<sup>323</sup> In this regard, the European Union agrees with the United Kingdom that “based on” does not mean “conform to”, such that even if advice is clear and unequivocal, it does not necessarily determine the content of the measure.<sup>324</sup>
187. Moreover, according to the European Union, the obligation in Article 496(2) of the TCA is one of result,<sup>325</sup> therefore, for the Parties to satisfy this obligation, they must “establish a rational or objective relationship between the best available scientific advice on one hand and any conservation and management measures adopted pursuant to it on the other.”<sup>326</sup>
188. The European Union notes that the term “best available scientific advice”, as contained within Articles 496(2) and 494(3)(c), has not been defined in the TCA.<sup>327</sup> Therefore, according to the European Union, it must be interpreted in line with the approach set out in Articles 4(1) and 4(2) of the TCA.<sup>328</sup> In doing so, the European Union first turns to the ordinary meaning of the term, which it establishes through the Oxford English Dictionary’s definitions of each of the three

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<sup>322</sup> EU’s Written Submission, paras 302-305.

<sup>323</sup> EU’s Written Submission, paras 306-308.

<sup>324</sup> EU’s Responses to Questions, para. 38; EU’s Replies to the UK’s Responses to Questions, paras 62-63.

<sup>325</sup> EU’s Written Submission, paras 310-312.

<sup>326</sup> EU’s Written Submission, paras 313-314.

<sup>327</sup> EU’s Written Submission, para. 405.

<sup>328</sup> EU’s Written Submission, para. 405.

constituent adjectives:<sup>329</sup> the advice must be the “best”, meaning “of the highest excellence”,<sup>330</sup> “available”, meaning “‘able to be used’ or ‘at one’s disposal’”,<sup>331</sup> and in a scientific context, the European Union submits this “may be understood to mean ‘published or peer reviewed and hence, open to corroboration’”; and finally “scientific”, meaning *inter alia* “based on or regulated by science”.<sup>332</sup> The European Union then considers the object and purpose of the term itself, noting that Article 496 of the TCA establishes an obligation to “base” measures on the “best available scientific advice”, such that the term “best available scientific advice” defines the quality that the evidential base for a given measure must have.<sup>333</sup> In the European Union’s view, this denotes a standard which constrains the Parties’ regulatory autonomy when deciding on measures.<sup>334</sup>

189. Further to the ordinary meaning and object and purpose of the term itself, the European Union contends that, in interpreting the term “best available scientific advice”, regard must also be given to its context, namely the objectives and purpose of the TCA more generally, as well as Heading V, “Fisheries” specifically.<sup>335</sup> Regarding the former, the European Union’s submissions on this point are reflected in Section IV.A.1(a) above. Regarding the latter, Heading V, “Fisheries”, the European Union considers it important to take into account how “best available scientific advice” has been understood within the specific framework of fisheries management and marine conservation.<sup>336</sup> According to the European Union, in the fisheries context, the “usual practice” of science typically revolves on the reliance “on large amounts of data and the ability to create and apply models so as to arrive at “objectively verifiable and valid conclusions” using “robust methods”.<sup>337</sup>
190. Additionally, the European Union notes that Article 494(3)(c) of the TCA further qualifies the term “best available scientific advice”, by providing that such advice is “principally that provided by [ICES].”<sup>338</sup> In the European Union’s view, the effect of this provision is that scientific advice

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<sup>329</sup> EU’s Written Submission, para. 406.

<sup>330</sup> EU’s Written Submission, para. 408, *citing* Oxford English Dictionary, s.v. “scientific (adj.), sense 3.a”; Hearing, 28 January 2025, 45:18-25 (Dr. Hofstötter).

<sup>331</sup> EU’s Written Submission, para. 409, *citing* Oxford English Dictionary, s.v. “available (adj.), sense 4”; *see also* Hearing, 30 January 2025, 10:22-11:7 (Norris).

<sup>332</sup> EU’s Written Submission, para. 407, *citing* Oxford English Dictionary, s.v. “scientific (adj.), sense 3.a”.

<sup>333</sup> EU’s Written Submission, para. 410.

<sup>334</sup> EU’s Written Submission, para. 410.

<sup>335</sup> EU’s Written Submission, para. 411.

<sup>336</sup> EU’s Written Submission, para. 412.

<sup>337</sup> EU’s Written Submission, paras 413-414.

<sup>338</sup> EU’s Written Submission, para. 415.

provided by ICES should form “a ‘preeminent’ or ‘main’ base for conservation and management decisions”, where relevant advice exists.<sup>339</sup> A further implication of this provision, in the European Union’s contention, is that any other advice relied upon “should be based on compelling and authoritative scientific evidence such that it can be considered to have an equivalent authoritative status.”<sup>340</sup> Because Article 494(3)(c) immediately follows the objectives set out in Articles 494(1) and 494(2) in the TCA, the European Union submits that the principles contained within Article 494(3)(c) should inform the means by which the objectives in Articles 494(1) and 494(2) are pursued.<sup>341</sup>

191. The European Union then turns to what it considers to be relevant rules of international law applicable in the relations between the Parties, namely the international law of the sea and international economic law.<sup>342</sup>
192. While “best available scientific advice” does not feature in UNCLOS, the European Union notes that “best available scientific *evidence*” is used on three occasions,<sup>343</sup> and that other provisions of UNCLOS also establish obligations related to scientific research and therefore reflect the role of scientific research in managing the marine environment.<sup>344</sup> The European Union submits that the International Tribunal for the Law of the Sea (hereinafter “**ITLOS**”) has held that provisions requiring States to have regard to the “best available scientific evidence” in the UNCLOS context additionally require States to take into account relevant environmental and economic factors, such as the impact of climate change and ocean acidification.<sup>345</sup> The European Union also notes that the FAO Code of Conduct and the UNFSA contain requirements for conservation and management decisions for fisheries to be based on the “best scientific evidence available.”<sup>346</sup> Additionally, the European Union highlights that various instruments establishing regional fisheries management organisations, which have the power to adopt binding fisheries conservation and management measures, refer to the “best available scientific evidence” or “best

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<sup>339</sup> EU’s Written Submission, para. 415.

<sup>340</sup> EU’s Written Submission, para. 415.

<sup>341</sup> EU’s Written Submission, paras 417-419.

<sup>342</sup> EU’s Written Submission, paras 420-459.

<sup>343</sup> EU’s Written Submission, paras 422-425, *referring to* Articles 61(2), 119(1)(a) and 234 of UNCLOS.

<sup>344</sup> EU’s Written Submission, paras 426-427, *referring to* Article 200 of UNCLOS.

<sup>345</sup> EU’s Written Submission, paras 428-429, *citing* ITLOS, *Advisory Opinion on Climate Change*, Advisory Opinion, 21 May 2024, para. 418 (**Exhibit CLA-21**).

<sup>346</sup> EU’s Written Submission, paras 431-435, *referring to* Articles 6.4, 7.3.1, 12.1 and 12.3 of the FAO Code of Conduct (**Exhibit CLA-33**); Articles 5(b), 6(7), 10(f) and 16(1) of the UNFSA (**Exhibit CLA-28**).

available scientific advice”, including two which specifically refer to ICES in this context.<sup>347</sup> Finally, the European Union considers that ITLOS’ provisional measures order in the *Southern Bluefin Tuna Cases* provides the requisite standard of review for a tribunal presented with scientific evidence, namely that tribunals “must determine whether that evidence has the attributes necessary to support the factual propositions asserted by a Party.”<sup>348</sup>

193. The European Union then considers the rules of international economic law, as defined and applied under the WTO Agreements.<sup>349</sup> The European Union contends that several principles that have been established in interpreting and applying the General Agreement on Tariffs and Trade 1994 (hereinafter “**GATT 1994**”) and other covered agreements provide relevant context for the interpretation of “best available scientific advice” as it appears in Article 496(2) of the TCA.<sup>350</sup>
194. As an example, the European Union highlights Article 2.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter “**SPS Agreement**”), which it states “requires WTO Members to base their SPS measures on scientific principles and prohibit their maintenance without ‘sufficient’ scientific evidence.”<sup>351</sup> Under the SPS Agreement, the European Union notes that Members may determine the “appropriate level of sanitary or phytosanitary protection” (hereinafter “**ALOP**”) that they wish to apply in their territory, and where there is scientific justification for that ALOP, they may introduce or maintain sanitary or phytosanitary measures which may result in a higher standard of protection than would be achieved by measures based on the relevant international standards.<sup>352</sup> In the European Union’s contention, a “scientific justification” exists under the SPS Agreement where, “on the basis of an examination and

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<sup>347</sup> EU’s Written Submission, paras 437-441, *referring to* Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, done at London on 18 November 1980 (**Exhibit CLA-34**); Convention for the Conservation of Salmon in the North Atlantic Ocean establishing the North Atlantic Salmon Conservation Organization (NASCO), done at Reykjavik on 2 March 1982 (**Exhibit CLA-35**); Convention on Cooperation in the Northwest Atlantic Fisheries establishing the Northwest Atlantic Fisheries Organization (NAFO), done at Ottawa on 24 October 1978 (**Exhibit CLA-36**); Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean establishing the South East Atlantic Fisheries Organisation (SEAFO), done at Windhoek on 20 April 2001 (**Exhibit CLA-37**).

<sup>348</sup> EU’s Written Submission, para. 442, *citing* ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 296, Recital 80 (**Exhibit CLA-27**); ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Joint Declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson (**Exhibit CLA-38**).

<sup>349</sup> EU’s Written Submission, para. 443.

<sup>350</sup> EU’s Written Submission, para. 446.

<sup>351</sup> EU’s Written Submission, para. 447.

<sup>352</sup> EU’s Written Submission, para. 449, *referring to* Art. 3.3 of the SPS Agreement (**Exhibit CLA-41**).



evaluation of available scientific information”, a Member determines that the relevant international standards are insufficient to achieve its appropriate level of sanitary or phytosanitary protection.<sup>353</sup> According to the European Union, the burden of proof then falls on that Member to demonstrate that its assertion is supported by the scientific evidence it relies upon, and in a WTO context, the types of scientific information and evidence that may be relied upon have been interpreted broadly, and need not reflect a majority view.<sup>354</sup> Additionally, the European Union notes that WTO Panels have recognised that, in reviewing a policy decision, it is not for the Panel to determine the requisite level of protection, nor to present its own scientific judgement, but instead to consider whether all of the evidence before it reasonably supports the proposition advanced, and whether there is a rational or objective relationship between the impugned measure and the evidence.<sup>355</sup> However, the European Union also submits that WTO Panels may also have regard to whether a particular piece of evidence has the “‘necessary scientific and methodological rigor to be considered reputable science’ according to the standards of the relevant scientific community, as well as the extent to which its use in support of the measures at issue is ‘objective and coherent’”.<sup>356</sup>

195. The European Union therefore contends that, in light of the approach adopted in international economic law to provisions containing similar wording to the term “best available scientific advice” as contained in Article 496 of the TCA, the term should be understood as reflecting the proposition that scientific information and advice must be based on “rigorous methods” and, where data is an integral part of the impugned measure, Parties must rely on “the most recent available data to ensure a balanced and coherent application of the measure.”<sup>357</sup> Additionally, the

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<sup>353</sup> EU’s Written Submission, para. 450, *citing* Article 3.3, n. 2 of the SPS Agreement (**Exhibit CLA-41**).

<sup>354</sup> EU’s Written Submission, paras 451-454, *referring to* WTO, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 178 (**Exhibit CLA-42**).

<sup>355</sup> EU’s Written Submission, paras 455, 457, *referring to* WTO, Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging* (hereinafter “*Australia – Tobacco Plain Packaging (Cuba)*”), WT/DS458/R, adopted 27 August 2018, para. 7.627 (**Exhibit CLA-31**); WTO, Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, paras 163-64 (**Exhibit CLA-44**).

<sup>356</sup> EU’s Written Submission, para. 456, *citing* WTO, Panel Report, *Australia – Tobacco Plain Packaging (Cuba)*, WT/DS458/R, adopted 27 August 2018, para. 7.627 (**Exhibit CLA-31**); WTO, Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (hereinafter “*US – Continued Suspension*”), WT/DS320/AB/R, adopted 14 November 2008, para. 591 (**Exhibit CLA-32**).

<sup>357</sup> EU’s Written Submission, para. 458, *citing* WTO, Panel Report, *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels* (hereinafter “*EU and Certain Member States – Palm Oil (Malaysia)*”), WT/DS600/R, adopted 26 April 2024, para. 7.566 (**Exhibit CLA-45**); *see also* Hearing, 28 January 2025, 49:2-4 (Dr. Hofstätter).

European Union submits that, consonant with the role of a WTO Panel, a tribunal considering the evidential foundation for a measure may review whether the conclusions drawn find sufficient support in the scientific advice relied upon, and, in doing so, should have regard to whether there is “a rational connection between the degree of risk and the measure applied.”<sup>358</sup>

196. Therefore, the European Union concludes that the term “best available scientific advice” as used in Articles 494(3)(c) and 496(2) of the TCA should be understood to have the following requirements.<sup>359</sup> Firstly, where data is an essential component justifying the particular design or scope of the impugned measure, which the European Union contends is the case with fisheries management measures, then the scientific advice invoked “must be supported by the most recent available scientific data and must be derived from rigorous scientific methods.”<sup>360</sup> Additionally, the European Union submits that the “*best* available scientific advice” standard contained within Articles 494(3)(c) and 496(2) of the TCA should be viewed as a stringent standard, such that the scientific advice relied upon must not be incomplete or based on outdated data.<sup>361</sup> Moreover, according to the European Union, the “*best available* scientific advice” must be understood to refer to publicly available advice, and be interpreted within the context of the Parties’ obligations to obtain scientific research or data prior to taking conservation and management decisions that are required to be based on scientific advice.<sup>362</sup> In this regard, the European Union clarifies that the term “best” entails a comparative assessment of “available advice”, which also extends to advice that could reasonably have been obtained at the time a measure is under consideration based on existing scientific evidence.<sup>363</sup> To the extent no such advice is readily available, the European Union avers that it implies a duty on the Parties to procure such advice from a scientific body and to ensure that the body requested bases its advice on existing scientific evidence.<sup>364</sup> Moreover, the European Union considers that “advice” cannot be considered the “best available”

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<sup>358</sup> EU’s Written Submission, para. 459.

<sup>359</sup> EU’s Written Submission, para. 460; *see also* EU’s Responses to Questions, para. 51 (acknowledging that there is a conceptual difference between “advice” and “evidence” in that advice consists of different, individual items of scientific evidence, which, collectively are relied upon as the basis for a measure); EU’s Replies to the UK’s Responses to Questions, para. 107.

<sup>360</sup> EU’s Written Submission, para. 461.

<sup>361</sup> EU’s Written Submission, para. 462.

<sup>362</sup> EU’s Written Submission, paras 463-464, *referring to* Article 12.3 of the FAO Code of Conduct (**Exhibit CLA-33**).

<sup>363</sup> EU’s Responses to Questions, paras 34, 36-37; EU’s Replies to the UK’s Responses to Questions, paras 56-57, 60. *See also* EU’s Supplementary Written Submission, paras 17-18.

<sup>364</sup> EU’s Responses to Questions, para. 35; EU’s Replies to the UK’s Responses to Questions, paras 56-57, 60.

if it fails to have regard to key observations in existing scientific evidence.<sup>365</sup> Finally, “the best available *scientific* advice” means that scientific bodies should be understood as best-placed to provide such advice; the European Union avers that this interpretation is supported by the reference to ICES in Article 494(3)(c) of the TCA.<sup>366</sup>

197. Additionally, the European Union contends that the Arbitration Tribunal in the present dispute need not “conclusively assess” the scientific evidence, but it must consider whether that evidence “has the methodological rigour required in order to be considered the ‘best available scientific advice’.”<sup>367</sup> Per the European Union, the essential attributes that inform scientific and methodological rigour can be inferred from those of the advice provided by ICES—*i.e.*, (i) scientific objectivity and integrity; (ii) quality assurance, including peer review as appropriate; and (iii) transparency.<sup>368</sup> However, the European Union considers that the lack of any one of these essential attributes does not necessarily render the advice not scientific.<sup>369</sup>

**(b) *The Alleged Failure of the United Kingdom to Base the Sandeel Fishing Prohibition on the “Best Available Scientific Advice”***

198. The European Union contends that the sandeel fishing prohibition is inconsistent with the United Kingdom’s obligation to base fisheries management measures applicable to its waters on the “best available scientific advice”, in accordance with Articles 496(1) and (2) of the TCA, read together with Article 493(3)(c).<sup>370</sup> This is because the scientific advice identified by the United Kingdom as the basis for the prohibition is not the “best available scientific advice”, due to certain elements of the advice lacking what it contends is the requisite scientific and methodological rigour (i), and that, in any event, the scientific advice relied upon by the United Kingdom does not justify the full spatial scope of the sandeel fishing prohibition (ii).<sup>371</sup>

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<sup>365</sup> EU’s Responses to Questions, para. 52; EU’s Replies to the UK’s Responses to Questions, para. 108.

<sup>366</sup> EU’s Written Submission, para. 465.

<sup>367</sup> EU’s Written Submission, para. 466, *referring to* ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 296, Recital 80 (**Exhibit CLA-27**); WTO, Panel Report, *Australia – Tobacco Plain Packaging (Cuba)*, WT/DS458/R, adopted 27 August 2018, para. 7.627 (**Exhibit CLA-31**); WTO, Appellate Body Report, *US – Continued Suspension*, WT/DS320/AB/R, adopted 14 November 2008, para. 591 (**Exhibit CLA-32**).

<sup>368</sup> EU’s Responses to Questions, paras 47-49; EU’s Replies to the UK’s Responses to Questions, para. 106.

<sup>369</sup> EU’s Responses to Questions, para. 50.

<sup>370</sup> EU’s Written Submission, para. 467.

<sup>371</sup> EU’s Written Submission, paras 468-470.

199. Referring to three letters received by the European Commission from the United Kingdom on 30 January 2024, 2 February 2024, and 8 February 2024, the European Union contends that the scientific advice relied upon by the United Kingdom as the basis for the sandeel fishing prohibition is the ICES Technical Service of 28 November 2023, the Natural England/Cefas/JNCC Advice, and the Scottish Scientific Review.<sup>372</sup>

(i) *The Scientific Advice Identified by the United Kingdom Is Not the “Best Available Scientific Advice”*

200. The European Union contends that “advice” in the present context “may consist of different, individual items of scientific evidence which, collectively are relied upon as the basis for a measure.”<sup>373</sup> According to the European Union, of the three pieces of scientific advice relied on by the United Kingdom in adopting the sandeel fishing prohibition, the Natural England/Cefas/JNCC Advice is the only one that could justify the full spatial scope of the prohibition, being all UK waters of the North Sea.<sup>374</sup> While the European Union does not argue that modelling is required for the purpose of “best scientific advice”, it does submit that where such modelling is undertaken, it must be done on the basis of scientific and methodological rigour and in particular be parameterised based on key observations from the scientific literature.<sup>375</sup> However, in the European Union’s submission, the United Kingdom should have relied on a “more scientifically rigorous model”, because this advice does not have the “necessary scientific and methodological rigour to be considered reputable science”, due to deficiencies in the assumptions and caveats adopted in the model it uses.<sup>376</sup> The European Union identifies four such flawed assumptions and caveats.

201. First, the European Union contends that the Natural England/Cefas/JNCC advice assumes that a prohibition on sandeel fishing in the UK waters of the North Sea would reduce the amount of

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<sup>372</sup> EU’s Written Submission, paras 472-476, *referring to* Letter from UK Secretary of State Environment, Food & Rural Affairs to the European Commissioner for the Environment, Oceans and Fisheries, 30 January 2024 (**Exhibit C-58**); Letter from the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands to the Directorate-General for Maritime Affairs and Fisheries of the European Commission, 2 February 2024 (**Exhibit C-59**); UK notification of the sandeel fishing prohibition to the EU pursuant to Article 496(3) of the TCA, 8 February 2024 (**Exhibit C-60**).

<sup>373</sup> EU’s Written Submission, para. 478.

<sup>374</sup> EU’s Written Submission, para. 479.

<sup>375</sup> EU’s Responses to Questions, paras 88-90, 103-104.

<sup>376</sup> EU’s Written Submission, para. 480, *citing* WTO, Panel Report, *Australia – Tobacco Plain Packaging (Cuba)*, WT/DS458/R, adopted 27 August 2018, para. 7.627 (**Exhibit CLA-31**); WTO, Appellate Body Report, *US – Continued Suspension*, WT/DS320/AB/R, adopted 14 November 2008, para. 591 (**Exhibit CLA-32**); *see also* EU’s Replies to the UK’s Responses to Questions, para. 61; EU’s Supplementary Written Submission, paras 30-36.

sandeel catches in the North Sea by 58%, but that this is likely an overestimate, because it is based on the outdated reference period of 2003-2020, disregarding that since 2011, the sandeel fishery in the North Sea is managed according to an escapement strategy that ensures catches are reduced in years where the sandeel stock size is estimated to be lower.<sup>377</sup> In response to the United Kingdom's claims that a calculation based only on the time period from 2011-2020 showed no material change to the result of 58%,<sup>378</sup> the European Union criticises that the United Kingdom failed to take into account Norwegian catches, thereby overestimating the proportion of catch from UK waters.<sup>379</sup> According to the European Union, taking into account Norwegian catches, the correct amount of sandeel catches in UK waters during that time period corresponds to an average of 39% of total sandeel catches in the North Sea.<sup>380</sup>

202. Second, the European Union submits that the Natural England/Cefas/JNCC Advice is based on “a fixed fishing pressure up until 2100”, again disregarding that since 2011, the sandeel fishery in the Greater North Sea is managed pursuant to an escapement strategy that reduces fishing pressure in years where sandeel stock size is estimated to be lower.<sup>381</sup>
203. Third, the European Union criticises the model's aggregation of functional groups, in particular seabirds and sandeel.<sup>382</sup> It argues that the model is not size-structured, such that it may overestimate the impacts of forage fish depletion by not accounting for cases where predators take small forage fish that are unaffected by fishing.<sup>383</sup> The European Union also disputes the simulated biomass response to the prohibition of industrial fisheries in UK waters of the North Sea of all seabird predators taken together as a group, as modelled in the Natural England/Cefas/JNCC Advice, contending that this may either underestimate or overestimate the

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<sup>377</sup> EU's Written Submission, para. 484, *citing* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 23 (**Exhibit C-45**); Hearing, 28 January 2025, 71:7-12, 72:11-75:4 (Dr. Puccio).

<sup>378</sup> UK's Written Submission, para. 282.1.

<sup>379</sup> EU's Responses to Questions, paras 106-111; *see also* Hearing, 30 January 2025, 20:11-21:15 (Dawes).

<sup>380</sup> EU's Responses to Questions, para. 111.

<sup>381</sup> EU's Written Submission, para. 485, *citing* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 30 (**Exhibit C-45**); Hearing, 28 January 2025, 72:2-6 (Dr. Puccio).

<sup>382</sup> Hearing, 28 January 2025, 71:13-19 (Dr. Puccio).

<sup>383</sup> EU's Written Submission, para. 488, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**); Hearing, 28 January 2025, 75:5-76:3 (Dr. Puccio).

biomass response of individual seabirds.<sup>384</sup> The European Union submits that this is the case for three reasons: because sandeel only comprise a substantial proportion of the diet of certain seabirds, the feeding range of seabirds varies across different species, and the spatial overlap between the feeding range of chick-rearing seabirds and the sandeel fishery is limited.<sup>385</sup>

204. Fourth, the European Union emphasises that the models in the study do not account for the spatial distribution of predators and sandeel, with the authors noting that this may mean that some specific ecosystem impacts of fishing are over- or underestimated.<sup>386</sup> The European Union elaborates that the model that was granted Key Run status by ICES in 2015 is an EwE model of the North Sea and does not contain an Ecospace dimension, which needs to be parameterised by way of a separate model extension, which, according to the European Union, has been available since at least 2013.<sup>387</sup>
205. The European Union accepts that as a matter of law, the flaws and caveats in the models used by Natural England/Cefas/JNCC are subject to a requirement of materiality in that those flaws, holistically, would need to make a material difference.<sup>388</sup> It states that the cumulative effect of the flaws in the model is that Natural England/Cefas/JNCC did not disclose how they updated their model, or what underlying data they used to parameterise the updated model, and additionally that the updated model “inter alia failed to consider separately different seabirds, failed to size-structure and failed to take into account the spatial distribution of sandeels.”<sup>389</sup> According to the European Union, the consequence of these flaws is that the simulated biomass responses to a prohibition of sandeel fishing in UK waters of the North Sea are likely to be overestimated,<sup>390</sup> such that the requirement of materiality is met.<sup>391</sup> The European Union contends that there was

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<sup>384</sup> EU’s Written Submission, para. 486, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 25 (**Exhibit C-45**); Hearing, 28 January 2025, 76:4-76:13 (Dr. Puccio); *see also* EU’s Supplementary Written Submission, para. 35.

<sup>385</sup> EU’s Written Submission, para. 486, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 25 (**Exhibit C-45**).

<sup>386</sup> EU’s Written Submission, para. 489, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**) Hearing, 28 January 2025, 71:20-72:1, 76:14-18, 77:1-81:5 (Dr. Puccio); EU’s Response to Questions, paras 82-86.

<sup>387</sup> Hearing, 30 January 2025, 16:23-18:16 (Dawes); EU’s Response to Questions, para. 83.

<sup>388</sup> EU’s Responses to Questions, para. 123.

<sup>389</sup> EU’s Written Submission, para. 490; *see also* EU’s Responses to Questions, paras 112-117.

<sup>390</sup> EU’s Responses to Questions, para. 117.

<sup>391</sup> EU’s Responses to Questions, para. 124.

available scientific advice to address the flaws and caveats in the model used.<sup>392</sup> Given, therefore, that in the European Union’s contention, the Natural England/Cefas/JNCC Advice is the only scientific advice invoked by the United Kingdom as a base for the sandeel fishing prohibition that supports its full spatial scope (being all UK waters of the North Sea), the European Union submits that the evidential basis for the prohibition is insufficient and therefore does not constitute the “best available scientific advice” for the purposes of Articles 496(2) and 494(3)(c) of the TCA.<sup>393</sup> The European Union clarifies that it otherwise “does not challenge the scientific and methodological rigour of: (i) the ICES Technical Service; (ii) the remainder of the Natural England/Cefas/JNCC advice; and (iii) the Scottish scientific literature review”.<sup>394</sup>

(ii) *In Any Case, the Scientific Advice Relied on by the United Kingdom Fails to Justify the Full Spatial Scope of the Sandeel Fishing Prohibition*

206. The European Union contends that, even if the Arbitration Tribunal finds that the scientific advice relied upon by the United Kingdom falls within the meaning of the “best available scientific advice” pursuant to Articles 496(2) and 494(3)(c) of the TCA, the sandeel fishing prohibition is not based on the “best available scientific advice”, because there is no rational or objective relationship between the scientific advice and the full spatial scope of the prohibition.<sup>395</sup>
207. According to the European Union, the sandeel fishery in the North Sea is currently exploited in a manner that ensures the healthy level of sandeel stock both in the North Sea as a whole and across each of the seven Sandeel Management Areas.<sup>396</sup> For example, the European Union notes that the ICES Technical Service provides that “ICES quotas for sandeel [...] are based on best available scientific assessments” such that “[i]f followed, this advice should ensure healthy levels of these stocks”; and that “for sandeel in particular, the spatial structure of the management advice is likely sufficient to ensure that local depletions can be reversed by recruitment from somewhere else in

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<sup>392</sup> EU’s Replies to the UK’s Responses to Questions, para. 61; Hearing, 28 January 2025, 84:3-85:4 (Dr. Hofstötter).

<sup>393</sup> EU’s Written Submission, paras 491-492.

<sup>394</sup> EU’s Written Submission, para. 491.

<sup>395</sup> EU’s Written Submission, para. 493; EU’s Responses to Questions, para. 95.

<sup>396</sup> EU’s Written Submission, paras 494-495, *referring to* ICES Technical Service, Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 2 (**Exhibit C-22**); DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023 (**Exhibit C-44**).

the management region”.<sup>397</sup> Additionally, the European Union submits that fluctuations in the North Sea sandeel stock are primarily due to natural mortality, rather than the sandeel fishery.<sup>398</sup>

208. The European Union accepts that “there is a correlation between the insufficient localised abundance of sandeel and the breeding success of chick-rearing seabirds for which sandeel comprises a substantial portion of their diet”, which it submits is the reason why sandeel fishing has been prohibited since 2000 in ICES Division 4b within English waters and ICES Divisions 4a and 4b in Scottish waters.<sup>399</sup> In the European Union’s view, there is a rational and objective relationship between the scientific advice and the prohibition on sandeel fishing in these particular UK waters that are within the feeding range of the chick-rearing seabirds.<sup>400</sup> However, the European Union draws a contrast between the prohibition on sandeel fishing in these particular waters, and the presently-impugned prohibition which goes beyond those waters which are within the feeding range of the chick-rearing seabirds, contending that the scientific advice invoked by the United Kingdom as the basis for the sandeel fishing prohibition does not indicate that a broader prohibition would have further positive environmental effects.<sup>401</sup> According to the European Union, this is for three reasons.
209. First, the European Union contends that fluctuations in the North Sea sandeel stock are principally due to natural mortality and not associated with the North Sea sandeel fishery, such that the scientific advice invoked by the United Kingdom does not demonstrate that a spatially broader prohibition on sandeel fishing going beyond the feeding range of chick-rearing seabirds for which sandeel comprise a substantial portion of their diet would increase the abundance and resilience of sandeel.<sup>402</sup>
210. Second, the European Union submits that the scientific advice invoked by the United Kingdom as the basis for the sandeel prohibition does not provide support for a spatially broader prohibition benefitting the breeding success of chick-rearing seabirds for which sandeel comprise a

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<sup>397</sup> EU’s Written Submission, para. 494, *referring to* ICES Technical Service, Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 2 (**Exhibit C-22**); *see also* EU’s Responses to Questions, paras 125-127.

<sup>398</sup> EU’s Written Submission, paras 496-497, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023 (**Exhibit C-50**).

<sup>399</sup> EU’s Written Submission, para. 499.

<sup>400</sup> EU’s Written Submission, para. 500.

<sup>401</sup> EU’s Written Submission, para. 501.

<sup>402</sup> EU’s Written Submission, para. 502.



substantial portion of their diet.<sup>403</sup> The European Union notes that the Scottish Scientific Review advises, in relation to kittiwakes, that they typically do not forage outside of the area that was already closed prior to the sandeel fishing prohibition, and that, unless a wider sandeel closure would significantly change sandeel availability within that existing closed area, “improved sandeel availability may generally be of limited benefit to kittiwake breeding success.”<sup>404</sup> According to the European Union, this conclusion is consistent with what it submits is a limited spatial overlap between the sandeel fishery and the feeding range of chick-rearing seabirds for which sandeel comprises a substantial proportion of their diet.<sup>405</sup> The European Union also reiterates its concerns about the assumptions underlying the model in the Natural England/Cefas/JNCC Advice to support this contention, concluding that it is “not possible to evaluate how the simulated biomass increase [modelled in the Natural England/Cefas/JNCC Advice] to such a more spatially limited prohibition would compare with the simulated biomass increase of ‘[p]rohibiting sandeel fishing in UK waters’ of the North Sea.”<sup>406</sup>

211. Third, according to the European Union, the scientific advice invoked by the United Kingdom does not indicate that the spatially broader sandeel fishing prohibition would lead to any other environmental effects that the United Kingdom ostensibly claims.<sup>407</sup> The European Union disputes five specific benefits, dealt with here in turn.
212. On the purported benefits for marine mammals, the European Union quotes from the Scottish Scientific Review as providing that “it seems a reasonable assumption that any increase in sandeel abundance that might result from a reduction in fisheries pressure might be beneficial to several populations of marine mammals given their dependence on sandeel as a prey source”.<sup>408</sup> However,

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<sup>403</sup> EU’s Written Submission, para. 503.

<sup>404</sup> EU’s Written Submission, para. 503, *citing* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 51, 53 (**Exhibit C-50**); *see also* EU’s Responses to Questions, para. 99.

<sup>405</sup> EU’s Written Submission, para. 504.

<sup>406</sup> EU’s Written Submission, para. 505, *citing* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, (**Exhibit C-45**).

<sup>407</sup> EU’s Written Submission, para. 506

<sup>408</sup> EU’s Written Submission, para. 507, *citing* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 74 (**Exhibit C-50**).

in the European Union's view, this assumption is based on a series of "unsupported assumptions" which are too speculative to support the alleged link.<sup>409</sup>

213. The European Union contends that any purported benefits of the broader prohibition for fish are disputed, relying on the Scottish Scientific Review's claim that predatory fish are often generalist feeders and that the importance of sandeel is therefore more variable for predatory fish than for seabirds and mammals.<sup>410</sup> Additionally, the European Union highlights the Natural England/Cefas/JNCC Advice's point that the ability of predatory fish to substitute diet shortfalls with other prey indicates that they are less crucially dependent on local sandeel abundance.<sup>411</sup> The European Union claims that this is also consistent with an ICES Report, which similarly provides that "more mobile marine mammals and fish may be less vulnerable to local sandeel depletion" than some species of birds.<sup>412</sup>
214. The European Union disputes the possibility of the sandeel fishing prohibition leading to an increased occurrence of marine mammals within UK waters of the North Sea, as raised in the Natural England/Cefas/JNCC Advice,<sup>413</sup> instead submitting that "fluctuations in the abundance of sandeel are principally due to natural sandeel mortality not associated directly or indirectly with the North Sea sandeel fishery".<sup>414</sup>
215. The European Union also disagrees that the sandeel fishing prohibition would lead to an improved condition of other commercial fish, stating that this is not supported by the Natural England/Cefas/JNCC Advice's statement that "increased sandeel availability and consumption

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<sup>409</sup> EU's Written Submission, para. 507.

<sup>410</sup> EU's Written Submission, para. 508, *referring to* Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 35 (**Exhibit C-50**); *see also* EU's Responses to Questions, para. 101.

<sup>411</sup> EU's Written Submission, para. 508, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, p. 13 (**Exhibit C-45**).

<sup>412</sup> EU's Written Submission, para. 508, *citing* Report of the ICES Working Group on the Assessment of Demersal Stocks in the North Sea and Skagerrak (WGNSSK), ICES WGNSSK REPORT 2011, ICES CM 2011/ACOM:13, 2011, Section 4.1.1 (**Exhibit C-74**).

<sup>413</sup> EU's Written Submission, para. 509, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, p. 19) (**Exhibit C-45**).

<sup>414</sup> EU's Written Submission, para. 509, *citing* Engelhard *et al.*, 'Forage fish, their fisheries, and their predators: who drives whom?' (2014) Vol. 71(1) ICES Journal of Marine Science 90 (**Exhibit C-19**).

has been shown to positively correlate with the body condition of some commercial fish”.<sup>415</sup> The European Union reiterates that fluctuations in the abundance of sandeel are principally due to natural sandeel mortality,<sup>416</sup> and repeats the Natural England/Cefas/JNCC Advice’s statement that the ability of predatory fish to substitute diet shortfalls with other prey indicates that they are less crucially dependent on local sandeel abundance.<sup>417</sup>

216. Finally, the European Union disputes that the sandeel fishing prohibition would lead to “progress towards achieving good environmental status”,<sup>418</sup> based on “substantiated links [...] between the abundance of sandeels and the survival and breeding success of birds, mammals, and commercial fish.”<sup>419</sup> The European Union contends that the scientific advice invoked by the United Kingdom as the basis for the sandeel fishing prohibition does not indicate that the broader spatial scope would create further benefits beyond those provided by the more spatially limited prohibition.<sup>420</sup>

### **3. Submissions of the United Kingdom**

217. The United Kingdom claims that the sandeel fishing prohibition is consistent with its obligations under Articles 496(1) and (2) of the TCA, read together with Article 494(3)(c).
218. The following sections address the United Kingdom’s submissions on the applicable legal standard (a), and the alleged failure of the United Kingdom to base the sandeel fishing prohibition on the best available scientific advice (b).
219. According to the United Kingdom, contrary to the European Union’s submissions the scientific advice it relied on was the “best available scientific advice” ((b)(i)),<sup>421</sup> and, further, the sandeel fishing measures were “based on” this advice ((b)(ii)).<sup>422</sup> The United Kingdom additionally

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<sup>415</sup> EU’s Written Submission, para. 510, *citing* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 20 (**Exhibit C-45**).

<sup>416</sup> EU’s Written Submission, para. 510, *referring to* Engelhard *et al.*, ‘Forage fish, their fisheries, and their predators: who drives whom?’ (2014) Vol. 71(1) ICES Journal of Marine Science 90 (**Exhibit C-19**).

<sup>417</sup> EU’s Written Submission, para. 510, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, (**Exhibit C-45**).

<sup>418</sup> EU’s Written Submission, para. 511.

<sup>419</sup> EU’s Written Submission, para. 511, *citing* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 20 (**Exhibit C-45**).

<sup>420</sup> EU’s Written Submission, para. 511.

<sup>421</sup> UK’s Written Submission, paras 273-288.

<sup>422</sup> UK’s Written Submission, paras 289-302.

contends that, pursuant to the precautionary principle, a lack of scientific information does not justify postponing or failing to take fisheries management measures ((b)(iii)).<sup>423</sup>

**(a) *The Applicable Legal Standard under the TCA***

220. The United Kingdom agrees with the European Union that, in interpreting the applicable legal standard under Articles 496(1) and (2) of the TCA, read together with Article 494(3)(c), “to base” should be understood as to “place on a foundation of”, which requires “a rational or objective relationship between the best available scientific advice on one hand and any conservation and management measures adopted pursuant to it on the other.”<sup>424</sup> The United Kingdom then advances five additional points on the meaning of “to base” in this context.
221. First, the United Kingdom submits that the requirement to “base” a measure on the “best available scientific advice” does not mandate that the advice be the only consideration taken into account.<sup>425</sup> This is supported by what the United Kingdom describes as one of the purposes of the TCA as contained in the Preamble, namely “to preserve the Parties’ regulatory autonomy in respect of the environment.”<sup>426</sup> The United Kingdom also contends that such an interpretation is consistent with ITLOS’ interpretation of “measures [...] necessary to prevent, reduce and control pollution of the marine environment” under Article 194(1) of UNCLOS in its *Advisory Opinion on Climate Change*,<sup>427</sup> as well as WTO jurisprudence distinguishing between an obligation to “base” measures on international standards and an obligation to “conform” measures to such standards.<sup>428</sup>
222. Second, the United Kingdom contends that “a measure may be ‘based on’ the best available scientific advice notwithstanding a lack of ‘adequate scientific information’”, through applying the word “best” as a relative term, as well as the precautionary approach contained within Articles 494(3)(a) and 495(1)(b) of the TCA.<sup>429</sup> In this regard, the United Kingdom explains that the precautionary approach may be engaged in the circumstance where there is an inadequacy in

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<sup>423</sup> UK’s Written Submission, paras 303-317.

<sup>424</sup> UK’s Written Submission, para. 215, *citing* EU’s Written Submission, paras 313-314; *see* para. 187 above.

<sup>425</sup> UK’s Written Submission, para. 217, *referring to* Article 494(3) of the TCA.

<sup>426</sup> UK’s Written Submission, para. 218, *referring to* Recitals 7-9 to the TCA.

<sup>427</sup> UK’s Written Submission, para. 219, *citing* ITLOS, *Advisory Opinion on Climate Change*, Advisory Opinion, 21 May 2024, para. 212 (**Exhibit CLA-21**).

<sup>428</sup> UK’s Written Submission, para. 220, *citing* WTO, Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 163 (**Exhibit CLA-43**).

<sup>429</sup> UK’s Written Submission, para. 221, *citing* Article 495(1)(b) of the TCA; *referring to* Article 494(3)(a) of the TCA.

the science, though one could not, in good faith, apply the precautionary principle if the inadequacy is caused by an affirmative decision not to seek readily available information.<sup>430</sup>

223. Third, the United Kingdom avers that measures may be “based” on the “best available scientific advice”, even in a situation where the scientific community’s views on a particular matter diverge,<sup>431</sup> which the United Kingdom contends the European Union also accepts.<sup>432</sup>
224. Fourth, the United Kingdom disputes the European Union’s categorisation of the obligation in Article 496(2) of the TCA as one of result,<sup>433</sup> contending instead that “the Parties are entitled to decide for themselves the outcomes they seek to achieve and the means by which they will seek to do so”, with Article 496(2) “merely provid[ing] a qualification on the manner in which each Party does so.”<sup>434</sup> Thus, the United Kingdom states that, as both Parties accept, even if the advice is clear or unequivocal, to comply with Article 496(2) of the TCA, the Party must base a measure on the advice, but the measure must not necessarily conform to the advice.<sup>435</sup>
225. Fifth, the United Kingdom avers that the European Union’s reliance on WTO jurisprudence interpreting the phrase “sufficient scientific evidence” in the SPS Agreement should be “treated with care in the present context”, because, according to the United Kingdom, the European Union’s submission “proceeds as if ‘sufficiency’ were the requisite standard for the TCA.”<sup>436</sup> The United Kingdom accepts that WTO jurisprudence may be of assistance in interpreting the TCA in some circumstances, but cautions that “this does not mean that concepts from that jurisprudence can be imported wholesale into provisions of the TCA dealing with quite different subject matter”.<sup>437</sup>

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<sup>430</sup> Hearing, 29 January 2025, 101:16-107:10 (Juratowitch, Prof. Ruiz Fabri, Justice Unterhalter); Hearing, 30 January 2025, 73:7-74:3 (Juratowitch); UK’s Responses to Questions, p. 9.

<sup>431</sup> UK’s Written Submission, para. 222, *referring to* WTO, Appellate Body Report, *US – Continued Suspension*, WT/DS320/AB/R, adopted 14 November 2008, para. 529 (**Exhibit CLA-32**).

<sup>432</sup> UK’s Written Submission, para. 222, *referring to* EU’s Written Submission, para. 454.

<sup>433</sup> UK’s Written Submission, para. 223, *referring to* EU’s Written Submission, paras 310, 313; *see also* para. 187 above.

<sup>434</sup> UK’s Written Submission, para. 223.

<sup>435</sup> UK’s Responses to Questions, p. 6.

<sup>436</sup> UK’s Written Submission, paras 224-225, *referring to* EU’s Written Submission, paras 456-457, 459; *see also* paras 194-195 above.

<sup>437</sup> UK’s Written Submission, paras 224-225, *referring to* EU’s Written Submission, paras 456-457, 459.

226. In considering the meaning of “best available scientific advice”, the United Kingdom begins with the word “best”.<sup>438</sup> The United Kingdom characterises “best” as a comparative term and submits that the comparison should be understood in relation to “other available scientific advice”.<sup>439</sup> According to the United Kingdom, the European Union “acknowledges that ‘best’ is a superlative term”,<sup>440</sup> but the European Union then incorrectly applies it as an “absolute, rather than comparative, standard”, including through asserting that it requires the “exclusion of evidence that is incomplete or which is not based on the most recent available scientific data.”<sup>441</sup> This is, in the United Kingdom’s view, erroneous for three reasons.<sup>442</sup>
227. First, the United Kingdom submits that there is no “fixed endpoint” to scientific research on topics like the North Sea ecosystem, contending that even ICES advice is incomplete by some standards; instead, the relevant obligation as contained within Articles 496(1) and (2), read together with Article 494(3)(c) of the TCA, is to base measures on the best scientific advice *available*, rather than the best scientific advice that might be *possible* “given unlimited time and resources.”<sup>443</sup>
228. Second, the United Kingdom contends that to exclude “incomplete” evidence from the definition of “best available scientific advice” in this context contradicts the precautionary principle which, according to the United Kingdom, “forms part of the interpretative ‘context’ of the applicable provisions”.<sup>444</sup> The United Kingdom submits that the definition of the precautionary approach in the TCA, as contained at Article 495(1)(b), refers not just to the Parties’ intention to conserve shared fish stocks, but also “associated or dependent species”, which reflects “the relevance of the precautionary approach to ecosystem-based measures”.<sup>445</sup> According to the United Kingdom, the precautionary approach in this context “does not obviate the need to base decisions on the

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<sup>438</sup> UK’s Written Submission, paras 203-206.

<sup>439</sup> UK’s Written Submission, para. 203 [emphasis in the original]; Hearing, 29 January 2025, 73:20-76:3, 80:3-13 (Juratowitch, Justice Unterhalter).

<sup>440</sup> UK’s Written Submission, para. 203, *referring to* EU’s Written Submission, para. 408.

<sup>441</sup> UK’s Written Submission, para. 203, *citing* EU’s Written Submission, para. 462.

<sup>442</sup> UK’s Written Submission, paras 203.1-203.3.

<sup>443</sup> UK’s Written Submission, para. 203.1, *referring to* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 1 (**Exhibit C-22**); WTO, Appellate Body Report, *US – Continued Suspension*, WT/DS320/AB/R, adopted 14 November 2008, para. 702 (**Exhibit CLA-32**).

<sup>444</sup> UK’s Written Submission, paras 203.2, 204, *citing* Articles 494(3)(a), Article 495(1)(b) of the TCA. Article 495(1)(b) of the TCA defines the precautionary approach for the purposes of Heading Five of Part Two of the TCA as “an approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment”.

<sup>445</sup> UK’s Written Submission, paras 204-205, *citing* Article 495(1)(b) of the TCA.

‘best available scientific advice’”, but recognises that, in some circumstances, the “best available scientific advice” may be imperfect, and that such circumstances do not justify failing to take management measures.<sup>446</sup>

229. Third, in the United Kingdom’s submission, interpreting “best available scientific advice” as excluding any advice not based on the most recent scientific data, as it contends the European Union does, is incorrect.<sup>447</sup> Further, the United Kingdom states that such a contention is unsupported by the *EU and Certain Member States – Palm Oil (Malaysia)* WTO Panel Report cited by the European Union, which the United Kingdom claims was a context-specific observation rather than providing a blanket rule.<sup>448</sup> In any event, it continues, the desirability of particular data will be fact- and circumstance-dependent.<sup>449</sup> The United Kingdom accepts 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 does not arise on the facts of the present case.<sup>450</sup>
230. Next, the United Kingdom considers the meaning of the word “available”, agreeing with the European Union that this means “at one’s disposal”,<sup>451</sup> which would in principle include material that could be added easily and quickly to provide a fuller picture.<sup>452</sup> However, the United Kingdom otherwise disagrees with the European Union’s submissions on the meaning of the word “available”, advancing the following four points.<sup>453</sup>

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<sup>446</sup> UK’s Written Submission, paras 203.2, 205, *referring to* Article 495(1)(b) of the TCA. Unlike the European Union, the United Kingdom considers that what is being defined here, and used specifically in Heading Five on “Fisheries”, is not a precautionary approach or a precautionary principle in general terms, but specifically a precautionary approach to fisheries management. Hearing, 29 January 2025, 20:3-9 (Juratowitch); UK’s Responses to Questions, p. 9; UK’s Replies to the EU’s Responses to the Questions, pp. 3-4.

<sup>447</sup> UK’s Written Submission, para. 203.3.

<sup>448</sup> UK’s Written Submission, para. 203.3.1, *referring to* EU’s Written Submission, para. 458; WTO, Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, WT/DS600/R, adopted 26 April 2024, para. 7.566 (**Exhibit CLA-45**); *see also* para. 195 above.

<sup>449</sup> UK’s Written Submission, para. 203.3.2.

<sup>450</sup> UK’s Written Submission, para. 203.3.2.

<sup>451</sup> UK’s Written Submission, para. 207, *citing* EU’s Written Submission, para. 409; *see also* para. 188 above; Hearing, 29 January 2025, 80:14-25 (Juratowitch).

<sup>452</sup> Hearing, 29 January 2025, 80:25-81:6 (Juratowitch).

<sup>453</sup> UK’s Written Submission, para. 207, *citing* EU’s Written Submission, para. 409.

231. First, the United Kingdom disputes the European Union’s submission that “available” means that the advice must be “published or peer reviewed”<sup>454</sup> and “publicly available”.<sup>455</sup> The United Kingdom notes that these definitions are not contained within the TCA, and further contends that they are not “the ordinary meaning or a necessary implication of the term”.<sup>456</sup> According to the United Kingdom, waiting for the publication and peer review processes prior to using advice as a basis for a measure would be contradictory to the ordinary meaning of the word “available” and also counter to the precautionary approach.<sup>457</sup> Additionally, the United Kingdom submits that, in the *Whaling Case*, the ICJ rejected Australia’s submission that “scientific research” must be the subject of peer review, and it contends that the same is true of “best available scientific advice”.<sup>458</sup> In any event, the United Kingdom advises that in the present case, “the scientific advice relied upon by the UK was published and publicly available, and the scientific papers relied on by it were peer-reviewed”, but it reiterates that these are not requirements imposed by the TCA.<sup>459</sup>
232. Second, the United Kingdom claims that the European Union’s submission that “available” means that the advice must be “published or peer reviewed”<sup>460</sup> contradicts the European Union’s argument that the United Kingdom should have relied on “a more scientifically rigorous model”, because “no such model exist[ed] at the time, much less one which was peer-reviewed and/or published.”<sup>461</sup>
233. Third, the United Kingdom accepts the European Union’s submission that the TCA contains obligations of cooperation, but disputes that these obligations extend to cooperation to obtain scientific research prior to taking conservation and management decisions that are required to be based on scientific advice.<sup>462</sup> The United Kingdom contends that Article 12.3 of the FAO Code of Conduct, cited by the European Union in support of this argument, does not contain a duty to

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<sup>454</sup> UK’s Written Submission, para. 207.1, *citing* EU’s Written Submission, para. 409; *see also* para. 188 above.

<sup>455</sup> UK’s Written Submission, para. 207.1, *citing* EU’s Written Submission, para. 464; *see also* para. 196 above.

<sup>456</sup> UK’s Written Submission, para. 207.1

<sup>457</sup> UK’s Written Submission, 207.1.

<sup>458</sup> UK’s Written Submission, 207.1, *referring to Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226 at p. 257, para. 84 (**Exhibit RLA-12**).

<sup>459</sup> UK’s Written Submission, 207.1.

<sup>460</sup> UK’s Written Submission, 207.1, *citing* EU’s Written Submission, para. 409; *see also* para. 188 above.

<sup>461</sup> UK’s Written Submission, 207.2, *citing* EU’s Written Submission, para. 480; *see also* para. 200 above.

<sup>462</sup> UK’s Written Submission, 207.3, *citing* EU’s Written Submission, para. 463.



cooperate in obtaining scientific research.<sup>463</sup> In the United Kingdom's view, the European Union's interpretation in this regard "would radically transform Article 496(2) [of the TCA] into an obligation to refrain from taking measures unless and until both Parties had cooperated to obtain scientific research or data."<sup>464</sup> According to the United Kingdom, such an interpretation of Article 496(2) would "create a veto and run counter to the regulatory autonomy of each Party emphasised by the TCA."<sup>465</sup> The United Kingdom notes that, in the present case, the Parties cooperated in submitting their joint request to ICES,<sup>466</sup> and that it waited until receipt of advice from ICES prior to implementing measures,<sup>467</sup> but that it was "under no legal obligation pursuant to the TCA to refrain from taking measures until having engaged in such cooperation."<sup>468</sup>

234. Fourth, according to the United Kingdom, its interpretation of the word "available" within the term "best available scientific advice" is supported by the relevant rules of international law applicable between the Parties, including Article 119(1)(a) of UNCLOS, which refers to "best scientific evidence available" being used in determining TACs and other conservation measures.<sup>469</sup> The United Kingdom notes that the Virginia Commentary on Article 119(1)(a) of UNCLOS *inter alia* provides that "'available' evidence [...] indicates that measures should be based on whatever evidence is at hand or reasonably obtainable. It does not suggest that no measures should be taken until the best scientific evidence or otherwise adequate information is available or obtainable."<sup>470</sup> The United Kingdom also refers to ITLOS' observations in the *Sub-Regional Fisheries Commission Advisory Opinion* with respect to States' obligations under Article 61 of UNCLOS as requiring that "conservation and management measures are based on the best scientific evidence available [...] and, when such evidence is insufficient, they must apply the precautionary approach".<sup>471</sup> According to the United Kingdom, ITLOS adopted the same approach in the *Advisory Opinion on Climate Change* when considering the obligation contained

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<sup>463</sup> UK's Written Submission, 207.3, referring to EU's Written Submission, para. 463; Article 12.3 of the FAO Code of Conduct (**Exhibit CLA-33**).

<sup>464</sup> UK's Written Submission, 207.3, referring to Article 496(2) of the TCA.

<sup>465</sup> UK's Written Submission, para. 207.3.

<sup>466</sup> UK's Written Submission, para. 207.3, referring to UK's Written Submission, para. 261.

<sup>467</sup> UK's Written Submission, para. 207.3, referring to UK's Written Submission, paras 159, 181.

<sup>468</sup> UK's Written Submission, para. 207.3.

<sup>469</sup> UK's Written Submission, para. 208, referring to Article 119(1)(a) of UNCLOS.

<sup>470</sup> UK's Written Submission, para. 208, citing Volume 3: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist *et al.*, eds. 1995), pp. 310-311, para. 119.7(c) (**Exhibit R-136**).

<sup>471</sup> UK's Written Submission, para. 209, citing ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4 at p. 59, para. 208(ii) (**Exhibit R-137**).

within Article 194(1) of UNCLOS.<sup>472</sup> The United Kingdom does not consider that any of the other instruments referred to by the European Union as containing similar language to “best available science” provide further support for interpreting “best available scientific advice” as contained within the TCA.<sup>473</sup>

235. The United Kingdom then considers the word “scientific” in the context of “best available scientific advice”, submitting that its ordinary meaning is “1. relating to or based on science. 2. Systematic; methodical”.<sup>474</sup> The United Kingdom disagrees with two main points raised by the European Union in this regard.<sup>475</sup>
236. First, the United Kingdom disputes the European Union’s imposition of a requirement of “methodological rigour” for advice to be considered “scientific”; it notes that the European Union has relied on WTO jurisprudence for this definition, but contends that the European Union does not explain what “methodological rigour” means “in the context of scientific advice on ecosystem considerations.”<sup>476</sup> The United Kingdom notes that in the *Whaling Case*, the ICJ rejected submissions by Australia that “scientific research” under the International Convention for the Regulation of Whaling needed to have particular characteristics, and further that the ICJ did not devise alternative criteria or offer a general definition of “scientific research” in that case; according to the United Kingdom, such an approach should also be adopted “in the present fisheries context.”<sup>477</sup> Moreover, the United Kingdom contends that even if the WTO standard of “methodological rigour” were to be relevant in the present context, this standard must be understood in its context within the WTO jurisprudence, which, according to the United

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<sup>472</sup> UK’s Written Submission, para. 209, citing ITLOS, *Advisory Opinion on Climate Change*, Advisory Opinion, 21 May 2024, paras 213-214 (**Exhibit CLA-21**).

<sup>473</sup> UK’s Written Submission, para. 210, referring to EU’s Written Submission, paras 431-441; see also paras 192-193 above.

<sup>474</sup> UK’s Written Submission, para. 211, citing Concise Oxford English Dictionary (12th edn), “scientific, adj.”, (**Exhibit R-138**).

<sup>475</sup> UK’s Written Submission, paras 211.1-211.3.4.

<sup>476</sup> UK’s Written Submission, para. 211.1, citing EU’s Written Submission, para. 466; see also para. 197 above; Hearing, 29 January 2025, 65:14-16, 72:16-17 (Juratowitch) (accepting that something needs to be systematic or methodical to qualify as science and noting that the United Kingdom does not have any particular objection to methodological rigour being required).

<sup>477</sup> UK’s Written Submission, para. 211.1, referring to *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226 at p. 258, para. 86 (**Exhibit RLA-12**).

Kingdom, is merely a standard which “serves to distinguish between science which is reputable/legitimate and science which is disreputable/illegitimate.”<sup>478</sup>

237. Second, the United Kingdom disagrees with the European Union’s contention that the meaning of “scientific” in the present context should be interpreted in accordance with usual practice in the fisheries context, which, according to the European Union, involves reliance on “large amounts of data and the ability to create and apply models so as to arrive at objectively verifiable and valid conclusions”.<sup>479</sup> The United Kingdom contends that the European Union has not attempted to establish “subsequent practice” within the meaning of Article 31(3)(b) of the VCLT but that, in any event, the character of the scientific advice relied upon in any given case is tied to the relevant measures, such that “large amounts of data” may not be necessary or feasible to obtain and, in some cases, it would be inconsistent with the precautionary approach to wait to obtain a large dataset before taking action.<sup>480</sup> The United Kingdom advises that, as an example, ICES “does not refrain from providing advice in respect of what it terms ‘data-limited’ stocks.”<sup>481</sup> Additionally, the United Kingdom contends that modelling is not a prerequisite for advice to be “scientific” under the TCA, and that it may be helpful in some contexts, but may not be necessary or feasible in others; further, the United Kingdom considers that ICES “recognises the importance and legitimacy of multiple forms of scientific knowledge in ecosystems-based decision-making.”<sup>482</sup> In the present case, the United Kingdom advises that ecosystem modelling was conducted for the Natural England/Cefas/JNCC Advice, but not the Scottish Scientific Review.<sup>483</sup> The United Kingdom also disputes what it describes as the European Union’s contention that “modelling allows one to arrive at ‘objectively verifiable and valid conclusions’”, submitting that ecosystem models are merely tools for prediction which are not infallible.<sup>484</sup>

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<sup>478</sup> UK’s Written Submission, para. 211.2, *citing* WTO, Appellate Body Report, *US – Continued Suspension*, WT/DS320/AB/R, adopted 14 November 2008, para. 591 (**Exhibit CLA-32**).

<sup>479</sup> UK’s Written Submission, para. 211.3, *citing* EU’s Written Submission, paras 413-414; *see also* para. 189 above.

<sup>480</sup> UK’s Written Submission, paras 211.3.1-211.3.2.

<sup>481</sup> UK’s Written Submission, para. 211.3.2, *citing* ICES, Advice on fishing opportunities, 23 April 2024, (**Exhibit R-100**); ICES catch advice for cod in Division 6.b, 30 June 2023, (**Exhibit R-102**).

<sup>482</sup> UK’s Written Submission, para. 211.3.3, *referring to* ICES Framework for Ecosystem-Informed Science and Advice (FEISA), March 2024, p. 9 (**Exhibit R-103**); *see also* UK’s Responses to Questions, p. 25.

<sup>483</sup> UK’s Written Submission, para. 211.3.3, *referring to* UK’s Written Submission, paras 226, 253.

<sup>484</sup> UK’s Written Submission, para. 211.3.4, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 48 (**Exhibit C-45**).

238. Turning then to the meaning of “advice”, the United Kingdom agrees with the European Union that within the context of the TCA, advice “consists of all the different items of scientific evidence which are collectively relied upon as the basis for a measure”,<sup>485</sup> which ought to be considered as a whole.<sup>486</sup> The United Kingdom notes that Article 494(3)(c) of the TCA provides that the “best available scientific advice” upon which decisions are to be based is “principally that provided by” ICES, agreeing with the European Union that this presupposes ICES has provided relevant advice, and that the use of “principally” means that other advice may also be relied upon.<sup>487</sup> The United Kingdom notes, however, that the European Union further states that “scientific bodies should be understood as best placed to provide such advice”, submitting that it is unclear what the European Union means by “scientific bodies” or “what point [the European Union] seeks to make on the basis of any such qualification”.<sup>488</sup> The United Kingdom further contends that, if the European Union seeks to draw a distinction between “advice from ICES and advice emanating from domestic bodies associated with the government (whether independent or not), such a distinction would find no support in the text of the TCA.”<sup>489</sup> In this regard, the United Kingdom clarifies that, while it agrees that advice provided by ICES is “scientific advice”, it disagrees that the “essential attributes of the advice provided by ICES” informs “the scientific and methodological rigour required by Article 496(2)”.<sup>490</sup>
239. Regarding the applicable standard of review, the United Kingdom contends that the European Union’s submission that the Arbitration Tribunal “must determine whether [the] evidence has the attributes necessary to support the factual propositions asserted by a Party” is only correct to the extent that the Arbitration Tribunal must review the scientific material to determine whether the measures were “based on” the “best available scientific advice”.<sup>491</sup> The United Kingdom submits that the Arbitration Tribunal therefore need not “engage in any review of the merits of the underlying scientific information, resolve any scientific controversies, or [...] evaluate the degree

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<sup>485</sup> UK’s Written Submission, para. 212, *referring to* EU’s Written Submission, para. 478; *see also* para. 200 above.

<sup>486</sup> UK’s Written Submission, para. 212, *referring to* EU’s Written Submission, paras 455, 478; *see also* Hearing, 29 January 2025, 34:2-19 (Juratowitch) (noting that “scientific evidence forms the foundation for scientific advice, and scientific advice would not be the best available if it was not founded on the best available evidence”).

<sup>487</sup> UK’s Written Submission, para. 213, *referring to* EU’s Written Submission, para. 415; *see also* para. 190 above.

<sup>488</sup> UK’s Written Submission, para. 213, *referring to* EU’s Written Submission, para. 465; *see also* para. 196 above.

<sup>489</sup> UK’s Written Submission, para. 213.

<sup>490</sup> UK’s Replies to the EU’s Responses to the Questions, p. 4.

<sup>491</sup> UK’s Written Submission, para. 214, *citing* EU’s Written Submission, para. 442; *see also* para. 192 above.

to which the scientific advice supports the measures.”<sup>492</sup> According to the United Kingdom, it considers that the European Union shares this view, insofar as the European Union “cit[es] jurisprudence to the effect that the role of a panel or tribunal is not to present its own scientific judgement or to ‘conclusively assess the scientific evidence’.”<sup>493</sup>

**(b) *The Sandeel Fishing Measures Are “Based on” the “Best Available Scientific Advice”***

*(i) The United Kingdom Relied on the “Best Available Scientific Advice” in Respect of the Sandeel Fishing Measures*

240. The United Kingdom contends that it relied on two pieces of scientific advice in respect of the English measure, namely the Natural England/Cefas/JNCC Advice and the ICES Technical Service.<sup>494</sup> The United Kingdom also submits that the scientific papers referred to in the Natural England/Cefas/JNCC Advice form part of the best available scientific advice it relied upon.<sup>495</sup> According to the United Kingdom, “[s]ave for specific criticisms of the modelling [...], the EU does not deny that the scientific advice relied on by the UK in respect of the English measure represents the ‘best available scientific advice’.”<sup>496</sup> The United Kingdom considers why this is the case for the Natural England/Cefas/JNCC Advice and the ICES Technical Service in turn.<sup>497</sup>
241. Considering the Natural England/Cefas/JNCC Advice first, the United Kingdom notes that it contains two components—a review of scientific literature, and ecosystem modelling using both EwE modelling and ensemble modelling—and contends that the modelling was to be viewed together with the evidence in the wider literature.<sup>498</sup>

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<sup>492</sup> UK’s Written Submission, para. 214.

<sup>493</sup> UK’s Written Submission, para. 214, *referring to* EU’s Written Submission, paras 455, 466, *citing* ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 296, Recital 80 (**Exhibit CLA-27**).

<sup>494</sup> UK’s Written Submission, para. 226, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023 (**Exhibit C-45**); ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023 (**Exhibit C-22**).

<sup>495</sup> UK’s Written Submission, para. 233, Annex I.

<sup>496</sup> UK’s Written Submission, para. 227, *referring to* EU’s Written Submission, para. 491; *see also* para. 205 above.

<sup>497</sup> UK’s Written Submission, para. 228.

<sup>498</sup> UK’s Written Submission, paras 230-231, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**).

242. The literature review in the Natural England/Cefas/JNCC Advice summarises the scientific literature on: sandeel dynamics, including the link between fishing exploitation pressure and risk of population collapse; the influence of environmental variation on sandeel; and the links between sandeel and other animals, namely marine mammals, many seabird species, and certain other fish.<sup>499</sup>
243. Regarding the modelling, the United Kingdom explains that EwE stands for “Ecopath with Ecosim”, and represents the two components of EwE modelling, with the former providing “a static, ‘snapshot image’ of the trophic structure and energy flow within a system at a particular point in time”, and the latter “integrat[ing] into the model key drivers of the system – such as fishing effort – [...] to predict how the system will react over time to changes in those drivers”.<sup>500</sup> The original EwE model of the marine food web of the North Sea was published in 2007 by scientists Mackinson and Daskalov.<sup>501</sup> A version of the original model, updated and calibrated using data from 1991-2013, was reviewed and evaluated in 2015 by the ICES WGSAM, and subsequently granted “Key Run” status, meaning that it was deemed agreed and accepted as appropriate for use by ICES in providing advice.<sup>502</sup>
244. It was this ICES Key Run version of the EwE model that was used in the Natural England/Cefas/JNCC Advice, however with two key changes.<sup>503</sup>
245. First, the ICES Key Run model, which was only updated to 2013, was updated to incorporate data up to 2020, which the United Kingdom contends was the most recent data available at the time the modelling in the Natural England/Cefas/JNCC Advice was done in 2022.<sup>504</sup>
246. Second, since the EwE model reflects the whole of the North Sea and cannot be restricted in its geographical scope to only UK waters in the North Sea, in order to be able to simulate the impact

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<sup>499</sup> UK’s Written Submission, para. 232, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 11-18, 38-40 (**Exhibit C-45**).

<sup>500</sup> UK’s Written Submission, paras 234-235, *referring to* Mackinson & Daskalov, *An Ecosystem Model of the North Sea to Support an Ecosystem Approach to Fisheries Management: Description and Parameterisation* (Science Series Technical Report No. 142, Cefas 2007), pp. 11, 60 (**Exhibit R-107**).

<sup>501</sup> UK’s Written Submission, para. 236, *referring to* Mackinson & Daskalov, *An Ecosystem Model of the North Sea to Support an Ecosystem Approach to Fisheries Management: Description and Parameterisation* (Science Series Technical Report No. 142, Cefas 2007), p. 9 (**Exhibit R-107**).

<sup>502</sup> UK’s Written Submission, paras 237-238, *referring to* ICES, Report of the Working Group on Multispecies Assessment Methods (WGSAM), 9-13 November 2015, Annex 6, pp. 103-104 (**Exhibit R-108**).

<sup>503</sup> UK’s Written Submission, paras 238-239.

<sup>504</sup> UK’s Written Submission, para. 239.1.

of a reduction in sandeel fishing in UK waters, it was necessary to calculate a reference point for how much sandeel fishing in the entire North Sea might be expected to reduce as a result of a prohibition in UK waters.<sup>505</sup> Based on historical fishing effort distributions in the North Sea between 2003 and 2020, the Natural England/Cefas/JNCC Advice calculated the average proportion of sandeel fished from within the United Kingdom's EEZ in the North Sea, compared to outside its EEZ in the North Sea, to be 58% (with the upper (95<sup>th</sup> percentile) and lower bounds (5<sup>th</sup> percentile) being 73% and 38%, respectively).<sup>506</sup> The updated EwE model was used to simulate a range of scenarios of sandeel depletion in the North Sea, ranging from 0% depletion (no fishing) to 50% depletion, to demonstrate the impacts of different levels of sandeel depletion on the relative biomass of other species or trophic groups.<sup>507</sup> The United Kingdom notes that the updated EwE model "assumed constant prevailing environmental conditions",<sup>508</sup> but also adopted a computational algorithm in order to account for uncertainty and to generate a range of plausible outputs, creating a 95% credibility interval.<sup>509</sup> The Natural England/Cefas/JNCC Advice then quantified the simulated biomass response of different species and trophic groups to a reduction of sandeel fishing in the North Sea of 58%, as well as 73% and 38% as the upper and lower bounds.<sup>510</sup> According to the United Kingdom, the EwE modelling indicates that a prohibition on sandeel fishing in UK waters of the North Sea is expected to lead, in the North Sea as a whole, among others, to a 7% increase in the biomass of seabirds, a 4% increase in the biomass of seals, and a 3% increase in the biomass of haddock.<sup>511</sup>

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<sup>505</sup> Hearing, 29 January 2025, 117:7-23 (Boileau); UK's Responses to Questions, p. 25.

<sup>506</sup> UK's Written Submission, para. 239.2, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, pp. 9-10 (**Exhibit C-45**); *see also* Hearing, 29 January 2025, 117:24-119:8 (Boileau).

<sup>507</sup> UK's Written Submission, para. 239.3, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, p. 26, Figure 6] (**Exhibit C-45**); UK's Responses to Questions, p. 26.

<sup>508</sup> UK's Written Submission, para. 241, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, p. 34 (**Exhibit C-45**).

<sup>509</sup> UK's Written Submission, para. 242, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, p. 24 (**Exhibit C-45**).

<sup>510</sup> UK's Written Submission, para. 240, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, p. 27 (**Exhibit C-45**).

<sup>511</sup> UK's Written Submission, para. 243, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, pp. 26-27, Table 3 (**Exhibit C-45**).

247. The United Kingdom contends that the Natural England/Cefas/JNCC Advice “transparently identified and explained the caveats to the modelling”, namely that the North Sea EwE model does not account for: “indirect effects of reduction in sandeel fishing such as bycatch”; “the fact that different predators and the fishery may target sandeel of different sizes”; “the spatial distribution of sandeel within the North Sea”; and “how environmental variation may impact the expected benefits of reduced fishing mortality”, while noting that, according to the literature review, “environmental variation as a result of climate change has negative implications for sandeel abundance.”<sup>512</sup> According to the United Kingdom, and contrary to the European Union’s claims, “[t]here was no ecosystem model of the North Sea available to the UK which could account for all or any of these factors”,<sup>513</sup> and “developing a spatially explicit model of the North Sea focusing on the ecosystem role of sandeel would be a significant task.”<sup>514</sup>
248. Turning to the ensemble modelling component of the Natural England/Cefas/JNCC Advice, the United Kingdom advises that ensemble modelling is an approach which “combines several different ecosystem models” with different assumptions, strengths and weaknesses, and further contends that it operated as a “sense check” on the EwE modelling results.<sup>515</sup> While the North Sea EwE model is, according to the United Kingdom, “the only available model that deals with the whole food web of the North Sea”, other, more specialised multispecies models also exist, which were used for the ensemble modelling.<sup>516</sup> The United Kingdom notes that some of the outcomes of the ensemble modelling in the Natural England/Cefas/JNCC Advice include the following: a prohibition on fishing of sandeel in the North Sea would lead to a greater increase in the biomass of seabirds compared to the 2019 level;<sup>517</sup> the EwE model’s projections for seabirds are more

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<sup>512</sup> UK’s Written Submission, para. 245, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 33-34, 38-40 (**Exhibit C-45**); *see also* UK Responses to Tribunal Questions, pp. 17-18.

<sup>513</sup> UK’s Written Submission, para. 245; UK’s Replies to the EU’s Responses to Questions, pp. 7-8.

<sup>514</sup> Hearing, 29 January 2025, 135:17-20, 139:9-17 (Boileau); UK’s Replies to the EU’s Responses to Questions, pp. 7-9.

<sup>515</sup> UK’s Written Submission, paras 246-247.

<sup>516</sup> UK’s Written Submission, para. 248, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 30 (**Exhibit C-45**).

<sup>517</sup> UK’s Written Submission, para. 249, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 32 (**Exhibit C-45**).



certain than those for mammals;<sup>518</sup> and, consistent with the EwE modelling, prohibiting sandeel fishing would have a “limited impact on the biomasses of commercial fish”.<sup>519</sup>

249. The United Kingdom then summarises what it sees as the key conclusions of the Natural England/Cefas/JNCC Advice, including that a prohibition on sandeel fishing in UK waters of the North Sea would benefit seabirds most, followed by seals, with mixed positive and negative outcomes for commercial fish.<sup>520</sup> Some of the risks that the United Kingdom notes the Natural England/Cefas/JNCC Advice identifies include “the risks of displacement of fishing effort”, and that environmental variation, including climate change, might “prevent the realisation of all of the benefits” of the prohibition.<sup>521</sup>
250. The United Kingdom therefore contends that it relied on the “best available scientific advice”, submitting that the Natural England/Cefas/JNCC Advice was “methodical, thorough and objective, with areas of uncertainty clearly identified.”<sup>522</sup> Additionally, the United Kingdom submits that the EwE model underwent “rigorous review by ICES WGSAM”, such that it has met “the highest standards of quality-control”, while the European Union “has not identified any scientific evidence on the same subject that it considers to be better”.<sup>523</sup> In this regard, the United Kingdom contends that if the European Union considers more should have been done, it was incumbent on it to provide the Arbitration Tribunal with a competing body of scientific evidence that is better.<sup>524</sup>
251. For the Scottish measure, the United Kingdom submits that the scientific advice that Scotland relied upon was “principally” the Scottish Scientific Review, the Scottish SEA, and the ICES

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<sup>518</sup> UK’s Written Submission, para. 249, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 32 (**Exhibit C-45**).

<sup>519</sup> UK’s Written Submission, para. 249, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 31 (**Exhibit C-45**).

<sup>520</sup> UK’s Written Submission, para. 250, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. i, 29 (**Exhibit C-45**).

<sup>521</sup> UK’s Written Submission, para. 251, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 34-40, 43-48 (**Exhibit C-45**).

<sup>522</sup> UK’s Written Submission, para. 252.

<sup>523</sup> UK’s Written Submission, para. 252.

<sup>524</sup> Hearing, 29 January 2025, 74:1-17, 75:7-76:3, 81:8-82:1 (Juratowitch).

Technical Service.<sup>525</sup> The United Kingdom also submits that it relied upon the scientific papers referred to in the Scottish Scientific Review.<sup>526</sup> The United Kingdom observes that the European Union expressly does not challenge any of these pieces of scientific advice.<sup>527</sup>

252. The United Kingdom notes that the Scottish Scientific Review “comprises a detailed exposition of studies relevant to sandeel in the North Sea, canvassing over 170 scientific papers”,<sup>528</sup> on topics including: “[t]he scientific evidence concerning sandeel distribution and movements”,<sup>529</sup> “[t]he effects of climate change on sandeel abundance and availability”,<sup>530</sup> and “[t]he data regarding the 2000 closure of part of SA4”.<sup>531</sup> The United Kingdom refers to the latter point as “[a] particularly important aspect of the Scottish Scientific [Review]”, noting that the Scottish Scientific Review advises that, while sandeel biomass initially increased immediately following the closure, it has subsequently declined to levels comparable to those pre-closure, despite “particularly strong recruitment of sandeel in certain years (2009 and 2020)”.<sup>532</sup> Additionally, the United Kingdom refers to the Scottish Scientific Review’s reference to two studies finding statistically significant increases in kittiwake breeding success following the closure of the sandeel fishery.<sup>533</sup> The United Kingdom notes the Scottish Scientific Review’s conclusions that “sandeel are likely to benefit from measures aimed at reducing fishing mortality due to their life-long attachment to particular

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<sup>525</sup> UK’s Written Submission, para. 253, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023 (**Exhibit C-50**); SEA Screening and Scoping Report, May 2023, (**Exhibit R-95**); ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023 (**Exhibit C-22**).

<sup>526</sup> UK’s Written Submission, para. 233, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, Annex I-II (**Exhibit C-45**).

<sup>527</sup> UK’s Written Submission, para. 254, *referring to* EU’s Written Submission, para. 491; *see also* para. 205 above.

<sup>528</sup> UK’s Written Submission, para. 255.

<sup>529</sup> UK’s Written Submission, para. 255.1.

<sup>530</sup> UK’s Written Submission, para. 255.2.

<sup>531</sup> UK’s Written Submission, para. 255.3.

<sup>532</sup> UK’s Written Submission, paras 256.1-256.2, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 20-21 (**Exhibit C-50**).

<sup>533</sup> UK’s Written Submission, paras 256.4-256.5, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 49, 55 (**Exhibit C-50**).

sand banks and limited dispersal and movements”, despite difficulties with observing the effect of a fishery closure in a changing environment, including due to the effects of climate change.<sup>534</sup>

253. Regarding the Scottish SEA, the United Kingdom contends that its scientific analysis is “largely the same as the Scottish Scientific [Review], with additional detail on some issues”, drawing the conclusion that a full closure “ha[s] the potential to bring about the greatest beneficial effects on the marine environment.”<sup>535</sup>
254. In the United Kingdom’s view, both the Scottish Scientific Review and Scottish SEA represent the “best available scientific advice”.<sup>536</sup> The United Kingdom submits that the goal of the Scottish Scientific Review “was to provide a neutral review of the available scientific evidence on the potential effects of sandeel fisheries management measures on the marine environment”, and that it did this in a “scrupulously objective” manner, through “identifying areas of uncertainty” and “results which should be treated with particular caution”, as well as noting “the limitations of certain studies”.<sup>537</sup> Additionally, the United Kingdom contends that the European Union has not identified any errors, omissions, or lack of scientific or methodological rigour in the advice relied upon in respect of the Scottish measure, nor has it identified any better scientific advice on the same subjects.<sup>538</sup>
255. Finally, the United Kingdom turns to the ICES Technical Service, which it notes was relied upon by both the UK Government for the English measure and the Scottish Government for the Scottish measure.<sup>539</sup> The United Kingdom draws attention to five specific points made in the ICES Technical Service.<sup>540</sup>

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<sup>534</sup> UK’s Written Submission, para. 257, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 25 (**Exhibit C-50**).

<sup>535</sup> UK’s Written Submission, para. 259, *referring to* Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, p. 85-86, 93-97 (**Exhibit C-52**).

<sup>536</sup> UK’s Written Submission, para. 260.

<sup>537</sup> UK’s Written Submission, para. 260.

<sup>538</sup> UK’s Written Submission, para. 260, *referring to* EU’s Written Submission, para. 491; *see also* para. 205 above.

<sup>539</sup> UK’s Written Submission, para. 261, *referring to* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023 (**Exhibit C-22**); *see also* Section III.D.4 above.

<sup>540</sup> UK’s Written Submission, paras 265-272.

256. First, the United Kingdom emphasises that the ICES Technical Service “confirmed that ICES stock advice has a single species focus which aims to maximise sustainable yield for that species and prevent overfishing”, such that ICES does not explicitly consider nor simulate whether sustainably exploited stocks will support the needs of predators dependent on those stocks.<sup>541</sup> Therefore, the United Kingdom states, Reviewer 1 of the ICES Technical Service’s statement that “[i]f [ICES quotas for forage fish] are followed, this advice should ensure healthy levels of these stocks” should be interpreted as meaning “‘healthy’ levels of those specific stocks for the purposes of exploitation by the associated fisheries, not healthy levels of species that prey on those stocks or a healthy ecosystem generally.”<sup>542</sup>
257. Second, the United Kingdom points to the ICES Technical Service’s note that, while the ICES advice framework includes a provision to keep stocks above a given precautionary level, “there is no analysis of whether this precautionary level is sufficient to provide adequate food levels for individual predator populations”,<sup>543</sup> as such, the ICES Technical Service acknowledges that this “buffer ‘may or may not be high enough to ensure the provision of the ecosystem services associated with a given stock and a given predator’.”<sup>544</sup>
258. Third, the United Kingdom notes that the ICES Technical Advice acknowledges that its advice is given at a stock level and therefore “cannot function at the level of individual feeding grounds”, such that it cannot advise on whether forage fish biomass is high enough for specific predator requirements; the ICES Technical Advice concludes on this point that “a large part of the question of whether management is supporting ecosystem functions should occur at the level of national regulations”.<sup>545</sup>

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<sup>541</sup> UK’s Written Submission, para. 266, *referring to* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 1-2 (**Exhibit C-22**).

<sup>542</sup> UK’s Written Submission, para. 267, *citing* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 2 (**Exhibit C-22**).

<sup>543</sup> UK’s Written Submission, para. 268, *citing* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 1-2 (**Exhibit C-22**).

<sup>544</sup> UK’s Written Submission, para. 269, *citing* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 2 (**Exhibit C-22**).

<sup>545</sup> UK’s Written Submission, para. 270, *citing* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 1-2 (**Exhibit C-22**), Hearing, 29 January 2025, 133:19-134:15 (Boileau).

259. Fourth, the United Kingdom highlights that the ICES Technical Advice provides that the current ICES advice for forage fish species is inclusive of “ecosystem effects on the assessed stocks through both variable predation mortality and qualitative ecosystem considerations”.<sup>546</sup> According to the United Kingdom, “[v]ariable predation mortality refers to changes in predation pressure on forage fish over time, e.g. if the stock of a predatory fish increases in the North Sea, other things being equal this will likely cause a decrease in sandeel stock in the North Sea”, while the inclusion of “qualitative ecosystem considerations” is a reference to the fact that ICES stock advice includes observations on the role that sandeel and other forage fish play in the North Sea ecosystem, but that the advice “does not qualitatively factor such considerations into its calculation of the amount of a fish stock that it considers may be extracted by the fishing industry each year.”<sup>547</sup>
260. Fifth, the United Kingdom refers to Reviewer 1’s comment in the ICES Technical Service that “for sandeel, the spatial structure of the management advice is likely sufficient to ensure that ‘small-scale local depletion’ can be reversed by recruitment from elsewhere in the same stock assessment area.”<sup>548</sup> According to the United Kingdom, this claim is “based on the fact that the seven stock assessment areas for sandeel have been divided based on larval connectivity.”<sup>549</sup> However, the United Kingdom notes that the Scottish Scientific Review advises that, on the grounds of direct observation from commercial data, some depleted grounds had not recovered after more than eight years, and, further, that delays in recovery can also result from

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<sup>546</sup> UK’s Written Submission, para. 271, *citing* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 1 (**Exhibit C-22**).

<sup>547</sup> UK’s Written Submission, paras 271.1-271.2, *referring to* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 1, 8-9 (**Exhibit C-22**).

<sup>548</sup> UK’s Written Submission, para. 272, *citing* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 2, 4 (**Exhibit C-22**).

<sup>549</sup> UK’s Written Submission, para. 272, *referring to* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, pp. 2, 4 (**Exhibit C-22**).

environmental changes.<sup>550</sup> The United Kingdom considers that neither of these contentions are addressed by Reviewer 1 in the ICES Technical Service.<sup>551</sup>

261. The United Kingdom then turns to the European Union’s contention that the scientific advice that the United Kingdom relied on in enacting the sandeel fishing measures was not the “best available scientific advice”.<sup>552</sup> Specifically, the United Kingdom considers the European Union’s submission that the advice relied upon “must provide a basis for the full extent of the measure in question”, but that only the EwE model is “sufficient to justify the full spatial scope of the sandeel fishing prohibition covering all UK waters of the North Sea.”<sup>553</sup> The United Kingdom advances three points as to why this is incorrect.
262. First, the United Kingdom reiterates that the European Union “does not challenge the scientific and methodological rigour of: (i) the ICES Technical Service; (ii) the remainder of the Natural England/Cefas/JNCC advice [apart from the EwE model]; and (iii) the Scottish scientific literature review”,<sup>554</sup> the United Kingdom contends that this approach is inconsistent with the requirement to evaluate the “best available scientific advice as a whole”,<sup>555</sup> and that the European Union “cannot succeed by impugning only one part of the scientific foundation of one measure”,<sup>556</sup> as the English measure was not based on the modelling alone, and the Scottish measure did not involve the EwE modelling at all.<sup>557</sup> According to the United Kingdom, even if the European Union’s criticisms of the EwE modelling were valid, the measures would still be “based on” the “best available scientific advice” insofar as they are supported by the “unchallenged scientific evidence” in the Natural England/Cefas/JNCC Advice and the Scottish Scientific Review.<sup>558</sup> Additionally, the United Kingdom submits that the modelling and evidence in the literature review in the Natural England/Cefas/JNCC Advice “support and reinforce one

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<sup>550</sup> UK’s Written Submission, para. 272, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 7-8 (**Exhibit C-50**).

<sup>551</sup> UK’s Written Submission, para. 272, *referring to* ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023 (**Exhibit C-22**).

<sup>552</sup> UK’s Written Submission, paras 273-288.

<sup>553</sup> UK’s Written Submission, para. 273, *citing* EU’s Written Submission, paras 479, 491 [emphasis added by the United Kingdom].

<sup>554</sup> UK’s Written Submission, para. 275, *citing* EU’s Written Submission, para. 491; *see also* para. 205 above.

<sup>555</sup> UK’s Written Submission, para. 275, *citing* UK’s Written Submission, para. 212.

<sup>556</sup> UK’s Written Submission, para. 275.

<sup>557</sup> UK’s Written Submission, para. 275, *citing* UK’s Written Submission, paras 226-252.

<sup>558</sup> UK’s Written Submission, para. 275.

another”, such that the conclusions drawn from the modelling are strengthened when viewed alongside the literature.<sup>559</sup>

263. Second, the United Kingdom disputes the European Union’s contention that only the EWE modelling supports the full spatial scope of the sandeel fishing prohibition.<sup>560</sup> According to the United Kingdom, the European Union “does not explain why that is the case”, but notes that the European Union “appears to be suggesting that only scientific evidence which is capable of quantifying the intended benefits of one measure compared to another can constitute the ‘best available scientific advice’”.<sup>561</sup> The United Kingdom says such a contention goes against the express words of Article 496(2) of the TCA, as well as the European Union’s own acceptance that the requirement contained therein is that there be “a rational or objective relationship” between the advice and the measure.<sup>562</sup>
264. Additionally, the United Kingdom submits that the effect of the European Union’s submission is that “nothing short of full scientific modelling would suffice”, but that scientific advice need not be quantitative in order to be considered the “best available scientific advice”, contending that ICES has recognised the value of not only full ecosystem models but also qualitative and expert-based syntheses of available knowledge and information.<sup>563</sup> For example, the United Kingdom notes that the advice on which the Scottish measure was based is the Scottish Scientific Review, which did not use primary modelling, but nonetheless allowed the “rational” conclusion “that a full closure would confer greater benefits than a partial closure”.<sup>564</sup>
265. Third and finally, the United Kingdom contends that the European Union does not identify any relevant alternative scientific model or advice which was “available” to the United Kingdom at

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<sup>559</sup> UK’s Written Submission, para. 276, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**).

<sup>560</sup> UK’s Written Submission, para. 277, *citing* EU’s Written Submission, para. 491; *see also* para. 205 above.

<sup>561</sup> UK’s Written Submission, para. 277 [emphasis in the original omitted].

<sup>562</sup> UK’s Written Submission, para. 277, *citing* EU’s Written Submission, para. 313-314; *see also* para. 187 above.

<sup>563</sup> UK’s Written Submission, paras 211.3.3, 278, *referring to* ICES Framework for Ecosystem-Informed Science and Advice (FEISA), March 2024, p. 9 (**Exhibit R-103**); *see also* para. 237 above.

<sup>564</sup> UK’s Written Submission, para. 279, *referring to* UK’s Written Submission, para. 211.3.3; Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023 (**Exhibit C-50**).

the time and was better than the advice relied upon by the United Kingdom; according to the United Kingdom, this “alone means that the EU’s claim fails.”<sup>565</sup>

266. The United Kingdom next considers the European Union’s four criticisms of the EwE model in turn, which the European Union submits demonstrate that the EwE model lacks the “necessary scientific and methodological rigour to be considered reputable science.”<sup>566</sup> The United Kingdom underlines that there exists a requirement of materiality for any claimed flaws in the EwE model.<sup>567</sup> Against this background, the United Kingdom contends that none of the European Union’s criticisms “withstands scrutiny.”<sup>568</sup>
267. First, the United Kingdom disputes the European Union’s contention that the Natural England/Cefas/JNCC Advice’s assumption that the average proportion of sandeel fishing occurring in UK waters of the North Sea, as opposed to the rest of the North Sea, was 58% is likely an overestimate, due to the inclusion of outdated data in its calculation from the pre-2011 period, when the sandeel fishery was not managed according to an escapement strategy.<sup>569</sup> To demonstrate this, the United Kingdom repeats the requisite calculation using the same data source from the European Commission’s Scientific, Technical and Economic Committee for Fisheries (hereinafter “**STECF**”), excluding the pre-2011 period, and advises that the average proportion from 2011-2020 is 58.7%, demonstrating that there is no material change in result.<sup>570</sup> According to the United Kingdom, this outcome is unsurprising, because the escapement strategy “has no inherent link with the location of fishing”, such that it would not lead to a different proportion of sandeel fishing taking place in UK waters as compared with non-UK waters.<sup>571</sup> The United Kingdom further questions the European Union’s claims and calculations regarding the Norwegian catches.<sup>572</sup> It observes that the European Union has not explained how it arrived at its postulated 39% reference point and states that the European Union seems to have made the

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<sup>565</sup> UK’s Written Submission, para. 280.

<sup>566</sup> UK’s Written Submission, para. 273, *citing* EU’s Written Submission, para. 480; *see also* paras 200-204 above.

<sup>567</sup> UK’s Responses to Questions, p. 29.

<sup>568</sup> UK’s Written Submission, para. 281.

<sup>569</sup> UK’s Written Submission, para. 282, *referring to* EU’s Written Submission, para. 484; *see also* para. 201 above.

<sup>570</sup> UK’s Written Submission, para. 282.1, Table 2.

<sup>571</sup> UK’s Written Submission, para. 282.2, *referring to* UK’s Written Submission, para. 121 [emphasis in the original].

<sup>572</sup> UK’s Responses to Questions, pp. 27-28; UK’s Replies to the EU’s Responses to Questions, p. 11.



assumption that all Norwegian catches occurred outside of the United Kingdom's EEZ.<sup>573</sup> In any case, the United Kingdom also recalls that the EwE modelling in the Natural England/Cefas/JNCC Advice accounted for the uncertainty by setting out the biomass response of predators of sandeel to a 38% reduction and 73% reduction in sandeel fishing in the North Sea (as the lower and upper bounds of the average proportion of sandeel fished from UK waters of the North Sea from 2003 to 2020), to reflect a 95% confidence interval.<sup>574</sup> According to the United Kingdom, even accepting the European Union's approach, the model would still predict biomass increases for predators of sandeel, albeit a percentage point or two smaller than using the 58% reference point.<sup>575</sup>

268. Second, the United Kingdom disagrees with the European Union's submission that using a fixed fishing pressure until 2100 in the ensemble modelling fails to reflect the escapement strategy, contending instead that this demonstrates "a misunderstanding of the methodology of ecosystem modelling" on the European Union's part.<sup>576</sup> The United Kingdom submits that this is a modelling convention which isolates a change to sandeel fishing pressure, keeping fishing pressure on other stocks at the *status quo*, in order to compare ecosystem dynamics where the sandeel fishing pressure is changed and other variables are kept constant.<sup>577</sup> The United Kingdom considers that the reason such simulations are forecast into the future (such as 2100 here) is to allow for the attainment of equilibrium, following an initial adjustment period.<sup>578</sup>
269. Third, the United Kingdom queries the European Union's criticism of the simulated biomass response to the prohibition of industrial fisheries in UK waters of the North Sea of all seabird predators taken together as a group, as modelled in the Natural England/Cefas/JNCC Advice, particularly insofar as the European Union contends that this may either underestimate or overestimate the biomass response of individual seabirds.<sup>579</sup> The United Kingdom submits that the European Union plainly does not explain why the EwE model ought to disaggregate this data

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<sup>573</sup> UK's Responses to Questions, p. 28.

<sup>574</sup> UK's Written Submission, para. 282.3, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, Table 3, Figure 6 (**Exhibit C-45**); UK's Responses to Questions, p. 28; *see also* para. 246 above.

<sup>575</sup> Hearing, 30 January 2025, 115:3-10 (Juratowitch); UK's Replies to the EU's Responses to Questions, p. 11.

<sup>576</sup> UK's Written Submission, para. 283, *referring to* EU's Written Submission, para. 485; *see also* para. 202 above; Hearing 29 January 2025, 143:1-9 (Boileau).

<sup>577</sup> UK's Written Submission, para. 284.

<sup>578</sup> UK's Written Submission, para. 285.

<sup>579</sup> UK's Written Submission, para. 286, *citing* EU's Written Submission, para. 486; *see also* para. 203 above.

by species (or, indeed, why doing so would affect the model’s status as “best available scientific advice”<sup>580</sup>), and the United Kingdom contends that the purpose of the EwE model was to simulate ecosystem-wide impacts of sandeel depletion, rather than to make predictions for individual species.<sup>581</sup> Additionally, according to the United Kingdom, the European Union does not offer an explanation of why the aggregation of seabird species means that the model lacks the “necessary scientific and methodological rigour to be considered reputable science”.<sup>582</sup> The United Kingdom reiterates that it “retained the parameters and structure of the ICES Key Run in order to ensure the quality of its modelling”,<sup>583</sup> and notes that the ICES Key Run model does not disaggregate seabirds by species.<sup>584</sup> Therefore, according to the United Kingdom, the European Union appears to be suggesting that the United Kingdom ought to have deviated from the ICES Key Run model, with no explanation as to how doing so would constitute the “best available scientific advice”.<sup>585</sup> In any event, according to the United Kingdom, there was no such ecosystem model in existence at the time of the decision about the measures which could disaggregate the seabird data by species, meaning that the European Union’s submissions on this point require the United Kingdom to have developed a new model with new capabilities, which the United Kingdom says is both incompatible with the meaning of the word “available” in “best available scientific advice”, and also incompatible with the precautionary approach under the TCA.<sup>586</sup> Finally, the United Kingdom contends that the European Union’s criticism of the modelling ignores the other evidence in the Natural England/Cefas/JNCC Advice, namely the context of the literature review which “identified that certain seabirds, such as kittiwakes, are heavily dependent on sandeel and therefore expected to benefit disproportionately from reduced fishing pressure.”<sup>587</sup>

270. Fourth, the United Kingdom notes that the European Union reproduces two of the caveats of the EwE model that are expressly identified in the Natural England/Cefas/JNCC Advice; the United Kingdom submits that, “[a]s a matter of principle, it cannot be the case that scientific studies can

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<sup>580</sup> UK’s Written Submission, para. 286.1, n. 507; Hearing, 29 January 2025, 136:3-9 (Boileau).

<sup>581</sup> UK’s Written Submission, para. 286.1, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 21 (**Exhibit C-45**).

<sup>582</sup> UK’s Written Submission, para. 286.2, *referring to* EU’s Written Submission, para. 480.

<sup>583</sup> UK’s Written Submission, para. 286.2, *referring to* UK’s Written Submission, paras 239-242.

<sup>584</sup> UK’s Written Submission, para. 286.2.

<sup>585</sup> UK’s Written Submission, para. 286.2.

<sup>586</sup> UK’s Written Submission, para. 286.3.

<sup>587</sup> UK’s Written Submission, para. 286.4, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 13, 39 (**Exhibit C-45**).

have no limitations or caveats in order to constitute ‘best available scientific advice’”, as “[n]o meaningful scientific advice could meet that standard.”<sup>588</sup>

271. Further elaborating on this point, the United Kingdom recalls that the first caveat to the Natural England/Cefas/JNCC Advice that the European Union takes issue with is that the EwE model is not size-structured (*i.e.*, the sandeel are not disaggregated into different size/age classes) and therefore, in the European Union’s submission, may overestimate the impacts of forage fish depletion.<sup>589</sup> The United Kingdom notes, however, that the European Union has not identified a size-structured ecosystem model of the North Sea which was “available” when the United Kingdom was making its decision, because “[t]here was none”;<sup>590</sup> additionally, according to the United Kingdom, “[t]he precautionary approach applicable under the TCA means that the UK did not need to, and indeed would not have been justified in, postponing measures until such a model was developed.”<sup>591</sup> The United Kingdom additionally disputes the European Union’s reliance on the fact that kittiwake generally switch from feeding on older sandeel to more juvenile sandeel, as the season progresses, as a reason in support of its argument.<sup>592</sup> Instead, the United Kingdom contends that this fact demonstrates that “sandeel of all sizes are important to kittiwake depending on the time of year” but that, in any event, kittiwake were not “intended to be the sole or primary beneficiaries of the measure” as the United Kingdom was “pursuing broader ecosystem-wide objectives.”<sup>593</sup>
272. The second caveat to the Natural England/Cefas/JNCC Advice the European Union takes issue with is that the models did not account for the spatial distribution of sandeel, as, the United Kingdom notes, was expressly acknowledged in the Natural England/Cefas/JNCC Advice itself.<sup>594</sup> According to the European Union, accounting for the spatial distribution of sandeel was

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<sup>588</sup> UK’s Written Submission, para. 287 [emphasis in the original]; Hearing, 29 January 2025, 131:15-17 (Boileau).

<sup>589</sup> UK’s Written Submission, para. 287.1, *referring to* EU’s Written Submission, para. 488; *see also* para. 203 above.

<sup>590</sup> UK’s Written Submission, para. 287.1.1; *see also* Hearing, 29 January 2025, 132:19-133:7 (Boileau).

<sup>591</sup> UK’s Written Submission, para. 287.1.1, *referring to* UK’s Written Submission, para. 246-249; Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**).

<sup>592</sup> UK’s Written Submission, para. 287.1.2, *referring to* EU’s Written Submission, para. 488.

<sup>593</sup> UK’s Written Submission, para. 287.1.2, *referring to* UK’s Written Submission, paras 189, 191-192.

<sup>594</sup> UK’s Written Submission, para. 287.2, *referring to* EU’s Written Submission, para. 489; Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**); *see also* para. 204 above.

necessary due to what it contends is limited spatial overlap between the feeding range of chick-rearing seabirds and the sandeel fishery.<sup>595</sup> However, the United Kingdom contends that the European Union mistakenly assumes that “the sole objective of the measures is to benefit individual populations of seabirds”, while the purpose of the EwE modelling was never to provide predictions for individual seabird species.<sup>596</sup> The United Kingdom reiterates its concerns that the European Union has not established an existing model available to the United Kingdom at the time which was capable of accounting for spatial distribution of sandeel, particularly one matching this distribution to the range of chick-rearing seabirds; additionally, it also reiterates that it would not have been required to, or justified in, postponing measures until such a model existed.<sup>597</sup> Additionally, the United Kingdom submits that the same limitation applies to ICES stock assessments, which the United Kingdom contends appear to be accepted by the European Union as constituting “best available scientific advice”, because such stock assessments “cannot function at the level of individual feeding grounds”, and it is not feasible for them to do so.<sup>598</sup>

273. Finally, the United Kingdom disputes the European Union’s contention that Natural England/Cefas/JNCC did not disclose how they updated the 2013 EwE model, submitting that the Natural England/Cefas/JNCC Advice itself “contains an explanation of the updates made.”<sup>599</sup>

(ii) *The Sandeel Fishing Measures Are “Based on” the Advice*

274. The United Kingdom then considers the European Union’s alternative submission that, even if the United Kingdom’s advice was the “best available scientific advice”, the sandeel fishing measures were not “based on” that advice.<sup>600</sup>
275. First, regarding the European Union’s contention that the sandeel fishery is “currently exploited in a manner that ensures the healthy level of the sandeel stock” in the North Sea, the United Kingdom submits that, in making this statement, the European Union relies on quotes from the

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<sup>595</sup> UK’s Written Submission, para. 287.2, *referring to* EU’s Written Submission, para. 489.

<sup>596</sup> UK’s Written Submission, para. 287.2.1, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 21 (**Exhibit C-45**).

<sup>597</sup> UK’s Written Submission, para. 287.2.2.

<sup>598</sup> UK’s Written Submission, para. 287.2.3, *referring to* EU’s Written Submission, para. 494; ICES Technical Service, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, pp. 1-3 (**Exhibit C-22**); Hearing, 29 January 2025, 133:6-13 (Boileau).

<sup>599</sup> UK’s Written Submission, para. 288, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 21 (**Exhibit C-45**).

<sup>600</sup> UK’s Written Submission, paras 289-302, *referring to* EU’s Written Submission, para. 493.

ICES Technical Service that are out-of-context and do not support its argument.<sup>601</sup> For example, the United Kingdom reiterates that the reference to “healthy levels of these stocks” in the ICES Technical Service refers only to levels of sandeel stocks for the purposes of advising on maximum sustainable yield in the fisheries context, rather than meaning that stocks are at a level that would “sustain populations of sandeel predators, let alone support recovery of those predators, which were objectives of the measures.”<sup>602</sup> The United Kingdom also notes the European Union’s reference to the “escapement strategy” used by ICES in stock assessment, but contends that the ICES Technical Service itself acknowledges that it does not contain any analysis regarding whether “this precautionary level is sufficient to provide adequate food levels for individual predator populations.”<sup>603</sup> Additionally, the United Kingdom considers the European Union’s reference to a comment by one of the reviewers in the ICES Technical Service that “the spatial structure of the management advice is likely sufficient to ensure that local depletions can be reversed by recruitment from somewhere else in the management region” to only be true where the depletion occurs at a “small-scale”, and notes that the Scottish Scientific Review’s “unchallenged evidence” provides that “recovery of local depletion of sandeel aggregations depends on several factors and may take several years to be achieved.”<sup>604</sup> Finally, the United Kingdom submits that there is no inconsistency between its measures and the information contained within the ICES Technical Service; instead, the Technical Service “affirms that management measures to support ecosystem functions should occur at the level of national regulations.”<sup>605</sup> It understands the ICES Technical Service to mean that what is “local” will vary depending on the foraging habits and ranges of different predator species, making local requirements a relative concept, and that an “assessment of whether management is supporting ecosystem functions should be undertaken by national authorities, rather than by ICES.”<sup>606</sup> The

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<sup>601</sup> UK’s Written Submission, para. 291, *citing* EU’s Written Submission, para. 494.

<sup>602</sup> UK’s Written Submission, para. 291.1 [emphasis in the original], *referring to* UK’s Written Submission, paras 266-267; *see also* para. 256 above.

<sup>603</sup> UK’s Written Submission, para. 291.2, *referring to* EU’s Written Submission, para. 495, *citing* ICES Technical Service, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 1 (**Exhibit C-22**).

<sup>604</sup> UK’s Written Submission, para. 291.3, *referring to* EU’s Written Submission, para. 494; ICES Technical Service, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 4 (**Exhibit C-22**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 5-8 (**Exhibit C-50**).

<sup>605</sup> UK’s Written Submission, para. 291.4, *referring to* ICES Technical Service, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 1 (**Exhibit C-22**).

<sup>606</sup> UK’s Responses to Questions, pp. 30-31.

United Kingdom rejects any implication by the European Union that the ICES Technical Service suggests that if a particular predator population is able to forage outside of a specific sandbank or sandbanks, they are not suitable for protection by national fisheries management measures.<sup>607</sup>

276. Second, the United Kingdom accepts the European Union's submission that fluctuations in the North Sea sandeel stock are principally attributable to natural sandeel mortality, rather than mortality as a result of fishing pressure; however, the United Kingdom contends that, contrary to the European Union's argument, this supports its measures.<sup>608</sup> This is because, according to the United Kingdom, while natural sandeel mortality is not within human control, fishing mortality is, and "the most obvious and rational means of pursuing the UK's objectives is to control the variables it can".<sup>609</sup> Additionally, as noted by the European Union, the United Kingdom emphasises that some of the drivers of natural mortality include environmental factors such as climate change, so increasing sandeel abundance in the North Sea will offer some resilience from this fluctuation, not only for sandeel but also for sandeel predators.<sup>610</sup>
277. Third, the United Kingdom contends that the European Union's submission that there may be instances where sandeel fishery impacts localised sandeel abundance within a management area actually supports the United Kingdom's measures, because it indicates that high overall biomass alone is insufficient to prevent local depletion.<sup>611</sup>
278. The United Kingdom then considers the European Union's fourth and fifth points together; namely, what the European Union refers to as a correlation between the "insufficient localised abundance of sandeel and breeding success of chick-rearing seabirds for which sandeel comprises a substantial portion of their diet",<sup>612</sup> and the European Union's statement that it does not contest that there is a rational and objective relationship between the scientific advice invoked by the

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<sup>607</sup> UK's Replies to the EU's Responses to Questions, p.12.

<sup>608</sup> UK's Written Submission, para. 292, *referring to* EU's Written Submission, para. 496; *see also* para. 207 above.

<sup>609</sup> UK's Written Submission, para. 292.1.

<sup>610</sup> UK's Written Submission, paras 292.2-292.3, *referring to* EU's Written Submission, para. 496(a); Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, pp. i, 38-39 (**Exhibit C-45**); Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, pp. 8-13 (**Exhibit C-50**).

<sup>611</sup> UK's Written Submission, para. 293, *citing* EU's Written Submission, para. 498; Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, Table 1 (**Exhibit C-45**).

<sup>612</sup> UK's Written Submission, para. 294, *citing* EU's Written Submission, para. 499; *see also* para. 208 above.

United Kingdom and a prohibition on sandeel fishing in areas that coincide spatially with the feeding range of chick-rearing seabirds.<sup>613</sup> The United Kingdom refers to the latter as “an important concession”, because it demonstrates that the European Union recognises “that the scientific advice relied upon in respect of the English measure establishes that a sandeel fishing prohibition contributes to sandeel abundance, which in turn contributes to the conservation and restoration of at least one type of dependent predator (seabirds).”<sup>614</sup> According to the United Kingdom, the European Union has not explained why this same logic would not extend to other dependent predators beyond the foraging range of chick-rearing seabirds.<sup>615</sup>

279. The United Kingdom recalls that, although the European Union accepts that the scientific advice supports the partial closure which coincides with the foraging range of chick-rearing seabirds, it submits that there is no “rational or objective” relationship between the scientific advice and the full closure, due to the scientific advice not showing “additional positive environmental effects” of the full closure.<sup>616</sup> According to the United Kingdom, the premise of this argument is incorrect, because it presumes that the United Kingdom’s measures were solely or predominantly intended to benefit seabirds, as opposed to the broader ecosystem.<sup>617</sup> The United Kingdom also considers that the European Union is attempting to reverse its burden in requiring the United Kingdom to demonstrate “additional positive environmental effects” of the full closure;<sup>618</sup> in the United Kingdom’s submission, the onus falls on the European Union “to establish that the measures were not based on the best available scientific advice.”<sup>619</sup> Instead, the United Kingdom contends, if the European Union’s position is that the best available scientific advice only supports the partial closure, then it ought to have identified the scientific evidence available at the time of the decision-making which demonstrates that the partial closure would have been just as likely to achieve the United Kingdom’s objectives as the full closure.<sup>620</sup>

280. In any event, according to the United Kingdom, the European Union has not demonstrated that a closure limited to the foraging range of chick-rearing seabirds would result in a meaningfully smaller closure than the full closure; the United Kingdom notes, for example, that gannet have a

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<sup>613</sup> UK’s Written Submission, para. 294, *referring to* EU’s Written Submission, para. 500.

<sup>614</sup> UK’s Written Submission, para. 294.

<sup>615</sup> UK’s Written Submission, para. 294.

<sup>616</sup> UK’s Written Submission, para. 295, *citing* EU’s Written Submission, para. 501. *See* para. 208 above.

<sup>617</sup> UK’s Written Submission, para. 295.

<sup>618</sup> UK’s Written Submission, para. 296, *citing* EU’s Written Submission, para. 501.

<sup>619</sup> UK’s Written Submission, para. 296.

<sup>620</sup> UK’s Written Submission, para. 296.

509.4 km foraging range, black-legged kittiwake 300.6 km, and puffin 265.4 km,<sup>621</sup> and that the latter two are the seabirds with the highest sensitivity of breeding success to sandeel abundance.<sup>622</sup> Additionally, the United Kingdom submits that the gannet's foraging range fully encompasses and extends beyond the United Kingdom's EEZ, while the black-legged kittiwake's foraging range covers most of it.<sup>623</sup>

281. The United Kingdom identifies two additional reasons why it submits the European Union's argument fails in its premise, namely: the European Union seems to assume that seabirds only require sandeel during chick-rearing, such that sandeel located outside the breeding-season foraging range need not be protected, which ignores that sandeel may provide an important source of food during the non-breeding period, when maintaining sufficient levels of energy is challenging for seabirds.<sup>624</sup> The United Kingdom also asserts that the European Union fails to consider that a prohibition on sandeel fishing covering only part of the UK waters in the North Sea creates the risk of displacement of fishing effort to the other parts of UK waters, which may lead to localised sandeel depletion.<sup>625</sup>
282. While the United Kingdom therefore considers that the European Union's arguments regarding a spatially-limited closure rest on flawed premises, it briefly addresses the sub-arguments advanced by the European Union.<sup>626</sup>
283. First, the United Kingdom contends that the European Union's reference to the 2000 prohibition on sandeel fishing being justified by the correlation between the localised abundance of sandeel and the breeding success of seabirds has no relevance to the present measures, the objectives of

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<sup>621</sup> UK's Written Submission, para. 297, *referring to* NatureScot, Guidance Note 3: Guidance to support Offshore Wind Applications: Marine Birds – Identifying theoretical connectivity with breeding site Special Protection Areas using breeding season foraging ranges, 1 January 2023, (**Exhibit R-114**).

<sup>622</sup> UK's Written Submission, para. 298, *referring to* Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 43 (**Exhibit C-50**).

<sup>623</sup> UK's Written Submission, para. 298, Figures 3 and 4.

<sup>624</sup> UK's Written Submission, para. 299.1, *referring to* Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 53 (**Exhibit C-50**).

<sup>625</sup> UK's Written Submission, para. 299.2, *referring to* Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, pp. 41, 44 (**Exhibit C-45**); Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, pp. 15, 36 (**Exhibit C-50**).

<sup>626</sup> UK's Written Submission, para. 300.



which are not limited to the restoration of seabird populations.<sup>627</sup> Additionally, the United Kingdom submits that if the European Union seeks to rely on the 2000 prohibition as precedent, then it should establish that the 2000 prohibition was effective in achieving its objectives, while also noting that the 2000 prohibition “did not enable kittiwake breeding success to recover to pre-fishery levels”, arguably supporting a broader closure.<sup>628</sup>

284. Second, the United Kingdom disputes the European Union’s contention that the scientific advice “does not indicate that a spatially broader prohibition would increase the abundance and resilience of sandeel”, reiterating that both natural and anthropogenic factors drive sandeel mortality.<sup>629</sup>
285. Third, the United Kingdom contests the European Union’s submission that the scientific evidence does not establish that a full closure would further increase the breeding success of chick-rearing seabirds beyond a partial closure, as this ignores the results of the EwE modelling, which the European Union “reiterate[s] its misguided criticisms of”.<sup>630</sup>
286. Fourth, on the purported benefits for marine animals, the United Kingdom notes that the European Union emphasises the use of the word “might” in the Scottish Scientific Review as denoting uncertainty; the United Kingdom agrees that there is a degree of uncertainty involved, given the complexity of species interactions in the North Sea as well as a lack of data on the effects of sandeel abundance on marine mammal sizes.<sup>631</sup> However, the United Kingdom submits that an acknowledgement of some uncertainty does not mean that there is a lack of a “rational or objective” link with the measure, and further that to refrain from acting based on some uncertainty is incompatible with the precautionary approach under the TCA.<sup>632</sup> Additionally, the United Kingdom contends that the European Union fails to address the “substantiated links between

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<sup>627</sup> UK’s Written Submission, para. 300.1, *referring to* EU’s Written Submission, paras 499, 503; *see also* para. 210 above.

<sup>628</sup> UK’s Written Submission, para. 300.1, *referring to* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, paras 4.7.4, 4.13 (**Exhibit C-50**); UK’s Written Submission, para. 256.

<sup>629</sup> UK’s Written Submission, para. 300.2, *referring to* EU’s Written Submission, para. 502; *see also* paras 209, 276 above.

<sup>630</sup> UK’s Written Submission, para. 300.3, *referring to* EU’s Written Submission, paras 503, 505, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 27, Table 3 (**Exhibit C-45**).

<sup>631</sup> UK’s Written Submission, para. 300.4.1, *referring to* EU’s Written Submission, para. 507.

<sup>632</sup> UK’s Written Submission, para. 300.4.1, *referring to* EU’s Written Submission, para. 507; Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 74(**Exhibit C-50**).

marine mammals and sandeel biomass” in the scientific advice, with sandeel constituting a large portion of marine mammals’ diets,<sup>633</sup> as well as the EwE modelling predicting a 4% increase in biomass response across the North Sea from a prohibition on sandeel fishing in UK waters of the North Sea.<sup>634</sup> The United Kingdom also once more rebuts the European Union’s repeated invocation of the fact that fluctuations in the abundance of sandeel are principally due to natural sandeel mortality, contending that this has no bearing on whether an increase in sandeel abundance from a fishing prohibition might lead to an increase in the biomass of marine mammals that feed on sandeel.<sup>635</sup>

287. Fifth, the United Kingdom submits that the European Union tries to deny any link between increased sandeel abundance and benefits for predatory fish.<sup>636</sup> In the United Kingdom’s view, just because predatory fish may be less critically dependent on sandeel than other predators does not mean that they do not stand to benefit at all, further noting that sandeel form 40% of the diet of gurnard, 26.76% of the diet of haddock, and 26% of the diet of whiting in the North Sea.<sup>637</sup> Additionally, the United Kingdom submits that availability of sandeel can contribute to improved body condition even for sandeel predators that can consume a variety of prey, including cod, whiting, plaice, gurnard, lesser weaver and haddock.<sup>638</sup> The United Kingdom also considers that the European Union has not addressed the results of the EwE modelling that predicted increases in the biomass of whiting (by 2%) and haddock (by 3%) across all of the North Sea.<sup>639</sup>

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<sup>633</sup> UK’s Written Submission, para. 300.4.2, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 12, Table 1 at pp. 15-18, p. 19 (**Exhibit C-45**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 57-74 (**Exhibit C-50**).

<sup>634</sup> UK’s Written Submission, para. 300.4.3.

<sup>635</sup> UK’s Written Submission, para. 300.4.4.

<sup>636</sup> UK’s Written Submission, para. 300.5.

<sup>637</sup> UK’s Written Submission, para. 300.5.1, *referring to* EU’s Written Submission, paras 508, 510; Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, Figure 4, p. 22-23 (**Exhibit C-45**); Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 26-29 (**Exhibit C-50**); *see also* para. 213 above.

<sup>638</sup> UK’s Written Submission, para. 300.5.2, *referring to* UK’s Written Submission, paras 100-110; Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 13 (**Exhibit C-45**).

<sup>639</sup> UK’s Written Submission, para. 500.5.3, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 27, Table 3, p. 28 (**Exhibit C-45**).

288. Therefore, the United Kingdom considers that the European Union has failed to establish its alternative argument that the sandeel fishing measures are not “based on” the “best available scientific advice”, averring that some uncertainty as regards the degree of benefit likely to accrue to certain species does not undermine the existence of a “rational and objective relationship” between the scientific advice and the measures, and that this view is further supported by the precautionary approach.<sup>640</sup> Additionally, the United Kingdom submits that the fact that sandeel experience mortality due to causes other than fishing does not mean that the United Kingdom has no “rational or objective” basis for aiming to decrease fishing mortality, but instead the existence of environmental pressures adds further weight to the “pressing need to improve sandeel abundance and resilience through measures within the UK’s direct control.”<sup>641</sup>
289. The United Kingdom concludes by contending that the European Union has therefore failed to show that the United Kingdom breached its obligation under Article 496(2) of the TCA to base the measures on the “best available scientific advice”, meaning that the European Union has, in turn, also failed to establish a breach of the obligation to “have regard” to said advice, under Article 496(1), read together with Article 494(3)(c) of the TCA.<sup>642</sup>
290. Finally, the United Kingdom submits that its conclusion is further confirmed by the precautionary approach to fisheries management, as contained within Articles 494(3)(a) and 495(1)(b) of the TCA, which expressly extends to “associated or dependent species and non-target species and their environment”.<sup>643</sup> The United Kingdom agrees with the European Union that there is a necessary relationship between the precautionary approach under Heading Five of Part Two of the TCA and the “best available scientific advice”, such that the latter must be taken into account when applying the precautionary approach, and further agrees that the precautionary approach does not displace the role of the “best available scientific advice”.<sup>644</sup> According to the United

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<sup>640</sup> UK’s Written Submission, para. 301.

<sup>641</sup> UK’s Written Submission, para. 301.

<sup>642</sup> UK’s Written Submission, para. 302.

<sup>643</sup> UK’s Written Submission, paras 303-304, *citing* Articles 6.2 and 7.52 of the FAO Code of Conduct (**Exhibit CLA-33**); Article 6(2) of the UNFSA (**Exhibit CLA-28**); Section 1(10) of the Fisheries Act 2020 (**Exhibit CLA-6**).

<sup>644</sup> UK’s Written Submission, para. 305, *referring to* EU’s Written Submission, paras 330, 334; *see also* para. 164 above.

Kingdom, the precautionary approach may not be required where the scientific position is sufficiently clear, which the United Kingdom contends is the situation in the present case.<sup>645</sup>

(iii) *In Any Case, the Precautionary Approach Justifies the Sandeel Fishing Measures*

291. In the alternative, where there is any uncertainty regarding the conclusions drawn from the scientific advice relied upon by the United Kingdom, the United Kingdom submits that a “straightforward application of the precautionary approach clearly justifies the measures”.<sup>646</sup> According to the United Kingdom, the precautionary approach in this regard is not a “separate stage”, but instead “informs what amounts to basing measures on best available scientific advice in the circumstances of an individual case.”<sup>647</sup> The United Kingdom then makes four supplementary points.<sup>648</sup>
292. First, the United Kingdom submits that the definition contained in Article 495(1)(b) of the TCA refers to “the absence of adequate scientific information”; according to the United Kingdom, when given its ordinary meaning, this does not mean the absence of any scientific information, just “adequate” scientific information, which should be read to include “uncertainty or gaps in scientific information.”<sup>649</sup>
293. Second, the United Kingdom characterises the European Union’s criticisms of the scientific advice relied upon by the United Kingdom as “amount[ing] to no more than that there are inadequacies in the scientific information” which, according to the United Kingdom, engages the precautionary approach.<sup>650</sup> The United Kingdom refers to two main criticisms of the European Union, the first being that the modelling evidence in the Natural England/Cefas/JNCC Advice lacked “scientific and methodological rigour” due to its assumptions and caveats, which the United Kingdom notes were expressly acknowledged in the Advice.<sup>651</sup> To the extent that this uncertainty was acknowledged, the United Kingdom argues, it is the kind of situation where the

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<sup>645</sup> UK’s Written Submission, para. 306, *referring to* ITLOS, *Advisory Opinion on Climate Change*, Written Statement of the United Kingdom, 16 June 2023, para. 78 (**Exhibit C-73**).

<sup>646</sup> UK’s Written Submission, para. 307.

<sup>647</sup> UK’s Written Submission, para. 307.

<sup>648</sup> UK’s Written Submission, paras 307-317.

<sup>649</sup> UK’s Written Submission, para. 308, *referring to* Article 31(3)(c) of the VCLT; Article 4(1) of the TCA; *Convention on Biological Diversity*, done at Rio de Janeiro on 5 June 1992, Preamble (**Exhibit RLA-7**).

<sup>650</sup> UK’s Written Submission, para. 309.

<sup>651</sup> UK’s Written Submission, para. 310.

precautionary approach may be considered, pursuant to which the United Kingdom was “positively encouraged to [rely upon the conclusions subject to those caveats and assumptions]”.<sup>652</sup> According to the United Kingdom, the second main criticism of the European Union is that there was “no rational or objective relationship” between the scientific advice relied upon by the United Kingdom and the full spatial scope of the measures.<sup>653</sup> The United Kingdom says this is in part due to “complex environmental interactions, including dynamics in predatory fish populations, competition for food sources, cannibalism and climate change” all potentially affecting the abundance of sandeel in the North Sea, making prediction of sandeel stock development following a fishery closure difficult.<sup>654</sup> The United Kingdom reiterates that “any absence of adequate scientific information concerning the extent of benefits that will be realised from the prohibition on sandeel fishing engages the precautionary approach.”<sup>655</sup>

294. Third, the United Kingdom submits that the UK authorities followed the precautionary approach in making their decisions—that is, they “recognise[d] there [was] uncertainty and to the extent necessary invoke[d] the precautionary principle as justifying the [measures].”<sup>656</sup> For example, the United Kingdom notes that the relevant Ministerial advice that the English measure was based on included the statement that “[n]otwithstanding the evidential difficulties, the [Natural England/Cefas/JNCC Advice] is the best available evidence [...] and introducing this measure is consistent with the [...] precautionary approach to fisheries management”.<sup>657</sup> Additionally, the Ministerial advice regarding the Scottish measure noted that “the evidence base demonstrating the effect of the sandeel fishery is not definitive [...] [but] our assessment is that the precautionary approach adopted in our scientific evidence base which takes account of this uncertainty remains valid.”<sup>658</sup>

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<sup>652</sup> UK’s Written Submission, para. 310, *referring to* EU’s Written Submission, paras 469, 480, 483-490.

<sup>653</sup> UK’s Written Submission, para. 311, *referring to* EU’s Written Submission, paras 493, 501; *see also* paras 206, 208 above.

<sup>654</sup> UK’s Written Submission, para. 311, *citing* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 35 (**Exhibit C-50**).

<sup>655</sup> UK’s Written Submission, para. 312.

<sup>656</sup> UK’s Written Submission, para. 313.

<sup>657</sup> UK’s Written Submission, para. 314, *citing* Ministerial submission of 14 September 2023, para. 16 (**Exhibit R-77**).

<sup>658</sup> UK’s Written Submission, para. 315, *citing* Ministerial submission of 26 January 2024, p. 14 Annex F (**Exhibit R-98**).

295. Fourth, the United Kingdom contends that the European Union is more concerned about the United Kingdom’s “chosen level of protection for sandeel”, rather than “the scientific basis for UK measures”.<sup>659</sup> In this regard, the United Kingdom refers to the European Union’s guidance on the precautionary principle, which *inter alia* provides that the decision to adopt the principle is one exercised “where scientific information is insufficient, inconclusive or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection.”<sup>660</sup> The United Kingdom further contends that it is “relevant” that it is pursuing an ecosystem approach to fisheries management, as endorsed by the Conference of the Parties of the CBD, which it notes recognises that “[m]easures may need to be taken even when some cause-and-effect relationships are not yet fully established scientifically.”<sup>661</sup>

### C. PROPORTIONALITY AND DISCRIMINATION CLAIM

296. The Parties further disagree on whether the sandeel fishing prohibition was a proportionate and non-discriminatory measure.

#### 1. Relevant Provisions of the TCA

297. Article 494 of the TCA provides:

1. The Parties shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States as exercised by the Parties.
2. The Parties share the objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield.
3. The Parties shall have regard to the following principles:  
[...]
  - (f) applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties;  
[...]

298. Article 496 of the TCA provides:

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<sup>659</sup> UK’s Written Submission, para. 316.

<sup>660</sup> UK’s Written Submission, para. 316, *citing* European Commission, Communication from the Commission on the Precautionary Principle, (COM(2000) 1 final), 2 February 2000, p. 7 (**Exhibit RLA-15**).

<sup>661</sup> UK’s Written Submission, para. 317, *citing* CBD Conference of the Parties, Decision V/6 Ecosystem Approach, Annex 4, para. 4 (**Exhibit RLA-8**).

1. Each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3).
2. A Party shall base the measure referred to in paragraph 1 on the best available scientific advice.  
A Party shall not apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the same measures to its own vessels.  
[...]

## 2. Submissions of the European Union

299. The European Union claims that in adopting and applying the sandeel fishing prohibition, the United Kingdom has acted inconsistently with its obligation to ensure measures decided on for the conservation of marine living resources and the management of fisheries resources pursuant to Article 496 of the TCA have regard to the principle that such measures must be proportionate and non-discriminatory within the meaning of Article 494(3)(f) of the TCA.<sup>662</sup> The European Union argues that Article 494(3)(f) of the TCA provides that the principle the Parties shall have regard to is “applying proportionate and non-discriminatory measures”.<sup>663</sup> Rejecting the United Kingdom’s proposition that engagement by the decision-maker with factors relevant to proportionality and discrimination would suffice,<sup>664</sup> the European Union submits that the requirement to have regard to the principle of “applying proportionate and non-discriminatory” measures extends beyond the decision-making process.<sup>665</sup> It adds that even within that process, it is not sufficient for a decision-maker to demonstrate “engagement” by simply referring to relevant factors, and that there should be evidence that those different factors have both been correctly identified and then weighed and balanced.<sup>666</sup> According to the European Union, “it is not open to a Party to decide on a measure that does not correspond to the requirement that, when applied, it will be proportionate and non-discriminatory”.<sup>667</sup> This interpretation, the European Union claims, does not render the term “having regard to” redundant, as it creates an explicit link between Article 496(1) and 494(3) of the TCA and ensures consistency between these provisions.<sup>668</sup> Rather, the European Union argues that the United Kingdom’s interpretation does not attach sufficient weight to the use of the term “applying” in the relevant sub-paragraph of Article 494(3)

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<sup>662</sup> EU’s Written Submission, paras 396, 513.

<sup>663</sup> EU’s Responses to Questions, para. 131 [emphasis added by the European Union].

<sup>664</sup> Hearing, 29 January 2025, 165:21-25 (Westaway); Hearing, 30 January 2025, 85:2-4, 89:12-16 (Westaway).

<sup>665</sup> Hearing, 28 January 2025, 120:17 (Norris); EU’s Responses to Questions, para. 130; EU’s Replies to the UK’s Responses to Questions, para. 218.

<sup>666</sup> EU’s Replies to the UK’s Responses to Questions, para. 218.

<sup>667</sup> EU’s Responses to Questions, para. 137.

<sup>668</sup> EU’s Responses to Questions, paras 138-140.

of the TCA.<sup>669</sup> Finally, to the extent that the Arbitration Tribunal considers the *travaux préparatoires* to be relevant as a supplementary means of interpretation, the European Union states that a comparison of the Parties' negotiating texts shows that "Article 494(3) TCA is intended to ensure that meaningful limits are placed on the exercise of regulatory autonomy when deciding on fisheries management measures."<sup>670</sup>

300. In the view of the European Union, the requirement that measures must be proportionate and non-discriminatory denotes two distinct elements that must be satisfied cumulatively in order for a fisheries management measure to be in accordance with Articles 496(1) and (2) and 493(3)(f) of the TCA.<sup>671</sup> The European Union submits that Article 493(3) of the TCA contains no indication that what is proportionate and non-discriminatory is self-judging, leading it to the conclusion that the meaning of both requirements must be determined objectively.<sup>672</sup> The following sections address the European Union's submissions on the requirements of proportionality (a) and non-discrimination (b).

**(a) *On the Alleged Lack of Proportionality of the Sandeel Fishing Prohibition***

**(i) *The Applicable Legal Standard***

301. The European Union notes that the term "proportionate" is not defined in the TCA.<sup>673</sup> In consequence, the European Union submits, it must be interpreted in line with the general approach under Articles 4(1) and (2) of the TCA as described in Section IV.A.1(a) above.<sup>674</sup>
302. The European Union states that the ordinary meaning of the reference to a proportionate measure in Article 494(3)(f) of the TCA is a measure which is in due proportion to the objective of the conservation of marine living resources and the management of fisheries resources in the sense that it is appropriate in its quantity, extent, and degree and that it is commensurate to that objective.<sup>675</sup>

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<sup>669</sup> EU's Replies to the UK's Responses to Questions, para. 225.

<sup>670</sup> EU's Replies to the UK's Responses to Questions, para. 86.

<sup>671</sup> EU's Written Submission, paras 520-525.

<sup>672</sup> EU's Written Submission, para. 524.

<sup>673</sup> EU's Written Submission, para. 526.

<sup>674</sup> EU's Written Submission, paras 527-529.

<sup>675</sup> EU's Written Submission, paras 530-535; Hearing, 28 January, 188:4-16 (Norris).



303. Apart from the ordinary meaning, the European Union claims that the object and purpose of the term “proportionate measure”, namely limiting the Parties’ respective regulatory autonomy when deciding on fisheries management measures by imposing a standard with which such measures must comply, is additional context for determining the meaning of proportionality under the TCA.<sup>676</sup>
304. Further, the European Union submits that in accordance with Article 4(1) of the TCA and Article 31(1) of the VCLT, the interpretation of what constitutes a proportionate measure in the sense of Article 494(3)(f) of the TCA must also take into account the overall objectives of the TCA and the context of the commitments on fisheries made in Heading Five.<sup>677</sup> In order for a measure to be proportionate, the European Union continues, it must balance these objectives and commitments.<sup>678</sup>
305. In this regard, the European Union recalls the objectives of the TCA: to provide for economic and social benefits in fisheries, as evidenced by Articles 498 and 501 of the TCA and Annex 38 to the TCA;<sup>679</sup> to ensure a high level of protection in the field of marine conservation;<sup>680</sup> and to foster and ensure cooperation between the Parties.<sup>681</sup> The European Union asserts that a fisheries management measure may impact economic rights and benefits derived from fishing opportunities allocated under Article 498 of the TCA.<sup>682</sup> Thus, according to the European Union, the function of Article 494(3)(f) of the TCA is to inform and set a limit on the manner in which the right to decide on and apply fisheries management measures for the purpose of conservation of marine living resources and the management of fisheries resources is exercised.<sup>683</sup> The European Union recognises that Article 494(3)(f) of the TCA expressly aims to preserve the Parties’ regulatory autonomy, an objective also reflected in Article 1 of the TCA, as well as several other provisions.<sup>684</sup> However, in the view of the European Union, the preservation of

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<sup>676</sup> EU’s Written Submission, paras 537-539.

<sup>677</sup> EU’s Written Submission, para. 540.

<sup>678</sup> EU’s Written Submission, para. 541.

<sup>679</sup> EU’s Written Submission, paras 543-545; *see also* para. 158 above.

<sup>680</sup> EU’s Written Submission, paras 546-547.

<sup>681</sup> EU’s Written Submission, para. 548; *see also* para. 158 above.

<sup>682</sup> EU’s Written Submission, para. 549.

<sup>683</sup> EU’s Written Submission, para. 551.

<sup>684</sup> EU’s Written Submission, paras 553-556.

regulatory autonomy under Article 494(3)(f) of the TCA is not unconstrained; rather, fisheries management measures must be calibrated considering the other objectives pursued.<sup>685</sup>

306. Further, the European Union clarifies, the principle under Article 494(3)(a) of the TCA, requiring the Parties to apply the precautionary approach to fisheries management, is not inconsistent with the requirement that fisheries management measures must be proportionate, as the precautionary approach addresses the threshold for intervention and is of relevance for determining the level of protection required, but does not displace the obligation to ensure that fisheries management measures must also be consistent with the other principles under Article 494(3) of the TCA.<sup>686</sup> Equally, the principle under Article 494(3)(e) of the TCA, requiring the Parties to take due account of and minimise harmful impacts of fishing on the marine ecosystem and to take due account of the need to preserve marine biological diversity must be reconciled with other relevant principles.<sup>687</sup> In support of this proposition, the European Union refers to Article 404(4) of the TCA, which states that the importance of conserving and sustainably managing marine biological resources and ecosystems recognised in Article 404(4) of the TCA, is without prejudice to the provisions of Heading Five.<sup>688</sup>
307. In further elaboration of its understanding of the requirement of proportionality under Article 494(3)(f) of the TCA, the European Union turns to what it considers to be other relevant rules of international law, in particular provisions of UNCLOS and international economic law.<sup>689</sup>
308. The European Union acknowledges that proportionality is not defined by UNCLOS, but it argues that a principle of proportionality has been applied in disputes involving the law of the sea.<sup>690</sup> While the ICJ in the *North Sea Continental Shelf* case and in subsequent judgments relied upon proportionality as a principle relevant to delimiting the continental shelf, as a final test against which the equity of a method for delimitation can be assessed,<sup>691</sup> the European Union asserts that UNCLOS contains numerous provisions that imply the need to weigh and balance competing

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<sup>685</sup> EU's Written Submission, paras 558-560.

<sup>686</sup> EU's Written Submission, paras 561-563.

<sup>687</sup> EU's Written Submission, paras 564-566.

<sup>688</sup> EU's Written Submission, para. 565.

<sup>689</sup> EU's Written Submission, paras 567-614.

<sup>690</sup> EU's Written Submission, paras 570-571.

<sup>691</sup> EU's Written Submission, paras 572-573, *referring to North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p.3 (**Exhibit CLA-46**); *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 at p. 99, para. 110 (**Exhibit CLA-47**).

rights and interests.<sup>692</sup> As examples, it refers to Articles 56(2) and 58(3) of UNCLOS which require coastal States to have due regard to the rights and duties of other States when exercising their rights and duties within their EEZs, and *vice versa*.<sup>693</sup> The European Union also submits that the interaction between Articles 192 and 193 of UNCLOS demonstrates that States have to balance their obligation to protect and preserve the marine environment against the sovereign right to exploit their natural resources.<sup>694</sup> Further, the European Union cites Article 194(4) of UNCLOS which it argues has been interpreted to require States to base any interference with activities of other States in the name of preventing, reducing, or controlling pollution of the marine environment on an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue.<sup>695</sup>

309. Turning to international economic law as further relevant context for the interpretation of the term “proportionate measure” under Article 494(3)(f) of the TCA, the European Union observes that while international economic law, and in particular the WTO Agreements, do not include a proportionality test as such, under the GATT 1994 as well as under the SPS Agreement and the Agreement on Technical Barriers to Trade (hereinafter the “**TBT Agreement**”), there exist mechanisms allowing for the reconciliation of requirements under these agreements with legitimate regulatory aims of WTO Members through a weighing and balancing of the rights and obligations at stake.<sup>696</sup> Addressing the interpretation of both Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement by the Appellate Body,<sup>697</sup> the European Union concludes that under both provisions, a measure that otherwise impairs economic rights must be shown to be apt

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<sup>692</sup> EU’s Written Submission, para. 574.

<sup>693</sup> EU’s Written Submission, paras 575-578.

<sup>694</sup> EU’s Written Submission, paras 579-581, *referring to* ITLOS, *Advisory Opinion on Climate Change*, Advisory Opinion, 21 May 2024, paras 187, 356-58, 380 (**Exhibit CLA-21**).

<sup>695</sup> EU’s Written Submission, paras 582-584, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 541 (**Exhibit CLA-48**).

<sup>696</sup> EU’s Written Submission, paras 590-592, *referring to* WTO, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 30 (**Exhibit CLA-22**).

<sup>697</sup> EU’s Written Submission, paras 593-597, *referring to* WTO, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 156 (**Exhibit CLA-52**), WTO, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter “*US – Clove Cigarettes*”), WT/DS406/AB/R, adopted 24 April 2012, para. 174 (**Exhibit CLA-53**), WTO, Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements* (hereinafter “*US – COOL*”), WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 461 (**Exhibit CLA-55**) and WTO, Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter “*US – Tuna II (Mexico)*”), WT/DS381/AB/R, adopted 13 June 2012, para. 319 (**Exhibit CLA-54**).

to contribute to the stated aim, and have a relationship of ends and means with the interest to be protected.<sup>698</sup> According to the European Union, the first requirement, that a measure is apt to contribute to its objective, has been considered to be met as long as the measure in question is not incapable of contributing to its stated aim.<sup>699</sup> The next step of the analysis, the European Union continues, “requires consideration of a number of distinct factors relating both to the measure sought to be justified and [...] to possible alternative measures [...]. Relevant factors include the degree of contribution that a measure may make to the objective it pursues and the degree of trade restrictiveness of the measure itself.”<sup>700</sup> With an eye particularly to environmental objectives, the European Union highlights that both Article XX(b) of the GATT 1994 and Article 2.2 of the TBT Agreement apply a standard of necessity rather than proportionality.<sup>701</sup> Noting the differences between “necessity” and “proportionality”, the European Union asserts that the rules under international economic law should serve as an interpretative guide rather than be applied *mutatis mutandis* to the TCA.<sup>702</sup> This does not, however, imply a lower degree of scrutiny.<sup>703</sup> In the view of the European Union, proportionality is a broader concept, of which an assessment of necessity as practised by the Appellate Body only forms one part.<sup>704</sup>

310. As the European Union opines that in circumstances where the Parties have ascribed a similar meaning to a term under their domestic law, this may be a further source of interpretative guidance,<sup>705</sup> it finally examines both Parties’ domestic law to inform its interpretation of what is to be considered a proportionate measure under Article 494(3)(f) of the TCA.<sup>706</sup> The European Union notes that regardless of the United Kingdom’s withdrawal from the European Union, the UK Supreme Court has expressed the view that proportionality has been integrated into the

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<sup>698</sup> EU’s Written Submission, para. 598, *referring to* WTO, Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles Apparel and Footwear* (hereinafter “*Colombia – Textiles*”), WT/DS461/AB/R, adopted 22 June 2016, para. 5.67 (**Exhibit CLA-57**), WTO, Appellate Body Report, *Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/AB/R, adopted 17 December 2007 para. 145 (**Exhibit CLA-58**).

<sup>699</sup> EU’s Written Submission, para. 599, *referring to* WTO, Appellate Body Report, *Colombia – Textiles*, WT/DS461/AB/R, adopted 22 June 2016, paras 5.68-5.70 (**Exhibit CLA-57**); WTO, Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, adopted 14 October 2016, para. 5.58 (**Exhibit CLA-59**).

<sup>700</sup> EU’s Written Submission, para. 601.

<sup>701</sup> EU’s Written Submission, paras 603-605.

<sup>702</sup> EU’s Written Submission, paras 606-613.

<sup>703</sup> EU’s Written Submission, para. 614

<sup>704</sup> EU’s Written Submission, para. 614; Hearing 28 January 2025, 130:14-23 (Norris).

<sup>705</sup> Hearing, 30 January 2025, 6:3-11 (Norris).

<sup>706</sup> EU’s Written Submission, paras 615-620; *see also* EU’s Responses to Questions, para. 75.

common law or at least is not materially different in the substantive analysis it implies.<sup>707</sup> According to the European Union, the UK Supreme Court has identified different components of a proportionality assessment, including the following: (i) the intensity of review will depend on the nature of the right that has been impaired; (ii) there should be a rational connection between the objective pursued and the measure applied; (iii) there should be an inquiry into whether less intrusive alternatives exist; and (iv) a measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification.<sup>708</sup> Similarly, the Court of Justice of the European Union has interpreted the principle of proportionality as contained in Article 5(4) of the Treaty on the European Union and as a general principle of European Union law to require that (i) a measure pursues a legitimate aim; (ii) the measure is an appropriate measure; (iii) the measure is among those that is the least restrictive available of the economic right; and (iv) when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the objectives pursued.<sup>709</sup> The European Union opines that the United Kingdom has not provided any convincing explanation as to why the manner in which the apex courts of the United Kingdom and the European Union have understood and applied the term of proportionality should not be one of the factors to which the Arbitration Tribunal may have regard.<sup>710</sup> In particular, it rejects the United Kingdom's contention that proportionality has only been applied in the domestic legal orders of the Parties to address the fundamental rights of individuals, arguing that proportionality has also been used in the Parties' domestic legal orders as a framework against which to review a measure which required a decision-maker to balance different interests.<sup>711</sup>

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<sup>707</sup> EU's Written Submission, paras 622-624, referring to *Kennedy (Appellant) v The Commission (Respondent)* [2014] UKSC 20, para. 57 (**Exhibit CLA-62**).

<sup>708</sup> EU's Written Submission, para. 625, referring to *Kennedy v The Charity Commission* [2014] UKSC 20, para. 57 (**Exhibit CLA-62**); *Bank Mellat v Her Majesty's Treasury*, [2013] UKSC 38, para. 25 (**Exhibit CLA-64**).

<sup>709</sup> EU's Written Submission, paras 626-627, referring to CJEU, Judgment of 13 November 1990, *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*, C-331/88, EU:C:1990:391 (**Exhibit CLA-66**).

<sup>710</sup> Hearing, 30 January 2025, 6:8-11 (Norris); EU's Responses to Questions, para. 78; see also EU's Supplementary Written Submission, paras 50-59.

<sup>711</sup> EU's Replies to the UK's Responses to Questions, paras 159-160, referring to *Kennedy v The Charity Commission* [2014] UKSC 20, para. 54 (**Exhibit CLA-62**); *R (on the application of Rotherham Metropolitan Borough Council and others) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, para. 47 (**Exhibit CLA-63**); *Bank Mellat v Her Majesty's Treasury*, [2013] UKSC 38, para. 74 per Lord Sumption (**Exhibit CLA-64**).

311. Thus, the European Union concludes that the proper interpretation of the term “proportionate measure” as used in Article 494(3)(f) of the TCA implies a multi-stage assessment:
312. First, it must be demonstrated that there is a relationship of ends and means between the legitimate objective of marine conservation or fisheries management and the measure in question.<sup>712</sup>
313. Second, the measure must be apt or suitable to secure that objective in the sense that it must be capable of contributing to that objective.<sup>713</sup>
314. Third, according to the European Union, it must be shown that there has been a weighing and balancing that has regard to the degree of contribution that the measure makes to the objective pursued; to the economic and social impacts of the measure and to the impairment of other rights, notably those provided for in the same Heading of the TCA; finally, a measure may not go beyond what is necessary to meet the pursued objective.<sup>714</sup> In the view of the European Union, one relevant factor in this determination is the reasonable availability of alternative measures which would contribute to the objective, the economic or social impacts of which would be commensurate with that contribution.<sup>715</sup> Consequently, according to the European Union, a measure may be “necessary” and nonetheless disproportionate when the balancing exercise reveals that the costs or impacts caused by the measure outweigh the benefits or contribution.<sup>716</sup> Thus, while each Party is free to determine the level of protection it wishes to achieve, a proper consideration of the proportionality of a measure per Article 494(3)(f), in most circumstances, would require a Party to show that it had considered less restrictive alternatives.<sup>717</sup> This is not to say, the European Union clarifies, that a Party must also adopt the least restrictive measure so identified.<sup>718</sup> Nonetheless, the European Union considers alternative measures to be a useful framework of assessment and analytical tool that may be advanced by a complaining Party asserting that a measure is not proportionate.<sup>719</sup>

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<sup>712</sup> EU’s Written Submission, para. 636.

<sup>713</sup> EU’s Written Submission, para. 637.

<sup>714</sup> EU’s Written Submission, paras 639-640; Hearing 28 January 2025, 131:2-7 (Norris).

<sup>715</sup> EU’s Written Submission, para. 640(d); Hearing, 28 January 2025, 138:19-22 (Norris).

<sup>716</sup> EU’s Written Submission, para. 640(d).

<sup>717</sup> EU’s Responses to Questions, para. 46; EU’s Replies to the UK’s Responses to Questions, paras 103-104.

<sup>718</sup> EU’s Responses to Questions, para. 55.

<sup>719</sup> Hearing, 28 January 2025, 190:3 (Norris); EU’s Supplementary Written Submission, para. 60.

315. In the present case, it is the European Union's position that since it affirmatively asserted a spatially targeted prohibition as an alternative and reasonably available measure to pursue the United Kingdom's objective in a manner that would have entailed costs commensurate to its benefits,<sup>720</sup> it falls to the United Kingdom to rebut this contention.<sup>721</sup>

(ii) *The Sandeel Fishing Prohibition Is Not a Proportionate Measure*

316. Applying the legal standard set out above to the sandeel fishing prohibition, the European Union finds that it is not a proportionate measure and, consequently, that the United Kingdom acted inconsistently with Article 496(1), read together with Article 494(3)(f) of the TCA.<sup>722</sup> According to the European Union, a proper assessment of the costs and benefits of the sandeel fishing prohibition reveals that the economic and social impacts and the degree of impairment to rights granted under the TCA outweigh the measure's contribution to the legitimate objectives it pursues.<sup>723</sup>

317. With a view to the first step of the test proposed by the European Union, it acknowledges that to the extent that the sandeel fishing prohibition is for the purpose of the broad objectives of marine conservation and the sustainable exploitation of fisheries resources, it is in pursuit of a legitimate objective.<sup>724</sup> At a more granular level, the European Union examines the English and Scottish consultation documents and other material published by the United Kingdom to identify the objectives of the sandeel fishing prohibition.<sup>725</sup> With regard to the prohibition concerning English waters, it identifies the objective to be "to increase the biomass of sandeel stocks and therefore increase the food availability for higher trophic level predators such as seabirds within the wider ecosystem".<sup>726</sup> Regarding the prohibition concerning Scottish waters, the European Union states the declared objectives are "a) [t]o seek effective protection of sandeel, as a contribution to the wider marine ecosystem. b) To provide the opportunity for wider ecosystem benefits to a range of species, including commercial fish species, seabirds and marine mammals, that will also improve resilience to changes in the marine environment. c) To complement, as far as possible,

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<sup>720</sup> EU's Written Submission, para. 746; Hearing 28 January 2025, 190:6-18 (Norris); *see also* para. 326 below.

<sup>721</sup> EU's Responses to Questions, para. 165; EU's Replies to the UK's Responses to Questions, paras 243-246.

<sup>722</sup> EU's Written Submission, para. 684.

<sup>723</sup> EU's Written Submission, para. 685.

<sup>724</sup> EU's Written Submission, para. 692.

<sup>725</sup> EU's Written Submission, para. 693.

<sup>726</sup> EU's Written Submission, para. 693, *citing* DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, para. 10 (**Exhibit C-44**).

existing sandeel management measures’.”<sup>727</sup> Concerning the objective of the Scottish instrument to complement existing sandeel management measures, the European Union remarks that a free-standing objective of “complementing” another existing measure cannot support the presumption that a measure was adopted for the purposes of the objectives defined in Articles 494(1) and (2) of the TCA.<sup>728</sup> However, the European Union understands this stated objective to be subordinate or ancillary to the primary objectives described in points a) and b) of the Scottish consultation document.<sup>729</sup> Consequently, it considers, in principle, that the Scottish and the English prohibition collectively constitute a measure that has been decided on in the exercise of the United Kingdom’s regulatory autonomy “for the purpose” of meeting objectives falling within the scope of those set out in Article 494 of the TCA.<sup>730</sup>

318. Proceeding to the second step of its test, the European Union accepts that the sandeel fishing prohibition is “apt” to contribute to the legitimate regulatory objectives it pursues.<sup>731</sup> Further, the European Union recognises that there may be instances where the North Sea sandeel fishery could have an impact on localised sandeel abundance.<sup>732</sup> It notes that such a localised impact may occur in areas within the feeding range of chick-rearing seabirds for which sandeel comprise a substantial proportion of their diet, since such seabirds require sufficient localised availability of sandeel during their breeding season.<sup>733</sup> Considering the evidence provided by ICES confirming that “seabirds are the most sensitive predators to changes in sandeel abundance”, the European Union accepts that the sandeel fishing prohibition, insofar as it may lead to a localised increase in sandeel, is apt to contribute to the objective of the conservation of certain seabirds sensitive to local changes in sandeel abundance.<sup>734</sup>
319. It is at the level of the third step of its proposed test, the weighing and balancing of the sandeel fishing prohibition’s contribution to its stated objectives with the economic and social impacts

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<sup>727</sup> EU’s Written Submission, para. 693, *citing* Scottish Government, Consultation on proposals to close fishing for sandeel in all Scottish waters, July 2023, p. 3 (**Exhibit C-49**).

<sup>728</sup> EU’s Written Submission, para. 695.

<sup>729</sup> EU’s Written Submission, para. 697.

<sup>730</sup> EU’s Written Submission, para. 698.

<sup>731</sup> EU’s Written Submission, para. 699; Hearing, 28 January 2025, 141:10-15 (Dawes).

<sup>732</sup> EU’s Written Submission, para. 700.

<sup>733</sup> EU’s Written Submission, para. 700.

<sup>734</sup> EU’s Written Submission, para. 700, *citing* ICES Technical Service, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 8 (**Exhibit C-22**).



and impairment of rights granted under the TCA, that the European Union finds the sandeel prohibition does not meet the requirement of proportionality.<sup>735</sup>

320. The European Union argues that the degree of contribution of a measure to its stated objective must be assessed by reference to the scientific and evidential basis relied upon by the Party applying that measure.<sup>736</sup> According to the European Union, the evidence relied upon by the United Kingdom for the sandeel fishing prohibition does not meet the requirements of Article 496(2), read together with Article 494(3)(c) of the TCA.<sup>737</sup> The European Union claims that when a measure is not based on the best available scientific advice, this also affects the assessment of proportionality.<sup>738</sup> Particularly where scientific knowledge is less certain, the European Union elaborates, due regard must be given to other impacts that the measure may have, even when taking into account the precautionary approach.<sup>739</sup> The European Union criticises that while it accepts that the sandeel fishing prohibition will contribute to its stated objectives, there is insufficient evidence to support the United Kingdom's claim that it will achieve all the environmental effects identified by the United Kingdom, namely, increased abundance and resilience of sandeel; increased availability of sandeel for predators, aiding the breeding success of certain seabirds, marine mammals and fish for which sandeel comprises a substantial proportion of their diet; increased occurrence of certain marine mammals within the United Kingdom's waters of the North Sea; increased breeding success and condition of certain other commercial fish; and progress towards achieving GES.<sup>740</sup>

321. First, regarding the link between the sandeel fishing prohibition and the abundance and resilience of sandeel, the European Union submits that fluctuations in the North Sea sandeel stock are primarily due to natural sandeel mortality, not the North Sea sandeel fishery.<sup>741</sup> Second, regarding the link between the sandeel fishing prohibition and the breeding success of chick-rearing seabirds, the European Union states that there is no link between the scientific advice invoked by the United Kingdom as the base of the prohibition and a spatial prohibition on sandeel fishing in UK waters of the North Sea that goes beyond the feeding range of chick-rearing seabirds.<sup>742</sup> Third,

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<sup>735</sup> EU's Written Submission, paras 701-702.

<sup>736</sup> EU's Written Submission, para. 703.

<sup>737</sup> EU's Written Submission, para. 704; *see also* Section IV.B.2 above.

<sup>738</sup> EU's Written Submission, para. 705.

<sup>739</sup> EU's Written Submission, para. 706.

<sup>740</sup> EU's Written Submission, para. 707.

<sup>741</sup> EU's Written Submission, para. 708; *see* para. 209 above.

<sup>742</sup> EU's Written Submission, para. 709; *see* para. 210 above.

the European Union argues that the alleged link between the sandeel fishing prohibition and the breeding success of marine mammals is not based on evidence, but rather on a series of unsupported assumptions and logical leaps.<sup>743</sup> According to the European Union, there is equally no evidence demonstrating a link between the sandeel fishing prohibition and the condition of other (commercial) fish.<sup>744</sup> Even if the Arbitration Tribunal were to accept that the sandeel fishing prohibition would make a significant contribution to the objectives pursued and would achieve the full spectrum of environmental effects claimed by the United Kingdom, the European Union asserts that this would not justify the other impacts to which the sandeel fishing prohibition gives rise to.<sup>745</sup>

322. The European Union stresses that industrial fishing and “fishing opportunities” provide important economic and social benefits and consequently are an important part of the commitments under Heading Five of Part Two of the TCA.<sup>746</sup> In the view of the European Union, the United Kingdom did not adequately consider the economic and social impacts of the sandeel fishing prohibition.<sup>747</sup>
323. As a consequence of the sandeel fishing prohibition, the European Union observes that vessels can no longer undertake sandeel fishing in the United Kingdom’s waters of the North Sea, and accordingly lose the economic benefits associated with the right to fish in those waters.<sup>748</sup> The European Union draws attention to the fact that the United Kingdom’s consultation documents acknowledge these economic and social impacts and that they should weigh in the balance of any decision-making exercise.<sup>749</sup> These documents, the European Union continues, against the background of the shares of sandeel agreed between the Parties and reflected in Annex 35 to the TCA also correctly determine that the sandeel fishing prohibition will primarily affect EU vessels and the fishmeal and fish oil sectors in the European Union.<sup>750</sup> While it is difficult to quantify the losses these sectors would incur, the European Union states that the United Kingdom’s consultation documents themselves contain estimates of the impact of the sandeel fishing prohibition.<sup>751</sup> The DMA notes that the prohibition of sandeel fishing in English waters of the

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<sup>743</sup> EU’s Written Submission, para. 710; *see* para. 212 above.

<sup>744</sup> EU’s Written Submission, para. 711; *see* paras 213, 215 above.

<sup>745</sup> EU’s Written Submission, paras 712-714.

<sup>746</sup> EU’s Written Submission, para. 715.

<sup>747</sup> EU’s Written Submission, para. 717; Hearing, 30 January 2025, 32:3-35:1 (Dawes).

<sup>748</sup> EU’s Written Submission, para. 719.

<sup>749</sup> EU’s Written Submission, para. 720.

<sup>750</sup> EU’s Written Submission para. 721.

<sup>751</sup> EU’s Written Submission paras 723-725.

North Sea will impact EU-registered vessels, with over 99 percent of the total value of sandeel landed from English waters, approximately GBP 41.2 million each year, historically having been landed by EU vessels.<sup>752</sup> It also observes that the loss of access to fisheries in English waters would likely lead to employment losses, particularly in Denmark, as well as indirect costs to the fish processing business.<sup>753</sup> Similarly, the Scottish Partial Impact Assessment for the prohibition in Scottish waters finds that “EU vessels catching sandeel in Scottish waters ‘will face the largest cost as they are the main catchers of sandeel in Scottish waters’”.<sup>754</sup> The Final Business and Regulatory Impact Assessment accompanying the Scottish Order estimates the direct cost to the European Union’s fishing industry to be between GBP 3.1 million and 4 million annually, and the indirect cost to the processing sector to be up to GBP 600.000 annually.<sup>755</sup> While the European Union acknowledges that the figures in the English and Scottish documents were based on revenue, not profit, and, thus, may overestimate actual costs, it maintains that the economic impact on EU vessels and the EU fishmeal and fish oil sectors is significant.<sup>756</sup> In support of its claim, the European Union relies on the findings of a study commissioned by the Ministry of Food, Agriculture and Fisheries of Denmark, which, based on the numbers of the years from 2011-2023, estimates the economic impact of a hypothetical sandeel fishing prohibition on Danish vessels during those years to amount to a loss in landing value of EUR 21.23 million, a loss of earning capability of EUR 16.51 million, and a loss of gross profit of EUR 12.35 million, and with regard to the Danish sandeel fishmeal and fish oil sectors an annual reduction in gross profit between EUR 1.2 and 22.7 million.<sup>757</sup> The European Union adds that these estimates also are based on certain assumptions, such as that none of the sandeel caught in the United Kingdom’s EEZ can instead be caught in other fishing areas, thereby potentially overstating the losses, but it submits

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<sup>752</sup> EU’s Written Submission para. 726, *citing* DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para. 65 (**Exhibit C-44**).

<sup>753</sup> EU’s Written Submission para. 726, *citing* DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para. 66, Annex 1 (**Exhibit C-44**).

<sup>754</sup> EU’s Written Submission para. 727, *citing* Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 13 (**Exhibit C-51**).

<sup>755</sup> EU’s Written Submission para. 728, *referring to* Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, section 16, Table 4 (**Exhibit C-66**).

<sup>756</sup> EU’s Written Submission, para. 729.

<sup>757</sup> EU’s Written Submission, para. 729, *citing* Andersen & Nielsen, ‘The economics of the Danish sandeel fishery and fishmeal and fish oil factories’, Department of Food and Resource Economics, University of Copenhagen, IFRO Commissioned Work No. 2024/16, July 2024, pp. 9, 14 (**Exhibit C-25**).

that the study nonetheless confirms the significant economic impact the sandeel fishing prohibition would have.<sup>758</sup>

324. Additionally, the European Union argues that the sandeel fishing prohibition impairs the right of full access to UK waters in the North Sea to fish under Article 2(1)(a) of Annex 38 to the TCA.<sup>759</sup> It is for this reason that the European Union rejects the United Kingdom's position that, for the purposes of the proportionality analysis, it should be considered that EU vessels could mitigate any losses by fishing for sandeel in other waters or other stocks in UK waters<sup>760</sup> as "legally misconceived" and "factually unsubstantiated".<sup>761</sup> According to the European Union, since Article 2(1)(a) of Annex 38 to the TCA grants EU vessels the right of full access to UK waters to fish the EU quota for each stock for which a quota has been agreed, the ability to fish other stocks or in other waters does not attenuate the nullification of this specific right.<sup>762</sup> At the factual level, the European Union does not accept that the costs and impacts could be mitigated to the extent argued by the United Kingdom.<sup>763</sup>
325. It is the submission of the European Union that the United Kingdom failed to properly account for these economic and social impacts and the impairment of rights under the TCA when it decided on the sandeel fishing prohibition.<sup>764</sup> According to the European Union, it is not sufficient for the United Kingdom "simply to identify various elements that formed part of the decision-making process" and the Arbitration Tribunal "should, and is required to, go further and scrutinise not only the elements that the United Kingdom has identified, but whether those elements disclose the proper weighing and balancing of the costs and benefits."<sup>765</sup> For this purpose, the European Union asserts that the Arbitration Tribunal must "evaluate [the] documentation holistically to ascertain whether it discloses [...] sufficient reasoning to explain both why the UK considered a cost or benefit to be significant or insignificant and how the UK actually balanced those costs and

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<sup>758</sup> EU's Written Submission, paras 730-731.

<sup>759</sup> EU's Written Submission, para. 733; EU's Responses to Questions, para. 149. *See also* Section IV.D.2 below.

<sup>760</sup> *See* UK's Written Submission, para. 396.3 *referring to* Ministerial Submission, 14 September 2023, paras 25-26 (**Exhibit R-77**); Ministerial Submission, 26 January 2024, p. 17, Annex F (**Exhibit R-98**).

<sup>761</sup> Hearing, 30 January 2025, 32:15-34:3 (Dawes); EU's Responses to Questions, paras 59, 151.

<sup>762</sup> Hearing, 28 January 2025, 167:19-168:12 (Dawes); EU's Responses to Questions, paras 59, 152-154.

<sup>763</sup> EU's Responses to Questions, para. 155.

<sup>764</sup> EU's Written Submission, paras 734-735; Hearing, 30 January 2025, 32:3-35:1 (Dawes); EU's Replies to the UK's Responses to Questions, paras 226-236.

<sup>765</sup> Hearing, 30 January 2025, 34:4-14 (Dawes)

benefits in light of their significance.”<sup>766</sup> The European Union further argues that the United Kingdom seems to have focused on the impact on its own vessels and having concluded that the impact would mainly affect European Union vessels disregarded these economic and social impacts.<sup>767</sup> The European Union also claims that while the degree of environmental benefits of the sandeel fishing prohibition is uncertain, the economic and social impacts are certain.<sup>768</sup> Further, the European Union highlights that particularly during the adjustment period established by Article 1 of Annex 38 to the TCA, the right to full access to each Party’s waters to fish under Article 2(1)(a) of Annex 38 to the TCA should not be lightly impaired, as this would run counter to the rationale of ensuring the “social and economic benefits of a further period of stability”.<sup>769</sup> In this regard, the European Union criticises the United Kingdom’s lack of adherence to the principle of cooperation underpinning the TCA and Heading Five, in particular also considering the fact that sandeel is a shared stock.<sup>770</sup>

326. Finally, the European Union submits that the availability of alternative proportionate measures is evidence that the sandeel fishing prohibition is not a proportionate measure.<sup>771</sup> In particular, the European Union suggests the United Kingdom could have implemented one or more spatially targeted prohibitions on sandeel fishing in parts of UK waters in the North Sea that would coincide with the feeding range of chick-rearing seabirds for which sandeel comprise a substantial proportion of their diet.<sup>772</sup> The European Union notes that spatially restricted closures to sandeel fishing have been linked to increases in the local sandeel population sizes.<sup>773</sup> It further asserts that the DMA indicates that the United Kingdom did not assess whether it could have implemented more spatially targeted prohibitions and the Scottish Partial Impact Assessment and Scottish SEA

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<sup>766</sup> EU’s Responses to Questions, para. 148.

<sup>767</sup> EU’s Written Submission, paras 736-737.

<sup>768</sup> EU’s Written Submission, para. 738.

<sup>769</sup> EU’s Written Submission, para. 739, *citing* the second preambular paragraph of Annex 38 to the TCA; *see also* EU’s Responses to Questions, paras 79-81; EU’s Supplementary Written Submission at paras 83-85.

<sup>770</sup> EU’s Written Submission, paras 740-742; EU’s Responses to Questions, paras 173-176; EU’s Replies to the UK’s Responses to Questions, paras 255-258.

<sup>771</sup> EU’s Written Submission, para. 743; EU’s Supplementary Written Submission, paras 60-67.

<sup>772</sup> EU’s Written Submission, para. 746.

<sup>773</sup> EU’s Written Submission, para. 747, *referring to* Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 11 (**Exhibit C-45**), ICES Technical Service, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species, 28 November 2023, p. 7 (**Exhibit C-22**).

only superficially touched upon the topic.<sup>774</sup> According to the European Union, spatially targeted prohibitions would fall within the range of measures contemplated by the United Kingdom's legal framework, would not have imposed an undue burden on the United Kingdom, and would have less severe economic and social impacts and constitute a less egregious impairment of commitments under the TCA.<sup>775</sup> In a similar vein, the European Union notes that no evidence has been provided that analyses possible fisheries displacement under a partial prohibition of sandeel fishing,<sup>776</sup> and argues that even if a partial closure were to lead to displacement in one or more open areas, this could not justify a full prohibition; otherwise, displacement could always be a valid justification to prohibit in full each and every fishery.<sup>777</sup> The European Union suggests that the United Kingdom did not justify why it failed to even consider a reasonably available and potentially proportionate measure and concludes that the measure chosen, the sandeel fishing prohibition, is not proportionate.<sup>778</sup>

**(b) *On the Alleged Discriminatory Nature of the Sandeel Fishing Prohibition***

**(i) *The Applicable Legal Standard***

327. Apart from requiring proportionality, the European Union submits that Article 494(3)(f) of the TCA also provides that when applying fisheries management measures, regard shall be had to ensuring that such measures are “non-discriminatory”.<sup>779</sup> While Article 495 of the TCA does not define the term “non-discriminatory” specifically for the purposes of Heading Five, the European Union notes that the term appears more than 115 times in the entire TCA, and that for the purposes of certain parts, a specific definition of the term “non-discriminatory” has been included in the TCA.<sup>780</sup> The European Union argues that the principle of non-discrimination underpins many

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<sup>774</sup> EU's Written Submission, paras 748-750, *referring to* DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023 (**Exhibit C-44**); Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023 (**Exhibit C-51**); Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023 (**Exhibit C-52**).

<sup>775</sup> EU's Written Submission, paras 751-755; EU's Responses to Questions, paras 166-169.

<sup>776</sup> EU's Responses to Questions, para. 24.

<sup>777</sup> EU's Replies to the UK's Responses to Questions, paras 28, 30, 32-33, 36-37, 39-40.

<sup>778</sup> EU's Written Submission, paras 756, 764; EU's Supplementary Written Submission, paras 69-79.

<sup>779</sup> EU's Written Submission, para. 642.

<sup>780</sup> EU's Written Submission, para. 643, n. 425, *citing* Article 300(2) of the TCA: “For the purposes of applying the provisions on energy, references to ‘non-discriminatory’ and ‘non-discrimination’ mean most-favoured-nation treatment as defined in Articles 130 and 138 and national treatment as defined in Articles 129 and 137, as well as treatment under terms and conditions no less favourable than that accorded to any other like entity in like situations.”

trade agreements and that the fact that there are multiple references to “non-discrimination” and “discrimination” across the parts on trade of the TCA is relevant to the interpretation of this term in Heading Five.<sup>781</sup> Still, in the absence of a specific definition of “non-discriminatory” for that Heading, the European Union also construes it in accordance with Article 4 of the TCA, placing particular importance on the broader context of the requirement of non-discrimination, including the rules of international economic law.<sup>782</sup>

328. Beginning with the term’s ordinary meaning of not making prejudicial distinctions on certain grounds,<sup>783</sup> and relying on Recital 18 to the TCA, which states that one of its objectives is “to promote the peaceful use of the waters adjacent to their coasts and optimum and equitable utilisation of the marine living resources in those waters including the continued sustainable management of shared stocks”, the European Union asserts that one of the objectives of the commitments in Heading Five of Part Two of the TCA should be considered to be ensuring that the utilisation of the marine living resources in the Parties’ waters is equitable or fair.<sup>784</sup>
329. In this context, the European Union recalls that Article 496(2) of the TCA expressly states that “[a] Party shall not apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the same measures to its own vessels”, addressing discrimination on the grounds of origin.<sup>785</sup> It adds that it is generally settled that discrimination may be *de facto* or *de jure*.<sup>786</sup> Thus, according to the European Union, the requirement set down in Article 496(2) of the TCA to ensure the even-handed or fair application of fisheries management measures to all vessels irrespective of origin requires the Parties to have regard to ensuring that such fisheries management measures are neither *de jure* nor *de facto* discriminatory.<sup>787</sup> The European Union argues such an understanding is in conformity with relevant international economic law and also with UNCLOS.<sup>788</sup>

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<sup>781</sup> EU’s Written Submission, para. 644.

<sup>782</sup> See EU’s Written Submission, para. 645.

<sup>783</sup> EU’s Written Submission, paras 646-647.

<sup>784</sup> EU’s Written Submission, paras 650-653.

<sup>785</sup> EU’s Written Submission, paras 316-317, 654-655. The European Union points to Article 495(1)(h) of the TCA for the definition of “vessels” of the Parties as fishing vessels flying the flag of the United Kingdom or a member State of the European Union and registered in either the United Kingdom or in the European Union respectively.

<sup>786</sup> EU’s Written Submission, paras 320, 656.

<sup>787</sup> EU’s Written Submission, para. 657.

<sup>788</sup> EU’s Written Submission, paras 322-324, 659-678.

330. In particular, the European Union claims, Article 2.1 of the TBT Agreement<sup>789</sup> offers a relevant analogy to the structure of the fisheries provisions in the TCA, as the TBT Agreement requires a balancing between trade liberalisation and regulatory autonomy that is similar to the balancing required by Article 494(3)(f) of the TCA.<sup>790</sup> The European Union elaborates that for the purposes of Article 2.1 of the TBT Agreement, a two-step analysis is required: first, it is necessary to consider a modification to conditions of competition to the detriment of imported products *vis-à-vis* like products of domestic origin and/or like products originating in another country; second, one must consider whether such detrimental impact stems exclusively from a legitimate regulatory distinction, and to the extent that it does, this is not inconsistent with Article 2.1 of the TBT Agreement.<sup>791</sup> The European Union submits that this requires an assessment of the design, architecture, revealing structure, operation, and application of the technical regulation at issue.<sup>792</sup>
331. The European Union further stresses that various provisions of UNCLOS contain provisions precluding discrimination “in form or in fact”, thereby supporting an interpretation of the requirement of non-discriminatory measures under Article 494(3)(f) of the TCA covering both *de jure* and *de facto* discrimination.<sup>793</sup>
332. On this basis, the European Union submits that in order for a measure to be non-discriminatory in the sense of Article 494(3)(f) of the TCA, it must first be shown that there is no *de jure* discrimination, in the sense that the measure does not on its face distinguish between vessels based on which Party those vessels belong to.<sup>794</sup> Second, it must be demonstrated that the measure does not give rise to *de facto* discrimination: to the extent that any detrimental impact stems exclusively from a legitimate regulatory distinction, this will not give rise to discrimination; conversely, where there is no legitimate regulatory distinction or where the design, architecture and revealing structure of a measure indicates that any detrimental impacts do not stem

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<sup>789</sup> Article 2.1 of the TBT Agreement provides: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

<sup>790</sup> EU’s Written Submission, paras 663-667.

<sup>791</sup> EU’s Written Submission, paras 668-672, *referring to* WTO, Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, paras 174-175, 182 (**Exhibit CLA-53**).

<sup>792</sup> EU’s Written Submission, para. 673, *referring to* WTO, Appellate Body Report, *US – Tuna II (Mexico)*, WT/DS381/AB/R, adopted 13 June 2012, para. 215 (**Exhibit CLA-54**); WTO, Appellate Body Report, *US – COOL*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 271 (**Exhibit CLA-55**).

<sup>793</sup> EU’s Written Submission, paras 674-678, *referring to* Articles 25, 52, and 227 of UNCLOS.

<sup>794</sup> EU’s Written Submission, para. 680.



exclusively from such a distinction, such a measure would have to be considered discriminatory.<sup>795</sup>

333. The European Union concludes by noting that there exists a relationship between non-discriminatory and proportionate measures in the sense that a discriminatory measure cannot be considered proportionate, “since by design it is premised on an impairment of one Party’s rights in a manner that is insufficiently connected to the legitimate regulatory objective pursued.”<sup>796</sup>

(ii) *The Sandeel Fishing Prohibition Is a Discriminatory Measure*

334. Apart from finding the sandeel fishing prohibition disproportionate, the European Union contends that it is also a discriminatory measure inconsistent with Articles 496(1) and (2), read together with Article 494(3)(f) of the TCA.<sup>797</sup>

335. The European Union does not claim that the sandeel fishing prohibition constitutes *de jure* discrimination, but that it does amount to *de facto* discrimination.<sup>798</sup> It states that the sandeel fishing prohibition has a clear and marked differential impact on UK and EU vessels.<sup>799</sup> It claims that this differential treatment does not exclusively stem from a legitimate regulatory objective, as sandeel are not the only fish consumed by seabirds, and there has been no explanation provided by the United Kingdom as to the policy choice to address the objective of marine conservation and fisheries management only with regard to a fish stock in respect of which the shares in the TCA have been attributed to such a significant proportion to one Party.<sup>800</sup> The European Union recalls that the United Kingdom relied on this differential impact on the European Union as a ground for concluding that the adverse economic and social impacts of the sandeel fishing prohibition are minimal.<sup>801</sup> Further, the European Union argues that the factors that lead to the prohibition not being a proportionate measure also inform the analysis regarding its discriminatory nature, in particular the absence of proper consideration of the economic and social

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<sup>795</sup> EU’s Written Submission, paras 681-682.

<sup>796</sup> EU’s Written Submission, para. 683.

<sup>797</sup> EU’s Written Submission, para. 757.

<sup>798</sup> EU’s Written Submission, paras 758-763.

<sup>799</sup> EU’s Written Submission, para. 762.

<sup>800</sup> EU’s Written Submission, para. 763; EU’s Responses to Questions, para. 68.

<sup>801</sup> EU’s Written Submission, para. 762.

impacts and the significant degree of impairment of the rights of full access to waters to fish in the adjustment period established under Annex 38 to the TCA.<sup>802</sup>

336. Accordingly, the European Union finds the sandeel fishing prohibition to also be a discriminatory measure and to be in violation of the United Kingdom's obligations under Articles 496(1) and (2), read together with Article 494(3)(f) of the TCA.<sup>803</sup>

### **3. Submissions of the United Kingdom**

337. Noting the European Union's acceptance that "the sandeel fishing prohibitions are measures that were decided on in pursuit of the objectives set out in Article 494(1) and (2) [of the TCA,]" the United Kingdom focuses its criticism on the European Union's interpretation of the meaning of "having regard to" and of the principles set out in Article 494(3)(f) of the TCA.<sup>804</sup> The United Kingdom asserts that the European Union misrepresents the Parties' obligations under Articles 496(1) and (2) and 494(3)(f) of the TCA, regarding both the requirements of proportionality and non-discrimination. In any case, the United Kingdom is of the view that the United Kingdom and Scottish measures are proportionate and non-discriminatory.<sup>805</sup>

#### **(a) On the Meaning of the Term "Having Regard to" in Article 496(1) of the TCA**

338. As a preliminary observation affecting both the questions of proportionality and non-discrimination, the United Kingdom opines that the European Union is "wrong when (without explanation, and exceeding its own definition of 'having regard to') it states that the United Kingdom has 'the obligation to ensure that any measure [...] is consistent with the [...] principles' in Article 494(3) [of the TCA.]"<sup>806</sup> The United Kingdom argues that the European Union's approach renders the term "having regard to" redundant and undermines an "express and deliberate limitation on how the principles of proportionality and non-discrimination are to be considered under Heading Five."<sup>807</sup>

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<sup>802</sup> EU's Written Submission, para. 763.

<sup>803</sup> EU's Written Submission, para. 764.

<sup>804</sup> UK's Written Submission, para. 319, *referring to* EU's Written Submission, para. 698.

<sup>805</sup> UK's Written Submission, paras 321-423.

<sup>806</sup> UK's Written Submission, para. 333, *citing* EU's Written Submission, para. 563; *see also* UK's Responses to Questions, pp. 32-34; UK's Replies to the EU's Responses to Questions, pp. 4-5.

<sup>807</sup> UK's Responses to Questions, p. 33.

339. Relying on the ordinary meaning of the words, their context and the object and purpose of the TCA, the United Kingdom agrees with the European Union’s understanding of the words “having regard to” meaning “to take into account”.<sup>808</sup> Beyond this shared understanding, however, the United Kingdom lists several key disagreements with the European Union with regard to the understanding of the term “having regard to” in Articles 496(1) and 494(3) of the TCA.<sup>809</sup>
340. First, the United Kingdom clarifies that it is the Party that must have regard to the principles in Article 494(3) of the TCA, not the measure itself.<sup>810</sup>
341. Second, the United Kingdom submits that the obligation “to have regard to” is one of conduct, not result.<sup>811</sup> According to the United Kingdom, the duty for each Party is to “*take into account* or to *give consideration to* the principles in Article 494(3) when deciding on measures referred to in Article 496(1) [of the TCA,] [...] not to conform with those principles in arriving at the measure”.<sup>812</sup> The United Kingdom notes that in relation to UNCLOS, the European Union recognises that language of “taking into account” establishes an obligation of conduct.<sup>813</sup> International courts, the United Kingdom adds, have also interpreted similar wording to indicate an obligation of conduct.<sup>814</sup> Thus, in the view of the United Kingdom, it would be permissible under Article 496(1) of the TCA “for the decision-making process not to comply with one or more of the principles in Article 494(3), so long as the State had regard to the relevant principles in that process”.<sup>815</sup>
342. Third, against the background of four other Articles of the TCA’s wording explicitly requiring “each Party to ‘ensure’ that certain domestic rules or laws *are* proportionate and non-discriminatory or *are applied in* a proportionate or non-discriminatory manner[.]” the United

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<sup>808</sup> UK’s Written Submission, paras 321-326.

<sup>809</sup> UK’s Written Submission, para. 328.

<sup>810</sup> UK’s Written Submission, para. 329, *citing* EU’s Written Submission, para. 513: “[...] the UK has acted inconsistently with its obligation to ensure that a measure [...] has regard to the principle”.

<sup>811</sup> UK’s Written Submission, para. 330; Hearing 29 January 2025, 154:9-15 (Westaway).

<sup>812</sup> UK’s Written Submission, para. 330 [emphasis in the original]; *see also* UK’s Responses to Questions, p. 34.

<sup>813</sup> UK’s Written Submission, para. 330, *referring to* EU’s Written Submission, para. 312.

<sup>814</sup> UK’s Written Submission, para. 330.1, *citing Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226 at p. 257, para. 83 (**Exhibit RLA-12**).

<sup>815</sup> UK’s Written Submission, para. 330.2.

Kingdom finds that the choice of the different language of “having regard to” was a conscious decision of the Parties that must be given meaning and effect.<sup>816</sup>

343. Fourth, the United Kingdom notes the lack of any qualifiers in respect of the “regard” that is to be had to the principles in Article 494(3) of the TCA, reflecting the emphasis placed on the coastal State’s sovereign rights and regulatory autonomy under the TCA.<sup>817</sup>
344. In light of these observations, the United Kingdom accordingly concludes that the European Union “goes too far when stating that the principle to be taken into account is ‘that measures applied [...] must be ‘proportionate and non-discriminatory’.”<sup>818</sup> In the view of the United Kingdom, the European Union’s position amounts to an attempt to impose an obligation and accompanying standard of review which the United Kingdom did not agree to and which is not contained in or consistent with the applicable provisions of the TCA.<sup>819</sup> Further, the United Kingdom asserts that the inclusion of the word “applying” immediately before “proportionate and non-discriminatory measures” does not alter the meaning of “having regard” to the principles in Article 494(3) of the TCA, as the verbs starting the sub-paragraphs of Article 494(3) of the TCA all still fall under the umbrella of the obligation in Article 496(1) of the TCA of “having regard” to the principles named in Article 494(3).<sup>820</sup>
345. According to the United Kingdom, its position is also supported by the *travaux préparatoires* of the TCA, as wording initially proposed by the European Union requiring that new technical measures, or changes to existing technical measures as well as emergency conservation measures “shall be based on the best available scientific advice” and “shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1” was changed to the existing obligation requiring the Parties to simply have regard to the principle of applying proportionate and non-discriminatory measures.<sup>821</sup>

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<sup>816</sup> UK’s Written Submission, para. 331, *referring to* Articles 75(5), 104(1)(c), 104(1)(d), and 304(3) of the TCA [emphasis in the original].

<sup>817</sup> UK’s Written Submission, para. 332.

<sup>818</sup> UK’s Written Submission, para. 334, *citing* EU’s Written Submission, para. 513 [emphasis in the original].

<sup>819</sup> UK’s Written Submission, paras 333-334.

<sup>820</sup> UK’s Written Submission, para. 334; UK’s Responses to Questions, p. 32.

<sup>821</sup> UK’s Written Submission, paras 335-338, *citing* Articles FISH.5(2) and FISH.6(2) of the Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020, pp. 95-96 (**Exhibit R-120**); Hearing 29 January 2025, 155:1-23 (Westaway).

**(b) *On the Alleged Lack of Proportionality of the Sandeel Fishing Measures***

*(i) The Applicable Legal Standard*

346. Against this background, the United Kingdom continues to explain what it considers to be the correct interpretation of the term “proportionate” in Articles 496(1) and 494(3)(f) of the TCA.<sup>822</sup>
347. At the outset, the United Kingdom agrees that given the lack of definition of the term “proportionate” in the TCA, its use in Article 494(3)(f) of the TCA must be interpreted in accordance with the applicable rules of treaty interpretation reflected in Article 4 of the TCA and Article 31 of the VCLT.<sup>823</sup> In this regard, the United Kingdom objects to the European Union’s position that the domestic law of the Parties “inform[s] the interpretation of the term in the TCA.”<sup>824</sup>
348. Having set out what it considers to be the applicable rules of treaty interpretation, the United Kingdom proceeds to elaborate on the ordinary meaning of the term “proportionate” in its context and in light of the object and purpose of the TCA.<sup>825</sup>
349. Referring to the European Union’s position on what constitutes a proportionate measure in the sense of Article 494(3)(f) of the TCA,<sup>826</sup> the United Kingdom agrees that (i) there must be a relationship between the ends and means of the measure, in the sense that it was adopted for the purposes of the objectives stated in Article 494(3)(f) of the TCA; (ii) the measure must be apt or appropriate for securing or contributing to that objective; and (iii) there must be a weighing of the benefits of the measure against its adverse impacts.<sup>827</sup>
350. However, the United Kingdom denies the European Union’s claim,<sup>828</sup> that as part of the proportionality analysis the United Kingdom was required to “look at less impactful alternatives”, while acknowledging that “alternative measures may be a relevant tool to consider whether or not

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<sup>822</sup> UK’s Written Submission, paras 339-355.

<sup>823</sup> UK’s Written Submission, para. 340.

<sup>824</sup> UK’s Written Submission para. 341, *citing* EU’s Written Submission, paras 529, 616, 619; *see also* paras 154, 310 above.

<sup>825</sup> UK’s Written Submission, paras 344-354.5.

<sup>826</sup> *See* paras 312-314 above.

<sup>827</sup> UK’s Written Submission, paras 345, 352.

<sup>828</sup> Hearing, 28 January 2025, 131:2-7, 138:19-22 (Norris).

a measure is proportionate.”<sup>829</sup> The United Kingdom maintains that, in principle, a Party can select and consider a single measure as a means of meeting its chosen level of protection, as long as said measure is consistent with the terms of the TCA.<sup>830</sup> It recalls that the European Union itself acknowledges that proportionality and necessity are not the same and that the Parties did not adopt a standard of necessity in Article 494(3)(f) of the TCA.<sup>831</sup> Countering the European Union’s argument that proportionality, as a broader concept, includes an element of necessity,<sup>832</sup> the United Kingdom argues that the ordinary meaning of the term does not include any test of necessity for a number of reasons.<sup>833</sup>

351. First, the United Kingdom submits that while proportionality in domestic human rights and other public law contexts, as well as in EU law, and Article 5(4) of the Treaty on the European Union in particular, does indeed incorporate a necessity test, this is a reflection of the function of the proportionality principle in vertical relationships between the State and individual, or between the European Union and its Member States in light of the rights and obligations of these actors.<sup>834</sup> According to the United Kingdom, that is very different from the “horizontal relationship of equality between the Parties to the TCA, in which the Parties have not committed to guaranteeing rights except where strictly necessary, nor adopted a test of necessity to govern decision-making under Article 496(1) [of the TCA].”<sup>835</sup>
352. Second, the United Kingdom lists examples of proportionality that operate in more analogous situations of horizontal relationships between States that do not involve elements of necessity or treat necessity as a separate criterion, such as the law of counter-measures, self-defence, the duty to make restitution unless it is out of all proportion to the benefit deriving from restitution, and equitable adjustment in maritime delimitation.<sup>836</sup>

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<sup>829</sup> Hearing, 29 January 2025, 160:10-14 (Westaway); *see also* UK’s Written Submission, paras 345, 349; UK’s Responses to Questions, pp. 40-41.

<sup>830</sup> Hearing, 30 January 2025, 94:19-95:12 (Westaway).

<sup>831</sup> UK’s Written Submission, para. 349, *referring to* EU’s Written Submission, paras 611-613; *see* para. 309 above.

<sup>832</sup> *See* EU’s Written Submission, para. 614; *see also* paras 309, 314 above.

<sup>833</sup> UK’s Written Submission, para. 349; Hearing, 29 January 2025, 160:20-163:21 (Westaway, Prof. Ruiz Fabri).

<sup>834</sup> UK’s Written Submission, para. 349.1.

<sup>835</sup> UK’s Written Submission, para. 349.1 [footnote omitted].

<sup>836</sup> UK’s Written Submission, para. 349.2, *referring to* *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 at p. 56, para. 85 (**Exhibit RLA-19**); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at p. 198, para. 85 (**Exhibit RLA-20**); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14

353. Third, the United Kingdom draws attention to the fact that other provisions of the TCA expressly refer to “necessary and proportionate” measures, indicating that the TCA does not consider necessity to be a part of proportionality.<sup>837</sup>
354. Fourth, the United Kingdom identifies other contextual factors supporting an interpretation of proportionality not involving a requirement of necessity, thereby not limiting each Party’s autonomy to choose the measures it considers most appropriate in light of the relevant circumstances.<sup>838</sup> For one, the United Kingdom notes that Article 494(3)(f) of the TCA itself requires the preservation of the regulatory autonomy of the Parties. Further, the United Kingdom recalls that Article 493 of the TCA prominently affirms the sovereign rights of coastal States in whose waters measures are being applied and that the preservation of the Parties’ regulatory autonomy is also a principal objective and purpose of the TCA.<sup>839</sup> Additionally, the United Kingdom states that requiring the Parties to apply a form of proportionality aimed at the least restrictive (and accordingly often the least protective) measure would be inconsistent with the requirement under Articles 496(1) and 494(3)(a) of the TCA to have regard to applying the precautionary approach to fisheries management, as this approach becomes relevant exactly in such circumstances where what is “necessary” or what might be the least restrictive measure cannot be determined.<sup>840</sup>
355. In any event, the United Kingdom concludes, even if the term “proportionate” in Article 494(3)(f) of the TCA did require consideration of necessity in the sense of examining alternative measures, any alternative measures would have to achieve the same objective, as opposed to a lesser measure for a different or less ambitious objective.<sup>841</sup> Regarding the European Union’s claim that it was incumbent on the United Kingdom to demonstrate that it did consider alternative measures, the United Kingdom counters that the European Union “has and retains the burden of establishing that the UK did not have regard to applying proportionate and non-discriminatory measures, including any fact that it relies upon for that purpose.”<sup>842</sup> In the view of the United Kingdom,

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at p. 103, para. 273 (**Exhibit CLA-29**); *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, I.C.J. Reports 2009, p. 61 at p. 129, para. 210 (**Exhibit CLA-47**).

<sup>837</sup> UK’s Written Submission, para. 349.3, *referring to* Articles 73(3), 176(2), 319(1), 366(1), 374(8), 411(2), 427(5), 525(d)-(e), 561(2), 571(1), 597, 636(1)(a) and 656(5) of the TCA; Hearing, 29 January 2025, 160:25-161:17 (Westaway).

<sup>838</sup> UK’s Written Submission, para. 349.4.

<sup>839</sup> UK’s Written Submission, para. 349.4.1.

<sup>840</sup> UK’s Written Submission, para. 349.4.2.

<sup>841</sup> Hearing, 29 January 2025, 191:25-192:6 (Westaway); *see also* UK’s Written Submission, para. 350.

<sup>842</sup> UK’s Responses to Questions, p. 42.

putting forward, *ex post facto*, a suggested alternative measure does not demonstrate this and, in any case, the alternative proposed by the European Union lacks definition.<sup>843</sup>

356. Regarding the weighing and balancing exercise more broadly, albeit with some nuance, the United Kingdom is generally in agreement with the European Union, that what is to be weighed must be the costs and benefits of the measure.<sup>844</sup> Concerning the way in which the costs and benefits are to be weighed, there is further disagreement.<sup>845</sup>
357. Addressing the “what” of the weighing exercise, the United Kingdom elaborates that in considering the side of the benefits, it will be relevant to take account of the measure’s objective, the importance of that objective, including the gravity of the situation the measure seeks to address both as a matter of fact and principle, the contribution that the measure is likely to make to achieving the objective, and any additional benefits that the measure may be expected to generate.<sup>846</sup> Turning to the measure’s costs, the United Kingdom considers it relevant to take account of the adverse effects of the measure on the rights or interests of the other Party, and the character of the rights or interests in question, with broad discretion reserved to the decision-making Party.<sup>847</sup> Providing further detail on the relevance of the character of any rights or interests likely to be adversely affected, the United Kingdom submits that the relative weight given to impacts of a measure will vary depending on whether what is being weighed are simply interests or unqualified rights existing within the Parties’ relationship.<sup>848</sup> In the present case, the United Kingdom asserts that it is “the *only* Party with *sovereign rights* in respect of living resources in its *own waters* [, whereas the European Union can only rely on] economic and social *interests* of the EU fishing industry and a *qualified* right of access for EU vessels which operates within the confines of the UK’s consent in the terms of the TCA.”<sup>849</sup>
358. Concerning the “how” of the weighing exercise, the United Kingdom rejects the European Union’s position that the costs must not outweigh the benefits for a measure to be proportionate, as too simplistic.<sup>850</sup> Instead, the United Kingdom proposes considering the following: in its view,

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<sup>843</sup> UK’s Responses to Questions, p. 42; UK’s Replies to the EU’s Responses to Questions, p. 15.

<sup>844</sup> UK’s Written Submission, paras 352-353.

<sup>845</sup> UK’s Written Submission, para. 354.

<sup>846</sup> UK’s Written Submission, para. 352.1.

<sup>847</sup> UK’s Written Submission, para. 352.2.

<sup>848</sup> UK’s Written Submission, para. 353.

<sup>849</sup> UK’s Written Submission, para. 353 [emphasis in the original].

<sup>850</sup> UK’s Written Submission, para. 354, *referring to* EU’s Written Submission, para. 640.



the repeated emphasis at all levels of the TCA on regulatory autonomy and sovereign rights, demonstrates that the Parties intended there to be a wide margin of discretion in deciding on appropriate measures for the conservation of marine living resources and fisheries management.<sup>851</sup> This discretion, the United Kingdom adds, is informed and supported by the precautionary approach to fisheries management endorsed in Heading Five of Part Two of the TCA, as it necessarily requires States to exercise judgement regarding the appropriateness of measures based on imperfect information.<sup>852</sup> Noting that proportionality assessments often cannot be conducted in a precise manner or in quantitative terms, the United Kingdom submits that it would not be appropriate for the Arbitration Tribunal to put itself in the shoes of a Party and re-make the decision for itself.<sup>853</sup> Rather, the United Kingdom proposes that the Arbitration Tribunal should apply a deferential approach and ask whether the measures are “clearly disproportionate”.<sup>854</sup> Even if EU law were to be considered, which in its view it should not, the United Kingdom adds that the Court of Justice of the European Union also applies a standard of review of “manifestly inappropriate” in recognition of the European Union’s legislature’s broad discretion in areas involving complex economic, social, and political choices.<sup>855</sup>

359. Finally, the United Kingdom addresses the European Union’s reliance on principles under UNCLOS and international economic law to inform its definition of proportionality, denying that the European Union’s observations make those rules relevant for the purpose of interpreting the term “proportionate” in Article 494(3)(f) of the TCA.<sup>856</sup>

(ii) *The Sandeel Fishing Measures Did Not Violate Article 496(1) Read Together with Article 494(3)(f) of the TCA Regarding Proportionality*

360. The United Kingdom asserts that it observed its obligation to have regard to applying proportionate measures for both the English and the Scottish measures.<sup>857</sup> Even if Article 496(1)

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<sup>851</sup> UK’s Written Submission, para. 354.1.

<sup>852</sup> UK’s Written Submission, para. 354.2.

<sup>853</sup> UK’s Written Submission, paras 354.2-354.4, *referring to Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, Decision of 9 December 1978, RIAA Vol. XVIII p. 417 at pp. 443-444, para. 83 (**Exhibit RLA-21**); *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, para. 21 (**Exhibit RLA-17**).

<sup>854</sup> UK’s Written Submission, paras 354.4, 385; Hearing, 30 January 2025, 75:24-76:1 (Westaway).

<sup>855</sup> UK’s Written Submission, para. 354.5, *citing* CJEU, Judgment of 10 January 2006, *R(IATA) v Department for Transport*, C-344/04, EU:C:2006:10, para. 80 (**Exhibit RLA-22**); CJEU, Judgment of 11 January 2017, *Kingdom of Spain v Council of the EU*, C-128/15, EU:C:2017:3, para. 72 (**Exhibit RLA-23**).

<sup>856</sup> UK’s Written Submission, para. 355, *referring to* EU’s Written Submission, paras 611, 617, 574; *see* paras 307-309 above.

<sup>857</sup> UK’s Written Submission, para. 368.

and Article 494(3)(f) of the TCA were to be read to require that the measures conformed with the proportionality principle, the United Kingdom submits that both the English and Scottish measures would meet that test.<sup>858</sup>

361. First addressing the standard the United Kingdom claims to be the applicable one, the United Kingdom states that in deciding on the English measure, the UK Government had regard to applying proportionate measures.<sup>859</sup> According to the United Kingdom, the alleged disproportionality of the proposed prohibition was raised directly by the European Union and Denmark in their responses to DEFRA's consultation and correspondence with the UK Government.<sup>860</sup> The United Kingdom highlights that in light of these concerns, the Ministerial Submission of 14 September 2023 "specifically considered the European Union's position 'whether a full closure could lead to a large negative impact on industry compared to the possible proposed benefits' and concluded that the prohibition 'would be a proportionate measure in terms of the effectiveness of this measure and delivery of Good Environmental Status for Seabirds and Marine food webs.'"<sup>861</sup> Indeed, the United Kingdom claims that the UK Government did not only have regard to whether the English measure was proportionate, but went further than required by Article 496(1), read together with Article 494(3)(f) of the TCA, concluding that it was, in fact, proportionate.<sup>862</sup> Regarding the expected benefits, the United Kingdom observes that the objective of the English measure is to "offer improved protection to sandeel and the dependent ecosystem", thereby improving the resilience of dependent marine life including seabirds, other species of fish, as well as marine mammals.<sup>863</sup> Further, concerning detrimental impacts, the UK Government was aware of and had regard to the anticipated adverse economic and social impact on UK and non-UK stakeholders, including a worst-case scenario assessment of the economic

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<sup>858</sup> UK's Written Submission, para. 384.

<sup>859</sup> UK's Written Submission, paras 369-375.

<sup>860</sup> UK's Written Submission, para. 369, *referring to* Letter from Danish Minister for Food, Agriculture and Fisheries to UK Minister of State for Food, Farming and Fisheries, 25 May 2023 (**Exhibit R-124**); Letter from the Ministry of Food, Agriculture and Fisheries of Denmark to DEFRA, 26 May 2023 (**Exhibit R-78**); Letter of Directorate-General for Maritime Affairs and Fisheries of the European Commission to DEFRA, 30 May 2023 (**Exhibit C-55**).

<sup>861</sup> UK's Written Submission, para. 369, *citing* Ministerial Submission, 14 September 2023, paras 21, 24 (**Exhibit R-77**).

<sup>862</sup> UK's Written Submission, para. 370.

<sup>863</sup> UK's Written Submission, para. 371, *citing* Letter from DEFRA to Directorate-General for Maritime Affairs and Fisheries of the European Commission, 8 February 2024 (**Exhibit C-60**); and *referring to* DEFRA, 'Consultation outcome: Government response', updated 31 January 2024 (**Exhibit R-87**).

impacts on non-UK vessels, fishing industry and down-stream effects.<sup>864</sup> The United Kingdom adds that to the extent it was necessary to consider alternative measures, which it denies, reasonable alternative measures were also taken into account.<sup>865</sup>

362. Turning to the Scottish measure, the United Kingdom claims that it also plainly had regard to applying proportionate measures.<sup>866</sup> Concerns regarding the alleged disproportionality were also raised directly by the European Union and Denmark in response to the Scottish consultation and correspondence with the Scottish Government.<sup>867</sup> As was the case for the English measure, the United Kingdom asserts that the Scottish Government, too, not only had regard to whether the proposed prohibition was proportionate, but, in fact, found it to be proportionate.<sup>868</sup> It equally considered the benefits and impacts,<sup>869</sup> and, to the extent it was necessary, alternative measures.<sup>870</sup>

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<sup>864</sup> UK's Written Submission, para. 372, *referring to* DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, p. 22 (**Exhibit C-44**); UK's Responses to Questions, p. 35.

<sup>865</sup> UK's Written Submission, para. 373-373.7, *referring to* DEFRA, Call for Evidence on future management of Sandeels and Norway pout, 22 October 2021, p. 8 (**Exhibit C-43**); DEFRA, Call for evidence outcome: Summary of responses, 18 March 2022 (**Exhibit R-71**); Natural England/Cefas/JNCC, What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice, 7 March 2023, pp. 21-22 (**Exhibit C-45**); DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, pp. 2, 9-11 (**Exhibit C-44**); DEFRA, 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea', March 2023, pp. 9-10 (**Exhibit R-61**); Ministerial Submission, 14 September 2023, paras 16, 22, 24 (**Exhibit R-77**); Letter from UK Minister of State for Food, Farming and Fisheries to Danish Minister for Food, Agriculture and Fisheries, 27 February 2024 (**Exhibit R-85**).

<sup>866</sup> UK's Written Submission, para. 376.

<sup>867</sup> UK's Written Submission, para. 376, *referring to* Letter from Directorate-General for Maritime Affairs and Fisheries of the European Commission to the Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands in response to the Scottish sandeel consultation, 1 August 2023 (**Exhibit C-57**); Letter from Danish Minister for Food, Agriculture and Fisheries to Scottish Cabinet Secretary for Rural Affairs, Land Reform and Islands, 9 October 2023 (**Exhibit R-97**).

<sup>868</sup> UK's Written Submission, para. 377.

<sup>869</sup> UK's Written Submission, paras 378-379, *referring to* Marine Directorate, Policy Note: The Sandeel (Prohibition of Fishing) (Scotland) Order, 2024 SSI 2024/36, January 2024, para. 4 (**Exhibit C-65**); Ministerial Submission, 26 January 2024, p. 3, Annex F (**Exhibit R-98**); Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, section 4.4 (**Exhibit C-66**).

<sup>870</sup> UK's Written Submission, paras 380-382, *referring to* Scottish Government, 'Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters', July 2023, pp. 8-14 (**Exhibit C-51**); Scottish Government, 'Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report', July 2023, pp. 85-87, 93-95 (**Exhibit C-52**); Sections 14(2)(b) and 18(3)(e) of the Environmental Assessment (Scotland) Act 2005 (**Exhibit RLA-26**); Scottish Government, Proposals to close fishing for sandeel in all Scottish waters: Scottish Government response to the consultation analysis report, January 2024, pp. 3-4 (**Exhibit R-96**);

363. Should “having regard to” the principle in Article 494(3)(f) of the TCA require the United Kingdom to decide on measures that conformed with this principle, which the United Kingdom again denies, it submits that the English and Scottish measures would both also meet that test.<sup>871</sup> In this regard, the United Kingdom, recalling the standard described above (paragraph 358), submits that the measures are not clearly disproportionate or manifestly inappropriate.<sup>872</sup>
364. On the first limb of the test, the United Kingdom states that, as accepted by the European Union, the measures were adopted for the purpose of marine conservation and in particular increasing sandeel biomass so as to benefit sandeel predators within the marine ecosystem.<sup>873</sup>
365. Concerning the second limb of the test, the United Kingdom criticises the European Union for not staying true to the standard of aptness, *i.e.*, the measure not being incapable of contributing to the objective, which the European Union itself sets out, and instead drawing a distinction between “contributing to the objective”, which the European Union admits the measures do, and “achieving all the environmental effects identified by the UK”, which the European Union denies the measures do.<sup>874</sup> The United Kingdom argues there is no basis for the elevated standard the European Union seeks to apply and submits that to the extent that there is any uncertainty about the measures achieving the objective of improving the resilience of sandeel and their predators, it derives not from the state of the evidence or data, but from the high degree of variability in the system and environmental processes.<sup>875</sup> In this regard, the United Kingdom also recalls the importance of the precautionary approach, which in its view supports the United Kingdom taking action, even where the link or benefit of the measures was uncertain.<sup>876</sup>
366. Proceeding to the third limb of the test, the weighing exercise, the United Kingdom claims that the measures are not clearly disproportionate.<sup>877</sup> First, it argues that they were supported by robust scientific evidence, which recognised that although sandeel stocks experience high levels of

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Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, section 4.3 (**Exhibit C-66**).

<sup>871</sup> UK’s Written Submission, paras 384-404.

<sup>872</sup> UK’s Written Submission, paras 385-386.

<sup>873</sup> UK’s Written Submission, para. 387, *referring to* EU’s Written Submission, paras 692-694 and 698; *see* para. 317 above.

<sup>874</sup> UK’s Written Submission, para. 389, *referring to* EU’s Written Submission, paras 637, 707; *see also* para. 320 above.

<sup>875</sup> UK’s Written Submission, paras 389.1-389.2, *referring to* EU’s Written Submission, para 712; Ministerial Submission, 26 January 2024, Annex F (**Exhibit R-98**).

<sup>876</sup> UK’s Written Submission, para. 389.3.

<sup>877</sup> UK’s Written Submission, para. 390.

natural fluctuation, the closure of sandeel fishing might increase sandeel's resilience and biomass, thereby also positively influencing the resilience and biomass of certain predators.<sup>878</sup>

367. Second, the United Kingdom asserts that it was entitled to place significant weight on the importance of its objective, including the gravity of the situation to be addressed, and the extent to which the measures met domestic policy goals.<sup>879</sup> The United Kingdom argues that sandeel are both integral to the marine ecosystem of the North Sea and also highly sensitive to environmental variation, including resulting from the effects of climate change, thus rendering them particularly vulnerable, even with low levels of fishing.<sup>880</sup> At the same time, the United Kingdom recalls, the United Kingdom is home to important seabird populations which for a variety of reasons are also in decline.<sup>881</sup> Further, the importance of the objective of the measure is also consistent with the United Kingdom's domestic policy goals to achieve GES in the marine environment.<sup>882</sup>
368. Third, the United Kingdom claims it was entitled to weigh in the balance the potential adverse consequences of not taking action, or of taking less robust action.<sup>883</sup>
369. Fourth, the United Kingdom opines that the UK and Scottish Governments were entitled to consider, as relevant to their exercise of regulatory autonomy, the extensive domestic support for their respective measures.<sup>884</sup>
370. Fifth, the United Kingdom refers to additional benefits arising from the closures, including the expected increase in biomass of commercially valuable fish that prey on sandeel, and tourism opportunities.<sup>885</sup>
371. Considering the adverse impacts of the measures, including economic and social consequences for UK and EU stakeholders, the United Kingdom finds that they do not clearly outweigh the

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<sup>878</sup> UK's Written Submission, para. 391, *referring to* Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p 13 (**Exhibit C-50**); Natural England/Cefas/JNCC, What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice, 7 March 2023, pp. 7, 10 (**Exhibit C-45**).

<sup>879</sup> UK's Written Submission, para. 392.

<sup>880</sup> UK's Written Submission, para. 392.1.

<sup>881</sup> UK's Written Submission, para. 392.2.

<sup>882</sup> UK's Written Submission, paras 392.3, 392.5 *referring to* Marine Strategy Regulations 2010, available at [www.legislation.gov.uk/uksi/2010/1627/contents](http://www.legislation.gov.uk/uksi/2010/1627/contents) (last accessed 27 March 2025).

<sup>883</sup> UK's Written Submission, para. 393.

<sup>884</sup> UK's Written Submission, para. 394.

<sup>885</sup> UK's Written Submission, para. 395.

benefits.<sup>886</sup> It recalls that the economic impact on non-UK vessels was, in the worst-case scenario, estimated by DEFRA to be around GBP 41.2 million a year, a considerable overestimation, given the calculation based on values of landed fish rather than operating profit.<sup>887</sup> The same applies, according to the United Kingdom, to the estimated impact of GBP 3.8 million a year caused by the Scottish measure.<sup>888</sup> Indirect costs to the UK and non-UK fishmeal and fish oil industries were also taken into account.<sup>889</sup> Further, the United Kingdom notes that the UK Government took account of data showing that EU vessels were not solely reliant on English waters or sandeel for their fishing activity and revenues and could reduce any economic impact by fishing outside UK waters or fishing other stocks in UK waters.<sup>890</sup> The United Kingdom rejects the European Union's attempt to disqualify these considerations as irrelevant.<sup>891</sup>

372. Regarding the balancing struck by the United Kingdom in weighing these adverse impacts against the expected benefits, the United Kingdom adds additional observations for consideration: first, according to the United Kingdom, the greater difficulties of quantifying environmental benefits in comparison to economic effects should not cause lesser weight being attached to them.<sup>892</sup> Second, in the view of the United Kingdom, the adverse economic and social impacts on EU fishing vessels derive from qualified rights of access for EU vessels to UK waters and should accordingly be given less weight when balanced against the sovereign right of the United Kingdom as the coastal State to exercise its regulatory autonomy in deciding on the most appropriate measures for conservation and management of marine living resources within its own waters.<sup>893</sup>
373. Rebutting the European Union's arguments on proportionality, the United Kingdom, finally, makes the following points: First, regarding the claim that the United Kingdom failed to balance the relevant factors in the weighing exercise by not adequately considering the economic and social impacts of the sandeel fishing prohibition,<sup>894</sup> the United Kingdom notes that the European

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<sup>886</sup> UK's Written Submission, para. 396.

<sup>887</sup> UK's Written Submission, para. 396.1.

<sup>888</sup> UK's Written Submission, para. 396.1.

<sup>889</sup> UK's Written Submission, para. 396.2.

<sup>890</sup> UK's Written Submission, para. 396.3, *referring to* Ministerial Submission, 14 September 2023, paras 25-26 (**Exhibit R-77**); Ministerial Submission, 26 January 2024, p. 17, Annex F (**Exhibit R-98**).

<sup>891</sup> Hearing, 29 January 2025, 173:14-174:9 (Westaway); *see also* UK's Replies to the EU's Responses to Questions, pp. 12-13.

<sup>892</sup> UK's Written Submission, paras 397, 397.1.

<sup>893</sup> UK's Written Submission, para. 397.2.

<sup>894</sup> EU's Written Submission, paras 717, 734; *see also* paras 322, 325 above.

Union does not question the accuracy of the assessment of the economic and social impacts relied on for the measures.<sup>895</sup> The United Kingdom rejects the European Union's claim that the economic and social impacts on EU operators were disregarded, observing that it appears to be based on a selective and inaccurate reading of the materials contributing to the decisions on the English and Scottish measures, and lists what it considers to be evidence of weighing and balancing of costs and benefits both in the consultation and decision-making process for both the Scottish and the English measure.<sup>896</sup> The United Kingdom once again rejects the notion that the alleged certainty of economic impacts should weigh more than the allegedly uncertain environmental benefits.<sup>897</sup>

374. Second, regarding the European Union's claim that the right of full access to UK waters is impaired by the sandeel fishing prohibitions,<sup>898</sup> the United Kingdom argues that there was no such impairment,<sup>899</sup> and even if there was, this would not automatically render the measures disproportionate given the qualified nature of the right of access compared to the United Kingdom's sovereign right to manage living resources in its own waters.<sup>900</sup>
375. Third, concerning the European Union's argument that the United Kingdom could have chosen alternative measures, the United Kingdom reiterates that there is no element of necessity under the correct interpretation of the proportionality requirement under Articles 494(3)(f) and 496(1) of the TCA.<sup>901</sup> In the event that there is a requirement to consider alternative measures, particularly regarding the European Union's suggestion of a spatially limited prohibition on fishing, more closely corresponding to the feeding range of chick-rearing seabirds,<sup>902</sup> the United Kingdom repeats that "alternative measures ought to be compared against whether they deliver upon the same objective as that pursued by the impugned measure."<sup>903</sup> As the measures' objectives are not limited to increasing the availability of sandeel for chick-rearing seabirds, but were expressly considered to have wider benefits to the marine ecosystem, the United Kingdom

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<sup>895</sup> UK's Written Submission, paras 400-400.2.

<sup>896</sup> UK's Written Submission, para. 400.3; Hearing, 29 January 2025, 169:3-177:21, 178:14-23 (Westaway); UK's Responses to Questions, pp. 34-39.

<sup>897</sup> UK's Written Submission, paras 400.4-400.5, *referring to* EU's Written Submission, para. 723.

<sup>898</sup> EU's Written Submission, para. 733; *see also* para. 324 above.

<sup>899</sup> *See* Section IV.D.3 below.

<sup>900</sup> UK's Written Submission, para. 401.

<sup>901</sup> UK's Written Submission, para. 402; *see also* UK's Responses to Questions, p. 41, *referring inter alia to* Hearing, 28 January 2025, 189:4-8 (Norris).

<sup>902</sup> EU's Written Submission, para. 746; *see also* para. 326 above.

<sup>903</sup> UK's Written Submission, para. 403.1; UK's Responses to Questions, pp. 42-43.

argues that a more spatially restrictive measure would not deliver the same wider ecosystem benefits to the marine environment, and is, thus, not a relevant comparator.<sup>904</sup> Further, the foraging range of seabirds differs widely between species, and may extend to the entirety of the United Kingdom's EEZ.<sup>905</sup> At the very least, the United Kingdom explains, it is very difficult to define, just as the feeding range of mobile predators such as marine mammals and fish, making a fuller spatial closure more likely to achieve fuller and greater benefits.<sup>906</sup> The United Kingdom also lists other reasons that a partial closure may not result in the anticipated ecosystem benefits, including the risk of fishing displacement within UK waters.<sup>907</sup> Other alternative measures, the United Kingdom continues, were also considered and rejected as unlikely or unable to achieve the same wider ecosystem benefits.<sup>908</sup> Accordingly, the United Kingdom concludes that a full closure, which is also more consistent with the precautionary approach, was recognised as providing a greater degree of protection and a more effective means of achieving the United Kingdom's objectives.<sup>909</sup>

**(c) *On the Alleged Discriminatory Nature of the Sandeel Fishing Measures***

**(i) *The Applicable Legal Standard***

376. The United Kingdom agrees with some aspects of the European Union's position on the interpretation of the term "non-discriminatory" in Article 494(3)(f) of the TCA, while disagreeing with others.
377. The United Kingdom agrees that due to the lack of any definition of the term, what is "non-discriminatory" must be interpreted in accordance with the customary rules on treaty interpretation reflected in Article 31 of the VCLT.<sup>910</sup> In this regard, the United Kingdom concurs that the term "non-discriminatory" in Article 494(3)(f) of the TCA relates to discrimination exclusively based upon origin or nationality and extends to both *de jure* and *de facto* discrimination.<sup>911</sup> Further, the United Kingdom is in agreement with the European Union that

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<sup>904</sup> UK's Written Submission, para. 403.1.

<sup>905</sup> UK's Written Submission, para. 403.2.

<sup>906</sup> UK's Written Submission, para. 403.2.

<sup>907</sup> UK's Written Submission, para. 403.3; UK's Responses to Questions, pp. 5-6.

<sup>908</sup> UK's Written Submission, paras 403.4-403.5.

<sup>909</sup> UK's Written Submission, paras 403.6-403.8.

<sup>910</sup> UK's Written Submission, para. 356.

<sup>911</sup> UK's Written Submission, paras 356.1-356.2.



whether there is *de facto* discrimination depends on whether the differential impacts stem from a measure that pursues a legitimate regulatory objective or not.<sup>912</sup>

378. However, the United Kingdom differs from the European Union with regard to other aspects of the interpretation of the term “non-discriminatory”.<sup>913</sup>

379. First, while there is agreement on the issue that whether there is *de facto* discrimination depends on whether the adverse impacts of a measure stem from a legitimate regulatory objective, the United Kingdom rejects the European Union’s further assertion that if any detrimental impact of a measure does not stem exclusively from the legitimate regulatory objective, then the measure will be discriminatory.<sup>914</sup> The United Kingdom notes that this position is based on other rules of international economic law, which the United Kingdom does not consider to provide material assistance for the interpretation of the term “non-discriminatory”.<sup>915</sup>

380. Second, the United Kingdom objects to the European Union’s contention that the measures decided on under Article 496(1) TCA must actually be non-discriminatory,<sup>916</sup> as it suffers from the same flawed approach as the European Union’s argument regarding proportionality.<sup>917</sup>

381. Third, the United Kingdom states that there is no credible basis for the European Union’s attempt to read in a principle of equity and fairness into the term “non-discriminatory”, as Recital 18 to the TCA relied on by the European Union for this purpose is, in the view of the United Kingdom, general in nature and does not materially assist with the understanding of what is meant by “non-discriminatory”.<sup>918</sup>

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<sup>912</sup> UK’s Written Submission, para. 356.3.

<sup>913</sup> UK’s Written Submission, para. 357.

<sup>914</sup> UK’s Written Submission, para. 357.1, *referring to* EU’s Written Submission, paras 681-682; *see* para. 332 above.

<sup>915</sup> UK’s Written Submission, para. 357.1.

<sup>916</sup> *See* EU’s Written Submission, para. 649.

<sup>917</sup> UK’s Written Submission, para. 357.2; *see* Section IV.C.3(a) above.

<sup>918</sup> UK’s Written Submission, para. 357.3, *referring to* EU’s Written Submission, paras 650-653, 657; *see also* para. 328 above.

382. Fourth, the United Kingdom ascribes no relevance to the fact that the term “non-discriminatory” is used repeatedly in Heading One (Trade) of Part Two of the TCA, rejecting the European Union’s suggestion to the contrary.<sup>919</sup>
383. Fifth, the United Kingdom does not accept that if a measure is discriminatory, it is automatically disproportionate, as the tests are different and it is not possible to make such a generalised statement.<sup>920</sup>
384. Regarding the European Union’s reliance on a line of case law from the trade context relating to the GATT 1994 and the TBT Agreement,<sup>921</sup> due to the different treaty language and factual context (such as the lack of a distinction being drawn between any “like” products by the sandeel fishing prohibitions), the United Kingdom does not consider it appropriate to import the specific steps set out for compliance with Article 2.1 of the TBT Agreement for an assessment of what is meant by “non-discriminatory” measures in Article 494(3)(f) of the TCA.<sup>922</sup>
385. Similarly, according to the United Kingdom, the references to “discrimination in form or in fact” in UNCLOS provisions made by the European Union,<sup>923</sup> “add nothing of material utility to the analysis.”<sup>924</sup>
386. Finally, concerning the role of Article 496(2) of the TCA for the European Union’s claim, the United Kingdom notes that the European Union’s request for arbitration only refers to Article 494(3)(f) of the TCA as the legal basis for its discrimination claim.<sup>925</sup> While the European Union accepts that the English and Scottish measures apply equally to all vessels such that there is no *de jure* discrimination, the United Kingdom submits that the European Union seems to allege in its Written Submission a possible *de facto* breach of Article 496(2) of the TCA and/or conflate Article 496(2) of the TCA with the separate obligation arising from Article 494(3)(f) read with Article 496(1) of the TCA.<sup>926</sup> In this regard, the United Kingdom clarifies its position to be that

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<sup>919</sup> UK’s Written Submission, para. 357.4, *referring to* EU’s Written Submission, paras 643-644, 658; *see also* para. 327 above.

<sup>920</sup> UK’s Written Submission, para. 357.5, *referring to* EU’s Written Submission, para. 683; *see also* para. 333 above.

<sup>921</sup> EU’s Written Submission, paras 659-673; *see* para. 330 above.

<sup>922</sup> UK’s Written Submission, para. 360

<sup>923</sup> EU’s Written Submission, paras 674-678; *see* para. 331 above.

<sup>924</sup> UK’s Written Submission, para. 361.

<sup>925</sup> UK’s Written Submission, para. 362, *referring to* EU’s Request for Arbitration, 25 October 2024, p. 2.

<sup>926</sup> UK’s Written Submission, para. 364, *referring to* EU’s Written Submission, paras 657, 758, and 759.

the second subparagraph of Article 496(2) of the TCA refers to the application of measures rather than their content.<sup>927</sup> According to the United Kingdom, there is no basis for contending that either measure is applied in a way that would contravene Article 496(2) of the TCA, as the measures deliberately apply to all vessels.<sup>928</sup> Regardless, the United Kingdom maintains that the Arbitration Tribunal should confine its assessment to the alleged breach of Article 494(3)(f) read with Article 496(1) of the TCA, as “any alleged breach of the second subparagraph of Article 496(2) [of the TCA] is not part of the subject matter of the request for arbitration.”<sup>929</sup>

387. In any event, the United Kingdom submits that regard was had to applying non-discriminatory measures, and going beyond this obligation under the TCA, the measures were also not discriminatory in either a *de jure* or *de facto* sense.<sup>930</sup>

(ii) *The Sandeel Fishing Measures Did Not Violate Article 496(1) Read Together with Article 494(3)(f) of the TCA Regarding Non-Discrimination*

388. The United Kingdom reiterates that “a breach of Article 496(2) in respect of discrimination is not within the subject-matter of the dispute submitted to arbitration and thus is not before the Tribunal [, which] should therefore confine itself to the EU’s argument as to breach of Article 496(1) read with Article 494(3)(f) [of the TCA].”<sup>931</sup> In this regard, the United Kingdom asserts that all it was obliged to do, was to “have regard to” applying non-discriminatory measures, while preserving its regulatory autonomy, which it claims it did with regard to both the English and the Scottish measures.<sup>932</sup>

389. Turning first to the English measure, as was the case with regard to the concerns regarding proportionality, the United Kingdom notes that the concerns with the alleged discrimination were raised directly by the European Union and Denmark in their responses to the DEFRA consultation and in correspondence with the UK Government.<sup>933</sup> The United Kingdom submits that in light of

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<sup>927</sup> UK’s Written Submission, para. 365.1.

<sup>928</sup> UK’s Written Submission, para. 365.2.

<sup>929</sup> UK’s Written Submission, paras 365.3, 366.

<sup>930</sup> UK’s Written Submission, para. 367.

<sup>931</sup> UK’s Written Submission, para. 405.

<sup>932</sup> UK’s Written Submission, para. 406.

<sup>933</sup> UK’s Written Submission, para. 407, *referring to* Letter from Danish Minister for Food, Agriculture and Fisheries to UK Minister of State for Food, Farming and Fisheries, 25 May 2023 (**Exhibit R-124**); Letter from the Ministry of Food, Agriculture and Fisheries of Denmark to DEFRA, 26 May 2023 (**Exhibit R-78**); Letter of Directorate-General for Maritime Affairs and Fisheries of the European Commission to DEFRA, 30 May 2023 (**Exhibit C-55**).

these concerns, the UK Government considered whether the English measure was *de jure* or *de facto* discriminatory, in particular with regard to the differential impact of the proposed prohibition on EU and especially Danish vessels, concluding that the measure nonetheless pursued a legitimate objective.<sup>934</sup>

390. The United Kingdom submits that the same is true for the Scottish measure.<sup>935</sup>

391. Despite its position that having regard to applying non-discriminatory measures suffices to discharge the United Kingdom's duty under Article 496(1) read in light of Article 494(3)(f) of the TCA as regards non-discrimination, in any event, the United Kingdom also claims that neither the English measure nor the Scottish measure is discriminatory.<sup>936</sup>

392. In response to the European Union's claim that although the measures have legitimate regulatory objectives, their differential impacts do not stem exclusively from the pursuit of those objectives,<sup>937</sup> the United Kingdom reiterates its position "that a measure which produces differential impacts will not be discriminatory for the purpose of Article 494(3)(f) [of the TCA] if the measure pursues a legitimate regulatory objective."<sup>938</sup> According to the United Kingdom, that is the case for the Scottish and English sandeel fishing prohibition, as they both pursue the legitimate objective of increasing sandeel populations and resilience for the benefit of the North Sea ecosystem and the differential effect on EU vessels arises only because the TAC for sandeel is allocated almost entirely to EU vessels.<sup>939</sup> The United Kingdom observes that the European Union fails to explain why the same disproportion that already exists under the spatial prohibitions

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<sup>934</sup> UK's Written Submission, paras 407-410, *referring to e.g.*, DEFRA, Call for evidence outcome: Summary of responses, 18 March 2022 (**Exhibit R-71**); DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, paras 26-57, Annex 1 (**Exhibit C-44**); Ministerial Submission, 15 February 2023, paras 18-19, 22 (**Exhibit R-74**); DEFRA, 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea', March 2023, p. 7 (**Exhibit R-61**); Letter from UK Minister of State for Food, Farming and Fisheries to Danish Minister for Food, Agriculture and Fisheries, 19 October 2023, (**Exhibit R-82**); Ministerial Submission, 14 September 2023, paras 19, 21, 24, 27 (**Exhibit R-77**).

<sup>935</sup> UK's Written Submission, paras 412-416, *referring to e.g.*, Letter from Danish Minister for Food, Agriculture and Fisheries to UK Minister of State for Food, Farming and Fisheries, 25 May 2023 (**Exhibit R-124**); Letter from the Ministry of Food, Agriculture and Fisheries of Denmark to DEFRA, 26 May 2023 (**Exhibit R-78**); Ministerial Submission, 26 January 2024, pp. 15-16, Annex F (**Exhibit R-98**); Ministerial Submission, 6 February 2023, p. 16 (**Exhibit R-91**); Scottish Government, 'Consultation on proposals to close fishing for sandeel in all Scottish waters', July 2023, p. 23 (**Exhibit C-49**).

<sup>936</sup> UK's Written Submission, paras 417-418.

<sup>937</sup> EU's Written Submission, para. 763; *see also* para. 335 above.

<sup>938</sup> UK's Written Submission, para. 419.

<sup>939</sup> UK's Written Submission, para. 419.

on sandeel fishing previously in place, which the European Union accepts as non-discriminatory, becomes discriminatory when applied to all UK waters in the North Sea.<sup>940</sup>

393. Even if one were to accept that any differential impact must stem exclusively from a legitimate regulatory objective, the United Kingdom argues that the European Union “has not come close to demonstrating that the differential impact was based even in part on something other than a legitimate regulatory objective”, merely impliedly speculating that the United Kingdom may have adopted the measures with the intention of differentially affecting EU vessels.<sup>941</sup>
394. Regarding the European Union’s submissions in support of its allegation,<sup>942</sup> the United Kingdom responds as follows: first, the observation that other fish are also consumed by seabirds leads nowhere, as the need for protections for sandeel in particular is clear, well-established and justified in its own right, and the United Kingdom is also considering ecosystem-based management approaches for other fisheries.<sup>943</sup> Second, the focus on sandeel derives not from the significance of the European Union’s share of the catch, but from the particular and well-evidenced significance of sandeel in the North Sea ecosystem.<sup>944</sup> In this regard, the United Kingdom notes that the European Union also has a significantly higher proportion of the TAC allocation for many of the stocks listed in Annexes 35 and 36 to the TCA.<sup>945</sup> Finally, the United Kingdom reiterates its objection to the European Union’s claim that the United Kingdom did not have proper regard to the economic and social impacts of its measures, highlighting that the United Kingdom had already taken domestic action, by not allocating the UK quota to its vessels since 2021, before extending the prohibition to all vessels.<sup>946</sup>
395. Finally, the United Kingdom states that the same reasoning as set out above would apply to any argument based on Article 496(2) of the TCA if it were properly before the Arbitration Tribunal.<sup>947</sup>

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<sup>940</sup> UK’s Written Submission, para. 420.

<sup>941</sup> UK’s Written Submission, para. 422.

<sup>942</sup> See EU’s Written Submission, para. 763; *see also* para. 335 above.

<sup>943</sup> UK’s Written Submission, para. 422.1.

<sup>944</sup> UK’s Written Submission, para. 422.2.

<sup>945</sup> UK’s Written Submission, para. 422.2.

<sup>946</sup> UK’s Written Submission, para. 422.3.

<sup>947</sup> UK’s Written Submission, para. 423.

**D. THE UNITED KINGDOM’S ALLEGED BREACH OF THE OBLIGATION TO GRANT FULL ACCESS TO FISH SANDEEL PURSUANT TO ANNEX 38 TO THE TCA**

396. The Parties agree that the present dispute has arisen during the “adjustment period” established by Article 1 of Annex 38 to the TCA,<sup>948</sup> which provides for an express derogation from the general access regime provided for in Articles 500(1), (3), (4), (5), (6) and (7) of the TCA.<sup>949</sup> The Parties also agree that the European Union’s claim that the United Kingdom breached its obligation to grant full access to the European Union to fish sandeel pursuant to Annex 38 to the TCA is one which is consequential on the European Union’s claims under Article 496 of the TCA, read together with Article 494 of the TCA.<sup>950</sup>
397. Further to their respective submissions on the European Union’s claims under Article 496 of the TCA, read together with Article 494 of the TCA,<sup>951</sup> the Parties disagree as to whether the United Kingdom breached its obligation to grant full access to the European Union to fish sandeel pursuant to Annex 38 to the TCA.<sup>952</sup>

**1. Relevant Provisions of the TCA**

398. Article 500 of the TCA, contained within Part Two, Heading Five, “Fisheries”, Chapter 3, “Arrangements on Access to Waters and Resources”, and titled “Access to waters” provides in full:

1. Provided that TACs have been agreed, each Party shall grant vessels of the other Party access to fish in its waters in the relevant ICES sub-areas that year. Access shall be granted at a level and on conditions determined in those annual consultations.
2. The Parties may agree, in annual consultations, further specific access conditions in relation to:
  - (a) the fishing opportunities agreed;
  - (b) any multi-year strategies for non-quota stocks developed under point (c) of Article 508(1); and
  - (c) any technical and conservation measures agreed by the Parties, without prejudice to Article 496.
3. The Parties shall conduct the annual consultations, including on the level and conditions of access referred to in paragraph 1, in good faith and with the objective of ensuring a mutually satisfactory balance between the interests of both Parties.

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<sup>948</sup> EU’s Written Submission, paras 345-357, *referring to* Article 1 of Annex 38 TCA; UK’s Written Submission, para. 425.1.

<sup>949</sup> EU’s Written Submission, para. 366, *referring to* Article 500 TCA and Article 2 of Annex 38 TCA; UK’s Written Submission, para. 425.2, *referring to* Article 500(8) TCA and Article 2(1) of Annex 38 TCA.

<sup>950</sup> EU’s Written Submission, paras 772, 781; UK’s Written Submission, paras 424-425, 429.

<sup>951</sup> *See* Sections IV.B and IV.C. above.

<sup>952</sup> EU’s Written Submission, para. 765; UK’s Written Submission, para. 424.

399. Article 1 of Annex 38 to the TCA, titled “Protocol on Access to Waters”, provides in full:

An adjustment period is hereby established. The adjustment period shall last from 1 January 2021 until 30 June 2026.

400. Article 2 of Annex 38 to the TCA provides in full:

1. By way of derogation from Article 500(1), (3), (4), (5), (6) and (7) of this Agreement, during the adjustment period each Party shall grant to vessels of the other Party full access to its waters to fish:
  - (a) stocks listed in Annex 35 and in tables A, B and F of Annex 36 at a level that is reasonably commensurate with the Parties’ respective shares of the fishing opportunities;
  - (b) non quota stocks at a level that equates to the average tonnage fished by that Party in the waters of the other Party during the period 2012-2016;
  - (c) for qualifying vessels to the zone in the waters of the Parties between six and twelve nautical miles from the baselines in ICES divisions 4c and 7d-g to the extent that each Party’s qualifying vessels had access to that zone on 31 December 2020.

For the purposes [of] point (c), “qualifying vessel” means a vessel of a Party, which fished in the zone mentioned in the previous sentence in at least four years between 2012 and 2016, or its direct replacement.
2. The Parties shall notify the other Party of any change in the level and conditions of access to waters that will apply from 1 July 2026.
3. Article 501 of this Agreement shall apply mutatis mutandis in relation to any change under paragraph 2 of this Article in respect of the period from 1 July 2026 to 31 December 2026.

## **2. Submissions of the European Union**

401. The European Union submits that, insofar as the United Kingdom has adopted a fisheries management measure that is inconsistent with Article 496 of the TCA, read together with Article 494 of the TCA, the United Kingdom has therefore committed a consequential breach of Article 2(1)(a) of Annex 38 to the TCA, because “the impairment of rights guaranteed by that provision is not justified or justifiable.”<sup>953</sup>

### **(a) *The Applicable Legal Standard under the TCA***

402. The European Union contends that the sovereign right of each Party to grant access to their respective waters to fish is not an unconstrained one, as it must be exercised pursuant to the commitments contained within the TCA, particularly Chapter 3 of Heading Five, as well as Annex 38 to the TCA during the “adjustment period”, which lasts from 1 January 2021 to 30 June 2026.<sup>954</sup> As the present dispute has arisen in the adjustment period, the European Union avers that

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<sup>953</sup> EU’s Written Submission, para. 765; EU’s Responses to Questions, paras 177-178; *see also* Hearing, 28 January 2025, 193:3-9 (Gauci).

<sup>954</sup> EU’s Written Submission, paras 345-354, *referring to* Article 1 of Annex 38 to the TCA.

Annex 38 to the TCA is engaged, and its interpretation must be informed by Article 500 and other provisions contained within Heading Five of Part Two of the TCA.<sup>955</sup>

403. According to the European Union, the rationale for the adjustment period includes the “social and economic benefits of a further period of stability, during which fishers would be permitted until 30 June 2026 to continue to access the waters of the other Party to fish as before the entry into force of the TCA”, reflecting European Union vessels’ broad access rights to UK waters to fish, prior to the TCA entering into force.<sup>956</sup> In the European Union’s view, these “economic and social benefits” should therefore be understood as European Union vessels’ certainty around the preservation of their rights to access waters to fish that they enjoyed at the time of the entry into force of the TCA.<sup>957</sup> The European Union contends that the ordinary meaning of the terms of Articles 2(2) and 2(3) of Annex 38 to the TCA demonstrate the Parties’ understanding that the legal framework governing access to waters to fish will change following 30 June 2026, such that an adjustment period in the interim period is required.<sup>958</sup>
404. In the European Union’s submission, the term “full access to waters to fish” as contained in Article 2(1)(a) of Annex 38 to the TCA, and when considered in relation to sandeel specifically, should be understood to mean “full access to waters to fish” sandeel at a level that is reasonably commensurate with the guaranteed share of the agreed TAC as set out in Annex 35 to the TCA.<sup>959</sup>
405. The European Union does not submit that the right provided for in Article 2(1)(a) of Annex 38 to the TCA of “full access to waters to fish” is non-derogable, however, it argues that the wording of the provision, particularly the use of “shall grant”, carries the necessary implication that “any impairment or reduction of this right must be justified.”<sup>960</sup> In the European Union’s view, it is possible that a measure that is consistent with Article 496 of the TCA, read together with Article 494, may provide a justification for a departure from the obligation contained in Article 2(1)(a) of Annex 38 to the TCA.<sup>961</sup> The European Union cautions, however, that a measure decided on for marine conservation of fisheries management that is inconsistent with the requirements of Article 496 of the TCA cannot justify an impairment of the right of the other

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<sup>955</sup> EU’s Written Submission, paras 354-357.

<sup>956</sup> EU’s Written Submission, paras 358-359, *citing* Article 1 of Annex 38 to the TCA.

<sup>957</sup> EU’s Written Submission, para. 768.

<sup>958</sup> EU’s Written Submission, paras 360-365, *referring to* Articles 2(2) and 2(3) of Annex 38 to the TCA.

<sup>959</sup> EU’s Written Submission, para. 378.

<sup>960</sup> EU’s Written Submission, para. 767, *see also* EU’s Written Submission, paras 379-387.

<sup>961</sup> EU’s Written Submission, paras 387-390, 768; EU’s Replies to the UK’s Responses to Questions, para. 20.



Party to “full access to waters to fish” pursuant to Annex 38 to the TCA.<sup>962</sup> In particular, the European Union rejects the United Kingdom’s position that regulatory autonomy has primacy over all other considerations, as such a rationale would mean that a marine conservation measure could always justify a full impairment of rights conferred under other provisions of Heading Five of Part Two of the TCA, thus depriving such provisions of their purpose and meaning.<sup>963</sup>

406. Moreover, according to the European Union, a departure from the obligation to grant “full access to waters to fish” mandates “a particular onus to consider the impairment to the objective of the ‘adjustment period’ established by Article 1 of Annex 38 [to the TCA], which is to ensure stability and thereby confer economic and social benefits.”<sup>964</sup> In the European Union’s view, in the context of Annex 38 to the TCA, any restriction on the right of “full access to waters to fish” should therefore be “extraordinary given the rationale for the adjustment period”, and warrants “a particularly high degree of scrutiny”.<sup>965</sup> In the same vein, according to the European Union, the fact that the sandeel fishing prohibition was adopted during the adjustment period means that the terms and rationale of Annex 38 to the TCA must also be taken into account when determining the scope of the United Kingdom’s regulatory autonomy to adopt the measure.<sup>966</sup>

**(b) *The Sandeel Fishing Prohibition Is Inconsistent with the Right to Full Access to Fish Sandeel Pursuant to Annex 38 to the TCA***

407. Per the European Union’s submission, applying the above legal standard, the sandeel fishing prohibition is inconsistent with the United Kingdom’s obligation to grant European Union vessels “full access to its waters to fish”, as mandated by Article 2(1)(a) of Annex 38 to the TCA.<sup>967</sup> In the European Union’s view, this obligation is one which requires the United Kingdom to grant EU vessels “full access to its waters to fish” sandeel, commensurate with the Parties’ respective shares of the TACs, as contained within Annex 35 to the TCA.<sup>968</sup> The European Union clarifies that, in this respect, it only challenges the sandeel fishing prohibition insofar as it extends beyond the pre-existing partial prohibition of sandeel fishing in parts of UK waters of the North Sea.<sup>969</sup>

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<sup>962</sup> EU’s Written Submission, para. 390; EU’s Responses to Questions, paras 14-15.

<sup>963</sup> EU’s Responses to Questions, para. 16; EU’s Replies to the UK’s Responses to Questions, paras 15-16, 23.

<sup>964</sup> EU’s Written Submission, para. 768.

<sup>965</sup> EU’s Written Submission, para. 391.

<sup>966</sup> EU’s Replies to the UK’s Responses to Questions, para. 22.

<sup>967</sup> EU’s Written Submission, para. 769.

<sup>968</sup> EU’s Written Submission, para. 769; EU’s Supplementary Written Submission, paras 86-87.

<sup>969</sup> EU’s Written Submission, paras 770-771.

408. In the European Union’s submission, the obligation to grant full access to waters to fish may only be restricted where “there is full respect of the requirements” of Article 496 of the TCA, read together with Article 494.<sup>970</sup> It does not claim that the right of full access to waters to fish must systematically take precedence over the legitimate objectives of other provisions of Heading Five.<sup>971</sup> However, the European Union rejects the United Kingdom’s suggestion that Annex 38 to the TCA can effectively be ignored as that would significantly diminish its meaning and role within the architecture of Heading Five.<sup>972</sup> Therefore, the European Union’s claim under Article 2(1)(a) of Annex 38 to the TCA is consequential on the claims outlined in Sections IV.B and IV.C. above.<sup>973</sup>
409. The European Union also submits that the sandeel fishing prohibition is incongruent with what it considers to be the rationale for the adjustment period, as well as the Parties’ negotiated agreement on the shares and TACs, and that these are relevant factors to be considered in assessing whether the impairment of the right of European Union vessels to full access to the United Kingdom’s waters to fish is justified.<sup>974</sup> It contends that the Arbitration Tribunal “should apply particular scrutiny to the UK’s exercise of its right to decide on fisheries management measures applicable to sandeel”, in light of the rationale for the establishment of an adjustment period.<sup>975</sup>
410. The European Union submits that it is not aware of any urgency involved in implementing the sandeel fishing prohibition.<sup>976</sup> To the extent that the United Kingdom claims that, “at the time of the adoption of the measures, there was a real and pressing need to take appropriate measures to protect sandeel abundance and resilience”, the European Union considers that there is no evidence on the record to support this claim.<sup>977</sup>
411. The European Union, therefore, because it contends that the sandeel fishing prohibition is inconsistent with Articles 496(1) and 496(2) of the TCA, read together with Articles 494(3)(c)

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<sup>970</sup> EU’s Written Submission, paras 773-775.

<sup>971</sup> EU’s Written Submission, para. 774; Hearing, 28 January 2025, 196:3-10 (Gauci).

<sup>972</sup> Hearing, 28 January 2025, 196:14-18 (Gauci).

<sup>973</sup> EU’s Written Submission, para. 772.

<sup>974</sup> EU’s Written Submission, paras 779-780; Hearing, 28 January 2025, 193:10-16 (Gauci).

<sup>975</sup> EU’s Written Submission, paras 776-778.

<sup>976</sup> EU’s Responses to Questions, para. 69.

<sup>977</sup> EU’s Responses to Questions, paras 70-74.

and 494(3)(f), submits that the United Kingdom is consequentially also in breach of Article 2(1)(a) of Annex 38 to the TCA.<sup>978</sup>

### 3. Submissions of the United Kingdom

#### (a) *The Applicable Legal Standard under the TCA*

412. By way of departure from the European Union’s submissions on the applicable legal standard, the United Kingdom disputes the European Union’s contention that “a particularly high degree of scrutiny” is warranted when considering any restriction on the right of “full access to waters to fish” under Annex 38 to the TCA, due to the rationale for the adjustment period.<sup>979</sup> The United Kingdom submits that the test is merely whether it has breached Article 496, read together with Articles 494(3)(c) and 494(3)(f) of the TCA, because Annex 38 to the TCA is subject to these articles.<sup>980</sup> Therefore, “social and economic benefits” are not “an overriding priority”, nor do they “otherwise operate effectively to prevent the coastal State from taking action to conserve and manage its living resources and protect marine ecosystems (as is permitted under Article 496 [of the TCA]) for [the adjustment period]”.<sup>981</sup> As such, the United Kingdom denies the proposition that a measure, properly justified under Article 496 of the TCA and having regard to Article 494, may amount to a derogation from the adjustment period.<sup>982</sup>
413. The United Kingdom notes that the European Union “repeatedly acknowledges that it attaches ‘significant importance’ and ‘considerable importance’ to ‘marine conservation and the sustainable exploitation of fisheries resources’”,<sup>983</sup> and that the European Union further “does not suggest that there should be a limitation on pursuing measures in support of those goals in the adjustment period, provided they comply with Article 496, read with Article 494 [of the TCA].”<sup>984</sup>
414. The United Kingdom additionally notes that the European Union does not make an argument for breach of Article 2(1)(a) of Annex 38 to the TCA “on the grounds that the reasons for the prohibition on sandeel fishing are not sufficiently ‘extraordinary’”; instead, the United Kingdom considers the European Union’s claim under Annex 38 to the TCA to be “wholly consequential,

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<sup>978</sup> EU’s Written Submission, para. 781.

<sup>979</sup> UK’s Written Submission, paras 427-428.1.

<sup>980</sup> UK’s Written Submission, paras 424, 428.1.

<sup>981</sup> UK’s Written Submission, para. 428.2.

<sup>982</sup> Hearing, 29 January 2025, 149:15-150:2 (Westaway, Prof. Ruiz Fabri); UK’s Responses to Question, p. 4.

<sup>983</sup> UK’s Written Submission, para. 428.1, *citing* EU’s Written Submission, paras 691, 774.

<sup>984</sup> UK’s Written Submission, para. 428.2.

consistent with the proper interpretation of the TCA as preserving the Parties' regulatory autonomy to decide on fisheries management measures that limit access to their waters so long as they are not in breach of Article 496, read with Article 494 [of the TCA]."<sup>985</sup> In particular, the United Kingdom rejects the proposition that Annex 38 operates to constrain the regulatory autonomy of a party to decide upon measures under Article 496 of the TCA; as such, there is no need to "reconcile" the rights granted under Annex 38 with the right to decide on management measures.<sup>986</sup>

**(b) *The Sandeel Fishing Measures Are Not Inconsistent with the Right to Full Access to Fish Sandeel Pursuant to Annex 38 to the TCA***

415. In the United Kingdom's submission, and as agreed by the European Union,<sup>987</sup> a measure that is not in breach of Article 496, read together with Article 494 of the TCA will subsequently not breach Article 2(1)(a) of Annex 38 to the TCA.<sup>988</sup> Accordingly, given the United Kingdom's submissions under Sections IV.B.3 and IV.C.3, the United Kingdom contends that it has not breached Article 2(1)(a) of Annex 38 to the TCA.<sup>989</sup>
416. In addition, the United Kingdom argues that, although the measures were not justified as an emergency, there was a need for urgent action to protect stocks from increasing pressure.<sup>990</sup>

**V. ANALYSIS**

**A. THE DISPUTED MEASURE**

417. The Arbitration Tribunal considers that there is a preliminary issue which the Parties have addressed and which provides a framework for the Arbitration Tribunal's analysis of the claims of the European Union, namely whether the challenge is in respect of a single measure, the sandeel fishing prohibition applicable to UK waters, or whether the prohibition on sandeel fishing should be considered in respect of its separate parts: a prohibition in English waters and a prohibition in

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<sup>985</sup> UK's Written Submission, para. 428.2, *referring to* EU's Written Submission, para. 390.

<sup>986</sup> UK's Responses to Questions, p. 4.

<sup>987</sup> *See* EU's Written Submission, para. 772.

<sup>988</sup> UK's Written Submission, para. 429.

<sup>989</sup> UK's Written Submission, para. 429-430.

<sup>990</sup> UK's Responses to Questions, p. 12, *referring to* Hearing, 29 January 2025, 151:13-23, 30 January 2025, 98:9-99:9 (Westaway).

Scottish waters. The Arbitration Tribunal will address this issue first, including an outline of the measure's objectives.

### **1. A Single Measure or Two Measures**

418. The European Union challenges the sandeel fishing prohibition as a single measure, to which effect has been given through two legal instruments, one pertaining to English waters and one pertaining to Scottish waters.<sup>991</sup> The challenge to the sandeel fishing prohibition as a single measure is based on the obligations as regards fisheries set out in the TCA which bind the United Kingdom and European Union as Parties, as well as a number of other factors, including the common approach that was adopted during consultations, the legal and practical implications of the legal mechanisms for giving effect to the prohibition, and the implementation date which is the same for both English and Scottish waters.<sup>992</sup> In addition, the European Union emphasises that there is a significant overlap in the evidence relied upon.<sup>993</sup>
419. Further, the European Union recalls that “the TCA, of which the Annexes form an integral part, is an international agreement that binds the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part” and that a measure that may form the subject of arbitration between the Parties “should be understood to cover acts or omissions attributable to either Party”.<sup>994</sup>
420. The United Kingdom argues that the sandeel fishing prohibition consists of two measures: the English measure and the Scottish measure.<sup>995</sup> This, it argues, follows from the fact that the UK Government took its own advice and made its own decision in respect of English waters, and the Scottish Government took its own advice and made its own decision in respect of Scottish waters.<sup>996</sup> It also follows from the devolution arrangements of the United Kingdom which devolve powers in respect of Scottish waters to the Government of Scotland.<sup>997</sup>
421. The Arbitration Tribunal must consider, as a preliminary matter, whether the dispute concerns a single measure or two measures, and how this affects the analysis of the claims it must decide.

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<sup>991</sup> EU's Written Submission, paras 150-153.

<sup>992</sup> EU's Written Submission, paras 166-175.

<sup>993</sup> EU's Replies to the UK's Responses to Questions, para. 7.

<sup>994</sup> EU's Replies to the UK's Responses to Questions, paras 4-5.

<sup>995</sup> UK's Written Submission, paras 188-192.

<sup>996</sup> Hearing, 29 January 2025, 30:19-22 (Juratowitch).

<sup>997</sup> Hearing, 29 January 2025, 30:23-31:5 (Juratowitch).

The European Union argues that the starting point for the Arbitration Tribunal's consideration of the measure at issue should be the manner in which the European Union, as the Complainant, has characterised the measure in its Request for Arbitration and its written submissions.<sup>998</sup>

422. The Arbitration Tribunal is mindful of the way in which the European Union has framed its challenge in the Request for Arbitration under Article 739 of the TCA and in its written submissions. The United Kingdom is Party to the TCA, and under international law the United Kingdom bears State responsibility for the actions that are attributable to it. This is accepted by the United Kingdom.<sup>999</sup> However, the Arbitration Tribunal takes account of the devolution of powers of the United Kingdom. The sandeel fishing prohibition has resulted from the exercise of distinct powers by which two separate decisions have been taken by two separate governmental authorities, each with its own decision-making process, involving separate consultations, upon the consideration of separate scientific advice, and ultimately resting upon separate reasons and evidence that are advanced in support of each decision, even if there are elements of commonality between them.
423. The European Union argues that as the sandeel fishing prohibition has been challenged as a single measure, a holistic approach should be taken by the Arbitration Tribunal to its analysis of what the European Union considers to be one prohibition with the same overall impact.<sup>1000</sup> The United Kingdom considers that whether the Arbitration Tribunal approaches the disputed measure as a single measure with two distinguishable parts or as two measures, each of the distinguishable parts or measures must be analysed separately for consistency with the obligations under the TCA.<sup>1001</sup> Furthermore, although each measure is to be considered in turn, where evidence is relevant to both, it may be thus considered for both.<sup>1002</sup>
424. The Arbitration Tribunal considers that, although as a matter of international law, the sandeel fishing prohibition is regarded as a measure that issues from the United Kingdom as a Party to the TCA, the claims made by the European Union require recognition that the measure has two distinguishable parts. Analytically, therefore, the Arbitration Tribunal will consider the action taken by the UK Government in respect of English waters and the action taken by the Scottish Government in respect of Scottish waters separately. The issue as to whether the dispute before

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<sup>998</sup> Hearing, 28 January 2025, 33:25-34:3 (Norris); EU's Responses to Questions, paras 3-5.

<sup>999</sup> Hearing, 29 January 2025, 31:8-9 (Juratowitch).

<sup>1000</sup> Hearing, 28 January 2025, 34:4-9 and 38:2-8 (Norris).

<sup>1001</sup> Hearing, 29 January 2025, 31:12-20 and 33:10-21 (Justice Unterhalter, Juratowitch).

<sup>1002</sup> UK's Responses to Questions, p. 2.

the Arbitration Tribunal concerns a single measure or two measures should not be determined by recourse to abstract characterisation. Rather, the issue is best resolved by reference to the claims that the Arbitration Tribunal is required to determine. The European Union claims, *inter alia*, a breach of Article 496(2) of the TCA. Where a distinct measure is based on an identified body of scientific advice, it is that body of scientific advice that must meet the requirement of “best available scientific advice”. This approach is dictated by the facts as to what scientific advice forms the basis of the measure. The action taken by the Scottish Government in respect of Scottish waters cannot benefit from or suffer detriment by reason of scientific advice that it did not rely upon, but which forms the basis of the action taken by the UK Government in respect of English waters. So too, for the action taken by the UK Government in respect of English waters.

425. The other principal claim advanced by the European Union is that the United Kingdom took measures without having regard to the principles referred to in Article 494(3)(f), and, in particular, the principle of applying proportionate and non-discriminatory measures (Article 496(1), read together with Article 494(3)(f)). This claim must also be decided on the basis of the actions taken, and whether in taking these actions, regard to the principles in Article 494(3)(f) was adhered to. It is unavoidable, therefore, that the enquiry of the Arbitration Tribunal must focus on how the decisions were taken, and whether, in so doing, there was an application of the principles set out in Article 494(3)(f). The Scottish Government and the UK Government took separate decisions. Whether they did so in conformity with the provisions of Article 496(1) read with Article 494(3)(f) requires scrutiny as to how each of these decisions was taken. Any want of conformity in the taking of one decision is not avoided by reason of the conformity of the other decision.
426. For these reasons, although the measure taken by the Scottish Government in respect of Scottish waters and the measure taken by the UK Government in respect of English waters are both attributable to the United Kingdom as the Party to the TCA, it is necessary, in order properly to determine the claims before the Arbitration Tribunal, to recognise the distinctive powers, processes, and reasons that brought about each measure.
427. The Arbitration Tribunal will address the consequences for any findings of inconsistency with the obligations under the TCA in its findings.

## **2. Objectives of the Measure**

428. The Parties do not disagree on the objectives of the sandeel fishing prohibition. The European Union considers that the objectives should be understood to be “to increase the biomass of sandeel

stocks with the aim of bringing about wide environmental and ecosystem benefits, which include potential benefits to sandeel, seabirds, marine mammals, and other fish species”.<sup>1003</sup>

429. The United Kingdom presented the policy objectives and intended effects of the English measure as:

To increase the biomass of sandeel stocks and therefore increase the food availability for higher trophic level predators such as seabirds within the wider ecosystem within English waters of the North Sea.<sup>1004</sup>

430. To this, the United Kingdom added the objective “to pursue good environmental status for the North Sea ecosystem”,<sup>1005</sup> and to bring about “improvements in the resilience of sandeel stocks and the wider marine ecosystem, including marine mammals, seabirds, and predatory fish in the North Sea area”.<sup>1006</sup>

431. With respect to the policy objectives of the Scottish measure, the United Kingdom referred, *inter alia*, to the Policy Note accompanying the statutory instrument:

The purpose of the Sandeel (Prohibition of fishing) (Scotland) Order 2024 is to prohibit fishing for sandeel in all Scottish waters with the aim of bringing about wider environmental and ecosystem benefits, which include potential benefits to sandeel, seabirds, marine mammals, and other fish species.<sup>1007</sup>

432. The Parties are in agreement that a Party to the TCA may set the level of environmental protection at the level it desires, which may be at a high level.<sup>1008</sup> It is not the role of the Arbitration Tribunal to determine what that level of environmental protection should be.<sup>1009</sup>

433. The Parties also agree that fisheries management measures, including fishing prohibitions which impair the rights of a Party, may be adopted to pursue legitimate objectives in respect of the marine environment.<sup>1010</sup> If a Party does so, however, any such measures must be consistent with

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<sup>1003</sup> EU’s Written Submission, para. 186.

<sup>1004</sup> UK’s Written Submission, para. 189.

<sup>1005</sup> Hearing, 29 January 2025, 1:12-13 (Juratowitch); UK’s Responses to Questions, p. 35.

<sup>1006</sup> Hearing, 29 January 2025, 28:6-9 (Juratowitch), *citing* DMA for Self-Certified Measures in DEFRA, Regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 3 (**Exhibit C-44**).

<sup>1007</sup> UK’s Written Submission, para. 191.

<sup>1008</sup> Hearing, 28 January 2025, 39:5-13 and 119:6-14 (Norris); Hearing, 30 January 2025, 2:1-3 (Norris); UK’s Written Submission, para. 197.

<sup>1009</sup> UK’s Written Submission, para. 198, *referring to* EU’s Written Submission, para. 455; EU’s Responses to Questions, para. 46.

<sup>1010</sup> Hearing, 28 January 2025, 9:2-6; 20-25 (Dawes); UK’s Written Submission, para. 197.



the provisions of the TCA.<sup>1011</sup> The Arbitration Tribunal will consider the obligations under the TCA and their interpretation when addressing each of the European Union’s claims.

## **B. THE APPLICABLE LEGAL FRAMEWORK**

434. In its analysis of the applicable legal framework, the Arbitration Tribunal will address in turn its interpretation of the relevant provisions, regulatory autonomy, the standard of review, and the burden of proof.

### **1. Interpretative Approach under the TCA**

435. Both Parties referred the Arbitration Tribunal to Article 4(1) of the TCA for the interpretative approach to be adopted in this dispute. This provides:

[...] the provisions of [the TCA] shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties.

436. Article 4(1) of the TCA reflects that the starting point for treaty interpretation is the customary international law rules set out in the VCLT. Article 31 of the VCLT, reproduced below, directs the Arbitration Tribunal to consider the “ordinary meaning” of the terms of the treaty, “in their context and in the light of [the treaty’s] object and purpose”.

#### Article 31

##### General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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<sup>1011</sup> Hearing, 28 January 2025, 9:2-6 (Dawes): “The EU accepts that rights to access to waters to fish may be impaired by fisheries management measures that pursue the legitimate objective of marine conservation, provided that such measures respect the conditions in the TCA.”; Hearing, 29 January 2025, 164:8-24 (Westaway).

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

437. The Parties agree that in accordance with Article 31(3)(c) of the VCLT, the interpretative approach includes taking into account relevant rules of international law applicable in the relations between them.<sup>1012</sup> They also agree that relevant rules of international law include UNCLOS.<sup>1013</sup> The United Kingdom refers in addition to a number of other agreements to which the United Kingdom and European Union are contracting parties, and which the United Kingdom considers may also be relevant rules of international law, including the OSPAR Convention,<sup>1014</sup> the CBD,<sup>1015</sup> and the FAO Code of Conduct.<sup>1016</sup> The European Union also considers that the FAO Code of Conduct provides relevant context for the interpretation of the TCA,<sup>1017</sup> and makes reference to the UNFSA in the context of its consideration of the precautionary approach.<sup>1018</sup>

438. The Parties appear to disagree on the extent to which the WTO Agreements and the interpretations of its provisions by WTO dispute settlement bodies are of utility in interpreting the relevant provisions of the TCA. The TCA addresses “WTO case law” in Article 516 in the following manner:

The interpretation and application of the provisions of this Part shall take into account relevant interpretations in reports of WTO panels and of the Appellate Body adopted by the Dispute Settlement Body of the WTO as well as in arbitration awards under the Dispute Settlement Understanding.

439. The European Union refers to the WTO Agreements as relevant rules of international law to be taken into account in the interpretation of the TCA, and notes that pursuant to Article 516 of the TCA, the interpretation and application of the provisions of Part Two (Trade, Transport, Fisheries and Other Arrangements) shall take into account relevant interpretations in reports of WTO panels and of the Appellate Body.<sup>1019</sup> The United Kingdom takes issue with the relevance to this dispute

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<sup>1012</sup> EU’s Written Submission, para. 200; UK’s Written Submission, para. 58.

<sup>1013</sup> EU’s Written Submission, para. 201; UK’s Written Submission, paras 59-67 and para. 193. *See also* UNCLOS (**Exhibit CLA-23**).

<sup>1014</sup> UK’s Written Submission, paras 68-73; OSPAR Convention (**Exhibit RLA-2**).

<sup>1015</sup> UK’s Written Submission, paras 74-82; Convention on Biological Diversity (**Exhibit RLA-7**).

<sup>1016</sup> UK’s Written Submission, paras 83-86; FAO Code of Conduct for Responsible Fisheries (**Exhibit CLA-33**).

<sup>1017</sup> EU’s Written Submission, paras 278-281.

<sup>1018</sup> EU’s Written Submission, paras 333-338, UN Fish Stocks Agreement (**Exhibit CLA-28**).

<sup>1019</sup> EU’s Written Submission, paras 203-209.

of certain interpretations of the WTO dispute settlement bodies.<sup>1020</sup> Nevertheless, the Arbitration Tribunal notes that both Parties have relied on Appellate Body reports to support their arguments.

440. The Arbitration Tribunal considers that UNCLOS and the WTO Agreements are among the relevant rules of international law that the Arbitration Tribunal may take into account in the interpretation of the provisions of the TCA. It agrees with the European Union that this is not a battle of norms between UNCLOS and the WTO, but that both may be considered.<sup>1021</sup> The manner in which the Arbitration Tribunal will take them into account will be addressed when analysing each of the claims of the European Union.

## **2. Regulatory Autonomy**

441. The issue of regulatory autonomy lies at the core of this dispute as has been emphasised by the Parties.<sup>1022</sup> However, the Parties differ in their interpretations of the TCA as it relates to regulatory autonomy. Given its cross-cutting nature, the Arbitration Tribunal will first consider this overarching issue. The Arbitration Tribunal will set out its understanding of regulatory autonomy as it pertains to the TCA, including through reference to the positions of the Parties, and in particular, the extent to which Annex 38 to the TCA operates to constrain the regulatory autonomy of a Party to decide fisheries management measures in its waters.

442. Article 1 of the TCA defines its purpose:

This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty.

The broad framework of the TCA is therefore respectful of the Parties' autonomy and sovereignty, which includes regulatory autonomy.

443. Regulatory autonomy, or autonomy to regulate, is referred to in both Article 1 and the Recitals to the TCA. Recital 7 recognises:

[...] the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection.

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<sup>1020</sup> See e.g., UK's Written Submission, paras 224-225.

<sup>1021</sup> Hearing, 30 January 2025, 6:1-2 (Norris).

<sup>1022</sup> Hearing, 30 January 2025, 2:16-22; 6:12-14 (Norris).

444. Noting that the United Kingdom, following its withdrawal from the European Union, is an independent coastal State with corresponding rights and obligations under international law,<sup>1023</sup> Recital 20 affirms that:

the sovereign rights of the coastal States exercised by the Parties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 (United Nations Convention on the Law of the Sea).

445. Article 493 reaffirms the sovereign rights of coastal States in their territorial seas and EEZs:

The Parties affirm that sovereign rights of coastal States exercised by the Parties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including the United Nations Convention on the Law of the Sea.

446. UNCLOS sets out the relevant rules for exploring, exploiting, conserving and managing marine living resources of the EEZ of a coastal State. It has a number of provisions which are relevant to consideration of regulatory autonomy. Article 56(1) provides for the sovereign rights of a coastal State in its EEZ for the purposes of exploring and exploiting, conserving and managing the living resources of the EEZ and coastal State jurisdiction with respect to the protection and preservation of the marine environment. According to Article 56(2), in exercising its sovereign rights and performing its duties under the Convention in the EEZ, a coastal State must have due regard to the rights and duties of other States and act in a manner compatible with the provisions of the Convention. Article 61 requires the coastal State to determine the allowable catch of the living resources in its EEZ. Article 62(2) obliges the coastal State to determine its capacity to harvest the living resources of the EEZ, and where it does not have capacity to harvest the entire allowable catch, it is to give other States access to the surplus of the allowable catch through agreements or other arrangements and pursuant to terms and conditions set out in its laws and regulations. States that operate in the EEZ of a coastal State must comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention.<sup>1024</sup>
447. UNCLOS therefore sets out the sovereign rights of coastal States in their waters, which encompass the right to decide to grant access to other States to fish the living resources of its waters. The Arbitration Tribunal agrees with the United Kingdom that there is no obligation under UNCLOS to grant access to the surplus of the allowable catch to a *particular* State.<sup>1025</sup> It also

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<sup>1023</sup> Recital 19 to the TCA.

<sup>1024</sup> Article 62(4) of UNCLOS (**Exhibit CLA-23**).

<sup>1025</sup> UK's Written Submission, para. 66, n. 38.

agrees with the European Union that there are limits to the exercise of the rights of the coastal State which result from the rights of other States.<sup>1026</sup> Although other States do not have rights to fish in a coastal State's waters or have rights of access to those waters to fish, a coastal State may decide to cooperate with another State by granting rights of access to its waters. Those States, in turn, must respect the laws and regulations adopted by a coastal State in respect of its waters. UNCLOS thus seeks to balance the rights and duties of coastal States with the rights and duties of other States.

448. The TCA is the instrument by which the Parties have agreed on certain matters related to fisheries, including “shared stocks”, defined broadly in Article 495(1)(c) of the TCA as “fish, including shellfish, of any kind that are found in the waters of the Parties, which includes molluscs and crustaceans”.

449. During the oral hearing, the United Kingdom highlighted the structure of Heading Five of Part Two of the TCA.<sup>1027</sup> Chapter 1 entitled ‘Initial Provisions’ includes the overarching Article 493 referred to above, and Article 494 on Objectives and Principles.

450. Article 494(1) provides:

The Parties shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States as exercised by the Parties.

451. Article 494(1) is an obligation to cooperate “while fully respecting the rights and obligations of independent coastal States as exercised by the Parties”. The conjunction “while” indicates that the Parties are to cooperate at the same time as fully respecting the rights and obligations of independent coastal States as exercised by the Parties.

452. The objectives of cooperation in Article 494(1) are to ensure “that fishing activities for shared stocks [...] are environmentally sustainable in the long term and contribute to achieving economic and social benefits”. The objectives set out in Article 494(2) are to exploit “shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield”. Article 494(3) contains nine principles to which the Parties “shall have regard”.

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<sup>1026</sup> EU's Responses to Questions, para. 173.

<sup>1027</sup> Hearing, 29 January 2025, 147:11-151:5 (Westaway).

453. Chapter 2 entitled ‘Conservation and Sustainable Exploitation’ includes Article 496(1) which accords to each Party the right to decide on any measures applicable to its waters in pursuit of the objectives set out in Articles 494(1) and (2), and having regard to the principles referred to in Article 494(3).
454. Chapter 3 addresses “Arrangements on Access to Waters and Resources”. This provides, *inter alia*, for the setting of TACs for the stocks listed in Annex 35, which includes sandeel. Article 498(3) provides that the Parties’ shares of the TACs for the stocks listed in Annex 35 shall be allocated between the Parties in accordance with the quota shares set out in that Annex. Article 500(1) provides that where a TAC has been agreed, a Party is to grant vessels of the other Party access to fish in its waters on the level and conditions determined in annual consultations. According to Article 500(3), the Parties are to conduct the annual consultations, including on the level and conditions of access, in good faith and with the objective of ensuring a mutually satisfactory balance between the interests of both Parties. The other paragraphs of Article 500 set out the procedures by which each Party grants vessels of the other Party access to fish at a level and under conditions agreed in annual consultations. According to Article 500(8), Article 500 is subject to Annex 38.
455. Annex 38, entitled “Protocol on Access to Waters” establishes an ‘adjustment period’ from 1 January 2021 until 30 June 2026.<sup>1028</sup> The Recitals to Annex 38 affirm “the sovereign rights and obligations of independent coastal States exercised by the Parties” and note “the social and economic benefits of a further period of stability, during which fishers would be permitted until 30 June 2026 to continue to access the waters of the other Party as before the entry into force of this Agreement”.<sup>1029</sup> Annex 38 is therefore temporally limited to the adjustment period which extends until 30 June 2026.
456. Article 2(1)(a) of Annex 38 provides that “each Party shall grant to vessels of the other Party full access to its waters to fish” stocks listed in Annex 35 (including sandeel in the North Sea) “at a level that is reasonably commensurate with the Parties’ respective shares of the fishing opportunities”.
457. A significant point of disagreement between the Parties is the extent to which Annex 38 constrains the regulatory autonomy of a Party. While agreeing with the United Kingdom that the right to full access to waters to fish in Article 2(1)(a) of Annex 38 does not systematically take precedence

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<sup>1028</sup> Article 1 of Annex 38 to the TCA.

<sup>1029</sup> Recitals 1 and 3 to Annex 38 to the TCA.

over other objectives of Heading Five of Part Two of the TCA,<sup>1030</sup> the European Union submits:<sup>1031</sup>

Measures that derogate from the right of full access to waters to fish must be decided on and applied in a manner that is consistent with Article 496 TCA, read together with Article 494 TCA, and taking into consideration the terms and rationale of Annex 38 TCA.

458. The United Kingdom argues that the conservation measures that a Party may take under Article 496 do not derogate from Annex 38.<sup>1032</sup> Furthermore, Annex 38 does not operate to limit the Parties' exercise of regulatory autonomy when deciding on measures under Article 496.<sup>1033</sup>

459. The Parties are in agreement that the extent to which Annex 38 derogates from Article 500 is limited by Article 2(1) of Annex 38, which specifically refers to Annex 38 by way of derogation from Article 500(1), (3), (4), (5), (6) and (7) of the TCA (but not Article 500(2)).<sup>1034</sup> Article 500(2) of the TCA provides that:

The Parties may agree, in annual consultations, further specific access conditions in relation to:

- (a) the fishing opportunities agreed; [...] and
- (c) any technical and conservation measures agreed by the Parties, without prejudice to Article 496.

460. Article 500(2) is an enabling provision. It enables the Parties to agree further specific access conditions including technical and conservation measures. As such it is logical that Annex 38, which sets out the requirements to be followed during the adjustment period, does not derogate from Article 500(2), but does derogate from the binding provisions in Article 500 relating to access to waters at a level and under conditions agreed in annual consultations.

461. The United Kingdom suggests that the omission of Article 500(2) from the list of provisions derogated from in Annex 38 is "critical because that relates to measures agreed or decided by the parties".<sup>1035</sup> The Arbitration Tribunal notes that Article 500(2) relates specifically to measures *agreed by the Parties*. 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 enables a Party to decide to adopt fisheries management measures under

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<sup>1030</sup> Hearing, 28 January 2025, 196:3-23 (Gauci); EU's Replies to the UK's Responses to Questions, para. 15.

<sup>1031</sup> EU's Replies to the UK's Responses to Questions, para. 16.

<sup>1032</sup> Hearing, 29 January 2025, 149:15-150:2 (Westaway, Prof. Ruiz Fabri).

<sup>1033</sup> UK's Responses to Questions, p. 4.

<sup>1034</sup> EU's Replies to the UK's Responses to Questions, para. 18; UK's Responses to Questions, p. 4.

<sup>1035</sup> Hearing, 29 January 2025, 149:12-14 (Westaway).

Article 496 and that any such measures are a derogation from Annex 38.<sup>1036</sup> This appears to be the basis for the United Kingdom's position that Annex 38 is "subject to" Article 496.<sup>1037</sup>

462. The Arbitration Tribunal has difficulty with this interpretation. First, this interpretation does not acknowledge Article 500(8) of the TCA, according to which Article 500 (including Article 500(2)) is subject to Annex 38. Second, the Arbitration Tribunal agrees with the European Union that the fact that the sandeel fishing prohibition was adopted during the adjustment period means that the terms and rationale of Annex 38 to the TCA must also be taken into consideration when determining the scope of the regulatory autonomy of the United Kingdom to adopt a fisheries management measure.<sup>1038</sup> Third, the interpretation offered by the United Kingdom would read Annex 38 out of the TCA.
463. In further support of its interpretation of the TCA, the United Kingdom suggested that the reference in Article 497(1) to "access to fish" (with respect to authorisations to fish) and the reference in Article 497(2) to the requirement that each Party "shall take all necessary measures to ensure compliance by its vessels with the rules [...]" means that access to waters is subject to or qualified by "measures".<sup>1039</sup> If what was meant by this comment is that a Party that is accorded access to the waters of the other Party to fish must ensure compliance by its vessels with the conservation measures adopted by that other Party, the Arbitration Tribunal agrees. That is consistent with the provisions of UNCLOS. The United Kingdom also suggested that "where conservation measures are agreed or decided upon, the effect of them is to qualify any access to waters to fish granted under the TCA".<sup>1040</sup> Again, if what is meant by this is that access to the waters of the other Party to fish must be undertaken in compliance with the conservation measures adopted by that other Party, the Arbitration Tribunal agrees. However, the Arbitration Tribunal does not agree that Article 497 provides any assistance in considering the extent of the regulatory autonomy of a Party.
464. The Arbitration Tribunal notes that Annex 38 is an integral part of Heading Five of Part Two of the TCA and that this is stated clearly in Article 778(1) and Article 778(2) of the TCA. As a result, the provisions of Heading Five should be read together with Annex 38.<sup>1041</sup> It is worth recalling

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<sup>1036</sup> UK's Responses to Questions, p. 4.

<sup>1037</sup> Hearing, 29 January 2025, 148:19-20 (Westaway); Hearing, 30 January 2025, 78:3-7 (Westaway).

<sup>1038</sup> EU's Replies to the UK's Responses to Questions, para. 22.

<sup>1039</sup> Hearing, 29 January 2025, 147:2-10 (Westaway).

<sup>1040</sup> Hearing, 29 January 2025, 146:24-147:1 (Westaway).

<sup>1041</sup> Hearing, 28 January 2025, 191:23-25 (Gauci).



that prior to the conclusion of the TCA, the United Kingdom was a member of the European Union to which the Common Fisheries Policy applied.<sup>1042</sup> On withdrawing from the European Union, the Parties agreed to establish a process by which each Party would grant vessels of the other Party access to fish at a level and under conditions agreed in annual consultations.<sup>1043</sup> The Parties also agreed on an ‘adjustment period’ for fisheries access which is set out in Annex 38. The object of the ‘adjustment period’ was to allow “a further period of stability”, during which fishers would be permitted until 30 June 2026 to continue to access the waters of the other Party as before the entry into force of the TCA.<sup>1044</sup> Articles 2(2) and 2(3) of Annex 38, which refer to notification of any change to the level and conditions of access from 1 July 2026, illustrate that the legal framework for access to fish will change after the end of the adjustment period. The Parties also agreed, in the TCA, to jointly review the implementation of Heading Five four years after the end of the adjustment period referred to in Annex 38, and at subsequent four year intervals.<sup>1045</sup>

465. The Arbitration Tribunal does not subscribe to the view of the United Kingdom that Annex 38 is an “administrative arrangement”,<sup>1046</sup> if by that is meant an arrangement that is not binding on the Parties. Annex 38 is clearly binding on the Parties.
466. Annex 38 first affirms in Recital 1 the sovereign rights and obligations of independent coastal States exercised by the Parties. Annex 38 then sets out the agreement of the Parties to grant specific rights of access to each other’s waters during the adjustment period. The Parties also agreed that, in accordance with Article 496(1), a Party may apply fisheries management measures in its waters, provided that in doing so, it complies with the disciplines set out in Article 494 and Article 496 of the TCA. Annex 38 operates within the framework of a need for cooperation between the Parties, which is expressly provided for both in Article 494 of Heading Five and in Article 1 of the TCA which sets out the purpose of the TCA.
467. The Arbitration Tribunal considers that Article 496 does not nullify Annex 38 and does not mean that a Party has completely unfettered regulatory autonomy in respect of the fisheries management measures within its waters. Indeed, this is a point which is accepted by the United Kingdom.<sup>1047</sup>

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<sup>1042</sup> Hearing, 28 January 2025, 5:19-21 (Dawes).

<sup>1043</sup> Article 500 of the TCA.

<sup>1044</sup> Recital 3 to Annex 38 to the TCA.

<sup>1045</sup> Article 510 of the TCA.

<sup>1046</sup> Hearing, 29 January 2025, 190:19-23 (Westaway).

<sup>1047</sup> Hearing, 30 January 2025, 79:14-18 (Westaway).

However, it does mean that the measures that derogate from the right of full access to waters to fish during the adjustment period must be decided on and applied in a manner that is consistent with the disciplines set out in the TCA. The Arbitration Tribunal agrees with the European Union that the requirements laid down in Article 494, Article 496 and Annex 38 to the TCA are important limits to the exercise of regulatory autonomy to adopt fisheries management measures.<sup>1048</sup>

### 3. Standard of Review

468. Pursuant to Article 742 of the TCA, the Arbitration Tribunal must “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity of the measures at issue with, the covered provisions.”

469. The question of the standard of review has occasioned a divergence of view between the Parties in the application of the standard to the specific claims in this dispute. This is considered further with respect to each of the claims of the European Union and is set out in those sections.

### 4. Burden of Proof

470. The starting point for consideration of the burden of proof is the principle *actori incumbit (onus) probatio*, which encapsulates the notion that a party shall have the burden of proving facts relied upon to support its claim or defence.<sup>1049</sup> This is reflected in para. 8.1 of Procedural Order No. 1: “Each Party shall have the burden of proving the facts relied on to support its claim or defence.” The Parties agree on this burden.<sup>1050</sup>

471. Apart from this, there is some difference of view between the Parties as to how the Arbitration Tribunal should understand the burden of proof in these proceedings. The Parties agree that under international law, States are presumed to act in good faith and States are not presumed to have breached their international obligations.<sup>1051</sup> Therefore, the European Union has to establish its claims that the measure at issue breaches the commitments of the United Kingdom under the TCA.<sup>1052</sup> The Parties also agree that to the extent that the United Kingdom seeks to argue that some other rule permitted or justified the measure or advances a defence, then it will be for the

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<sup>1048</sup> EU’s Supplementary Written Submission, para. 6.

<sup>1049</sup> EU’s Written Submission, para. 392 *citing Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Judgment, I.C.J. Reports 2010, p. 14 at p. 71, para. 162 (**Exhibit CLA-29**).

<sup>1050</sup> UK’s Written Submission, para. 194; Hearing, 30 January 2025, 40:6-9 (Juratowitch).

<sup>1051</sup> Hearing, 30 January 2025, 37:9-12 (Juratowitch); EU’s Responses to Questions, para. 25.

<sup>1052</sup> EU’s Responses to Questions, para. 26; Hearing, 30 January 2025, 37:12-17 (Juratowitch).

United Kingdom to establish that the rule relied upon provides it with a justification or a defence.<sup>1053</sup> Where the Parties differ is over whether the present proceedings should take into account the WTO Appellate Body's decision in *Wool Shirts and Blouses* where it stated that: "If [a] party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".<sup>1054</sup>

472. The European Union argues that the WTO Appellate Body in reaching its decision had regard, *inter alia*, to the position that has been expressed by the ICJ.<sup>1055</sup> As to the meaning of a *prima facie* case, the European Union considers that this requires a complainant to raise a presumption that what is claimed is correct, based on evidence and legal argument put forward in relation to each of the elements of the claims.<sup>1056</sup> On the other hand, the United Kingdom contends that the European Union reads too much into the discussion in the *Wool Shirts and Blouses* case.<sup>1057</sup> It argues that the burden of the European Union cannot be discharged by resorting to a *prima facie* standard. The burden is on the European Union to establish its claims.<sup>1058</sup>
473. The burden of proof provides a regime of rules of application to decisions by the Arbitration Tribunal concerning its findings of fact, in the face of uncertainty that arises from the evidence adduced by the Parties. The well understood rule, set out in para. 8.1 of Procedural Order No. 1, and its proper application, suffice for the Arbitration Tribunal to decide the dispute referred to it. The evidence on record provides a sufficient basis for the Arbitration Tribunal to decide the issues of fact relevant to a final determination of the European Union's claims. The Arbitration Tribunal apprehends no need to have recourse to the further rule enunciated in the WTO Appellate Body decision in *Wool Shirts and Blouses*. The Arbitration Tribunal therefore does not consider it necessary to make a determination as to whether the Appellate Body ruling in *Wool Shirts and Blouses* is a correct statement of law of application in these proceedings.

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<sup>1053</sup> EU's Responses to Questions, para. 27; Hearing, 30 January 2025, 37:25-38:8 (Juratowitch).

<sup>1054</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323, quoted in EU's Responses to Questions, para. 28; *see also* Hearing, 28 January 2025, 32:9-13 (Dawes).

<sup>1055</sup> EU's Responses to Questions, para. 28.

<sup>1056</sup> EU's Responses to Questions, para. 29.

<sup>1057</sup> UK's Replies to the EU's Responses to Questions, p. 3.

<sup>1058</sup> Hearing, 30 January 2025, 38:18-21 (Juratowitch).

### C. BEST AVAILABLE SCIENTIFIC ADVICE CLAIM

474. The European Union contends that the sandeel fishing prohibition is inconsistent with the United Kingdom's obligations under Articles 496(1) and (2) of the TCA, read together with Article 494(3)(c) of the TCA, because it is not "based" on the "best available scientific advice".<sup>1059</sup> This is disputed by the United Kingdom.<sup>1060</sup>

#### 1. Applicable Legal Standard

475. The Parties agree that Article 496 and Article 494(3)(c) of the TCA set out an obligation on the Parties to base their fisheries management measures on the best available scientific advice.

476. The Arbitration Tribunal will consider first the interpretation of "based" on the "best available scientific advice" and, in particular, the meaning of "scientific advice" and "best available" scientific advice. It will then turn to the standard of review and the application of the applicable legal standard to the issue before it.

#### (a) *The Meaning of "Based on" the "Best Available Scientific Advice"*

477. The Parties agree that "to base" means to "place on a foundation of".<sup>1061</sup> In the words of the European Union, conservation and management decisions "are to be placed on a foundation of the best available scientific advice which is to serve as the underlying basis of these decisions".<sup>1062</sup> The Arbitration Tribunal agrees with this interpretation.

478. The Parties are also in agreement that "based on" the best available scientific advice does not mean that the measure must "conform to" that advice.<sup>1063</sup> They also accept that there must be a rational or objective relationship between the measure and the advice in order for a Party to have based the measure on the advice.<sup>1064</sup>

479. The question arises as to the extent to which a decision-maker may have regard to factors other than scientific advice, in deciding on conservation and management measures. The Arbitration Tribunal notes that Article 496(2) expressly obliges a Party to base its measures on the best

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<sup>1059</sup> EU's Written Submission, paras 398-512.

<sup>1060</sup> UK's Written Submission, paras 203-317.

<sup>1061</sup> EU's Written Submission, paras 306-308, 314; UK's Written Submission, para. 215.

<sup>1062</sup> EU's Written Submission, para. 307.

<sup>1063</sup> EU's Responses to Questions, para. 38; UK's Written Submission, para. 220.

<sup>1064</sup> Hearing, 28 January 2025, 92:23-24 (Dr. Hofstötter); UK's Responses to Questions, p. 6.

available scientific advice. However, Article 496(2) should be read in the context of Article 494(3) which provides that a Party shall have regard to various listed principles, including basing decisions on the best available scientific advice. The Parties are in agreement that while Article 496(2) gives a certain weight to basing measures on the best available scientific advice, other relevant factors may be considered and weighed together with the best available scientific advice.<sup>1065</sup>

**(b) *The Meaning of “Scientific Advice”***

480. The Arbitration Tribunal will examine the meaning of “scientific” “advice” and address the question of whether there are certain attributes of “scientific advice” that can be gleaned from the ordinary meaning of the words in their context, and in light of the object and purpose of the TCA.
481. The Arbitration Tribunal agrees with the United Kingdom that the ordinary meaning of “scientific” is “1. relating to or based on science. 2. systematic; methodical”.<sup>1066</sup> The European Union cites the Oxford English Dictionary definition of “scientific”,<sup>1067</sup> but does not disagree with the description suggested by the United Kingdom.
482. The European Union argued in its submissions that scientific advice must be supported by the most recent available scientific data,<sup>1068</sup> and derived from rigorous scientific methods,<sup>1069</sup> that it must be publicly available,<sup>1070</sup> and that scientific bodies are best placed to provide such advice.<sup>1071</sup> In that regard, the European Union referred to Article 494(3)(c), according to which the best available scientific advice is to be “principally” that of ICES. This means, according to the European Union, that ICES advice should be the main base for conservation and management measures.<sup>1072</sup> However, the Parties agree that while the TCA gives a particular role to ICES, this does not preclude reliance on scientific advice from other scientific bodies, including national

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<sup>1065</sup> UK’s Written Submission, paras 218-219, *citing* ITLOS, *Advisory Opinion on Climate Change*, Advisory Opinion, 21 May 2024, para. 212 (**Exhibit CLA-21**); EU’s Responses to Questions, para. 38.

<sup>1066</sup> UK’s Written Submission, para. 211, *citing* Concise Oxford English Dictionary (12<sup>th</sup> edn), “scientific, adj” (**Exhibit R-138**).

<sup>1067</sup> EU’s Written Submission, para. 407.

<sup>1068</sup> EU’s Written Submission, para. 461; Hearing, 28 January 2025, 47:21-48:10 (Dr. Hofstötter).

<sup>1069</sup> EU’s Written Submission, para. 461.

<sup>1070</sup> EU’s Written Submission, para. 464.

<sup>1071</sup> EU’s Written Submission, para. 465.

<sup>1072</sup> EU’s Written Submission, para. 415.

scientific bodies.<sup>1073</sup> Nevertheless, in the view of the European Union, advice from ICES has certain qualities which qualify its advice as the best available scientific advice, namely scientific objectivity and integrity, quality assurance, including peer review as appropriate, and transparency.<sup>1074</sup> In its view, this has the corollary that where a scientific body, on whose advice a measure is based, has these same qualities as ICES, the advice that emanates from that body is in accordance with the requirements of scientific rigour, and could therefore be considered the best available scientific advice.<sup>1075</sup> However, the European Union also considered that the lack of any one of these essential attributes, for example peer review, does not necessarily render the advice not scientific.<sup>1076</sup>

483. The United Kingdom does not support what it terms “an elaborate approach” of the European Union.<sup>1077</sup> The United Kingdom rejects the proposition of the European Union that scientific advice should be supported by the most recent available scientific data.<sup>1078</sup> Indeed the United Kingdom rejects the notion that “scientific advice” should have any particular characteristics,<sup>1079</sup> or that there should be an objective yardstick for a consideration of what is “scientific”.<sup>1080</sup> It also disagrees with the European Union that the “essential attributes” of the advice provided by ICES informs “scientific or methodological rigour” or that ICES sets an objective benchmark for what constitutes “scientific advice”.<sup>1081</sup>

484. There is, however, some agreement between the Parties. The European Union submitted that “scientific advice” must respect the criterion of “scientific and methodological rigour”.<sup>1082</sup> During the oral hearing, the United Kingdom agreed that something needs to be systematic and

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<sup>1073</sup> UK’s Written Submission, para. 213; Hearing, 28 January 2025, 44:8-17 (Dawes).

<sup>1074</sup> Hearing, 28 January 2025, 63:16-64:4-24 (Dr. Hofstötter); EU’s Responses to Questions, paras 47-50, *citing* ICES, Technical Guidelines – Technical Services meaning, 16 December 2016, p. 1 (**Exhibit C-54**).

<sup>1075</sup> Hearing, 28 January 2025, 64:15-23 (Dr. Hofstötter).

<sup>1076</sup> EU’s Responses to Questions, para. 50.

<sup>1077</sup> Hearing, 29 January 2025, 65:12-22; 68:20-23 (Juratowitch).

<sup>1078</sup> UK’s Written Submission, paras 203, 203.3.

<sup>1079</sup> UK’s Written Submission, para. 211.1.

<sup>1080</sup> Hearing, 29 January 2025, 74:9-17 (Juratowitch).

<sup>1081</sup> UK’s Replies to the EU’s Responses to Questions, p. 4.

<sup>1082</sup> EU’s Written Submission, para. 466; EU’s Responses to Questions, para. 47.

methodical in order to qualify as science,<sup>1083</sup> and indicated that it “does not have any particular objection to methodological rigour being required”.<sup>1084</sup>

485. The Arbitration Tribunal agrees with the European Union that some precision is required as to the meaning of “scientific advice”. It does not find the proposition that scientific advice must be “based on science”, as suggested by the United Kingdom,<sup>1085</sup> particularly useful because it fails to give content to the essential attributes as to what renders advice scientific, rather than some other kind of advice. The Arbitration Tribunal does, however, agree that according to the ordinary meaning of “scientific”, scientific advice should have a sound basis in science. This is supported by the context of the TCA, particularly the FAO Code of Conduct, of which Article 12.1, first sentence, provides: “States should recognize that responsible fisheries require the availability of a sound scientific basis to assist fisheries managers and other interested parties in making decisions”. The Parties are in agreement that scientific advice should also display methodological rigour. Such methodological rigour is situated within a scientific discipline. In addition, in the context of the reference in Article 494(3)(c) to scientific advice being “principally” that of ICES, the Arbitration Tribunal considers that scientific advice must be scientifically objective and transparent, in the sense of being open to scrutiny and corroboration.
486. In the view of the Arbitration Tribunal, there must also be a clear link between the scientific advice and the scientific evidence on which it is based. The Parties agree that scientific advice must have its foundation in scientific evidence.<sup>1086</sup> For the European Union, this means that where advice fails to have regard to key observations in the existing scientific evidence, it is not founded on the best available evidence.<sup>1087</sup> The Parties agree that “advice” may consist of different, individual items of scientific evidence which collectively are relied upon as the basis for a measure.<sup>1088</sup> They also agree that what has to be evaluated is whether that evidence, “assessed holistically” can qualify as the “best available scientific advice”.<sup>1089</sup> The Arbitration Tribunal considers that there is a difference between scientific advice, and the scientific evidence on which

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<sup>1083</sup> Hearing, 29 January 2025, 65:14-16 (Juratowitch).

<sup>1084</sup> Hearing, 29 January 2025, 72:16-17 (Juratowitch).

<sup>1085</sup> Hearing, 29 January 2025, 65:13-14 (Juratowitch).

<sup>1086</sup> Hearing, 29 January 2025, 34:13-16 (Juratowitch); EU’s Replies to the UK’s Responses to Questions, para. 108.

<sup>1087</sup> EU’s Replies to the UK’s Responses to Questions, para. 108.

<sup>1088</sup> EU’s Written Submission, para. 478; Hearing, 29 January 2025, 34:2-5 (Juratowitch); EU’s Responses to Questions, para. 51.

<sup>1089</sup> EU’s Written Submission, para. 478; Hearing, 29 January 2025, 34:5-11 (Juratowitch).

advice is based, and it does not seek to treat them synonymously, as does the European Union.<sup>1090</sup> There is, nevertheless, apparent agreement between the Parties that scientific evidence forms the foundation for scientific advice, and that scientific advice must therefore be evidence-based.

487. In the view of the Arbitration Tribunal, scientific advice should therefore be scientifically objective, transparent, evidence-based, and have methodological rigour within a scientific discipline. The Arbitration Tribunal recognises that there may also be other characteristics of “scientific advice”, depending on the context, but the attributes identified are the ones that are salient for the resolution of this dispute.

**(c) *The Meaning of “Best Available”***

488. The Parties are in agreement that “best” is a superlative,<sup>1091</sup> and that it entails a comparative assessment of the “available advice”.<sup>1092</sup> The Arbitration Tribunal agrees that although “best” and “available” are separate notions,<sup>1093</sup> “best” should be read in the context of “available advice” and not in the absolute sense of the best possible.<sup>1094</sup> That is to say, “best” is a comparative judgment decided upon in relation to the advice that is available.
489. The European Union contends that as a superlative, “best” indicates that it is a stringent standard,<sup>1095</sup> a high threshold,<sup>1096</sup> and that it implies that scientific advice must be based on robust methods.<sup>1097</sup> The Arbitration Tribunal has already concluded that “scientific advice” must have certain attributes including methodological rigour and that “best” should be read in the context of “available advice”, not the “best” in the sense of advice that could in a perfect world be available. Rather than have recourse to adjectival descriptions such as “stringent”, it is perhaps more helpful, as the Arbitration Tribunal has sought to do, to identify the essential attributes of what renders advice scientific, and what comparative judgment is required to qualify as “best” available scientific advice.

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<sup>1090</sup> EU’s Written Submission, para. 460.

<sup>1091</sup> Hearing, 28 January 2025, 45:19 (Dawes).

<sup>1092</sup> UK’s Written Submission, para. 203; EU’s Responses to Questions, paras 36-37.

<sup>1093</sup> EU’s Responses to Questions, para. 37.

<sup>1094</sup> Hearing, 29 January 2025, 80:10-11 (Juratowitch).

<sup>1095</sup> EU’s Written Submission, para. 462.

<sup>1096</sup> Hearing, 28 January 2025, 45:20 (Dr. Hofstätter).

<sup>1097</sup> EU’s Written Submission, para. 414.



490. The Parties differ on the interpretation to be given to “available”. In its Written Submission, the European Union interpreted “available” as “able to be used” or “at one’s disposal”.<sup>1098</sup> The United Kingdom agreed with this interpretation but went on to submit that “available” means that the advice was in existence at the time the measure was decided upon.<sup>1099</sup> The European Union, referring to the Virginia Commentary,<sup>1100</sup> and the FAO Code of Conduct,<sup>1101</sup> considers that “available advice” extends to advice that could reasonably have been obtained at that time based on existing scientific evidence.<sup>1102</sup> During the oral hearing, the United Kingdom conceded that theoretically “available” may also extend to advice that could be easily and quickly obtained to provide a fuller picture.<sup>1103</sup> The European Union noted that the United Kingdom therefore “accepts that ‘available’ does not exclude that Parties have to make a degree of effort to obtain advice that does not exist at the time the measure is under consideration, based on existing scientific evidence”.<sup>1104</sup>
491. The Arbitration Tribunal agrees with the European Union that the term “available scientific advice” is not limited to advice that exists at the time a measure is under consideration, but extends to advice which could reasonably have been obtained at that point in time.<sup>1105</sup> This approach is consistent with the international rules relating to the law of the sea which do not refer to “advice” as such, but “best scientific evidence available” on which advice is based. The Arbitration Tribunal points in particular to Article 12.1 of the FAO Code of Conduct which provides that States should recognise that responsible fisheries management requires the availability of a sound scientific basis and that therefore they should ensure that appropriate research is conducted on all aspects of fisheries.<sup>1106</sup> This suggests that “available scientific advice” and the evidence on which the advice is based is not necessarily limited to that existing at the time a measure is under consideration. This is not to suggest, however, that no fisheries management measures can be taken until the best scientific evidence or advice is available or obtainable.<sup>1107</sup> Rather, it is simply

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<sup>1098</sup> EU’s Written Submission, para. 409.

<sup>1099</sup> UK’s Written Submission, para. 207.

<sup>1100</sup> Volume 3: *United Nations Convention on the Law of the Sea 1982: A Commentary* 702-29 (Nordquist *et al.*, eds. 1995), pp. 310-311, para. 119.7(c) (**Exhibit R-136**).

<sup>1101</sup> FAO Code of Conduct (**Exhibit CLA-33**).

<sup>1102</sup> EU’s Responses to Questions, para. 34; Hearing, 28 January 2025, 46:5-7 (Dr. Hofstötter).

<sup>1103</sup> Hearing, 29 January 2025, 81:1-6 (Juratowitch).

<sup>1104</sup> EU’s Replies to the UK’s Responses to Questions, para. 57.

<sup>1105</sup> EU’s Responses to Questions, para. 37.

<sup>1106</sup> FAO Code of Conduct (**Exhibit CLA-33**).

<sup>1107</sup> UK’s Written Submission, paras 208-209.

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 improve the quality or value of the advice that exists.

492. A further issue arose during the oral hearing on which the Parties diverge. The United Kingdom argued that in order to challenge a fisheries management measure, a Party must adduce its own scientific evidence to demonstrate that the respondent’s measure was not based on the “best available scientific evidence” and failure to do so was dispositive of the claim.<sup>1108</sup> The European Union countered that it had pointed to flaws in the scientific advice relied upon, and that the Arbitration Tribunal “may assess the consistency of the sandeel fishing prohibition with the obligation to base measures on the best available scientific advice on the basis of those [...] valid criticisms”.<sup>1109</sup>
493. The Arbitration Tribunal considers that conceptually there is a distinction between two types of claims that can be made alleging a breach of the requirement to base fisheries management measures on “best available scientific advice”. The first is where a complainant maintains that advice is not “best available scientific advice”, and to demonstrate this, comparable “better” advice is shown, or more compelling evidence is shown that would have led to better advice. The other situation is where a complainant argues that the scientific advice relied upon is deeply flawed on its own terms, and because of those flaws, the advice cannot be the “best available”. In the first situation, “better” advice or more compelling evidence could be shown to demonstrate that the advice is not “best available scientific advice”. In respect of the second kind of challenge, the complainant would have to show that the level of faultiness in the advice is very clear. In such a circumstance, the notion of “best available scientific advice” permits a challenge to advice that is irredeemably flawed and therefore, the advice could not be “best available scientific advice”.
494. The Arbitration Tribunal considers that in the latter situation, a complainant is not required to adduce competing scientific advice that it postulates is “better” scientific advice in order to challenge the consistency of a measure under Article 496(2) of the TCA. In this, the Arbitration Tribunal agrees with the European Union.<sup>1110</sup> In particular, a complainant is not required to develop and run an alternative ecosystem model in order to demonstrate that advice based on an ecosystem model is not “best available scientific advice”. However, the complainant will have to show that the material flaws in the scientific advice fail to meet the required standard of “best

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<sup>1108</sup> Hearing, 29 January 2025, 2:1-5; 81:16-82:1 (Juratowitch).

<sup>1109</sup> Hearing, 30 January 2025, 9:20-10:2 (Norris).

<sup>1110</sup> EU’s Supplementary Written Submission, para. 25.

available scientific advice”. For the purposes of assessing the European Union’s challenge, therefore, the Arbitration Tribunal will assess the European Union’s claims on the basis of the arguments and evidence on the record.

**(d) *Relevance of the Precautionary Approach***

495. An issue has arisen over the relationship between the best available scientific advice and the precautionary approach to fisheries management. Article 494(1)(b) of the TCA defines “precautionary approach to fisheries management” as:

An approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment.

496. Article 494(3)(a) includes “applying the precautionary approach to fisheries management” as one of the nine principles to which the Parties shall have regard in deciding on any fisheries management measures applicable in its waters under Article 496(1).

497. The European Union considers that the precautionary approach “should be applied only if the best available scientific advice leaves room for uncertainty”.<sup>1111</sup> It agrees with the United Kingdom that where scientific information is adequate, the precautionary approach to fisheries management cannot be engaged.<sup>1112</sup> However, the European Union goes on to state that the precautionary approach cannot apply “where a Party omits to base its measure on advice that it could reasonably have been obtained at the time the measure was under consideration”.<sup>1113</sup>

498. The United Kingdom contends that if a measure was not based on adequate scientific information, it would still be justified by reference to the precautionary approach, even with that inadequacy.<sup>1114</sup> The United Kingdom accepted, however, that one could not in good faith apply the precautionary approach if the situation is one in which the absence of adequate scientific information is caused by an affirmative decision not to seek readily available information.<sup>1115</sup>

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<sup>1111</sup> EU’s Responses to Questions, para. 44.

<sup>1112</sup> EU’s Replies to the UK’s Responses to Questions, para. 98.

<sup>1113</sup> EU’s Replies to the UK’s Responses to Questions, para. 99.

<sup>1114</sup> Hearing, 29 January 2025, 103:1-6 (Juratowitch).

<sup>1115</sup> Hearing, 29 January 2025, 106:12-15 (Juratowitch).

499. The European Union disputes that the precautionary approach can be a “fallback” where a Party omits to base its measure on advice that it could reasonably have obtained.<sup>1116</sup>
500. The Arbitration Tribunal agrees that the precautionary approach to fisheries management can be applied where there is uncertainty arising from scientific information or where there is not sufficient adequate scientific information. However, it does not consider that it is necessary at this stage to determine whether the precautionary approach to fisheries management can be a “fallback” to “cure” deficiencies in the scientific advice on which a measure is based. This question only arises if the fisheries management measure is not “based on best scientific advice available”. The Arbitration Tribunal will return to this issue, if necessary, following the analysis of the challenge to best available scientific advice. At this stage, the Arbitration Tribunal does not consider it necessary further to consider the Parties’ submissions on the precautionary approach.

## **2. Standard of Review**

501. The Parties share certain views as to the standard of review that the Arbitration Tribunal should adopt in its analysis of whether the sandeel fishing prohibition is “based on the best available scientific advice”. However, they differ as to the extent of the inquiry the Arbitration Tribunal should undertake.
502. The Parties are in agreement that the Arbitration Tribunal does not need to engage in any review of the merits of the underlying scientific information,<sup>1117</sup> present its own scientific judgement,<sup>1118</sup> resolve scientific controversies,<sup>1119</sup> or “conclusively assess” the scientific evidence.<sup>1120</sup> The Arbitration Tribunal agrees.
503. On the other hand, the European Union contends that the Arbitration Tribunal should consider “whether the evidence has the methodological rigour required in order to be considered the ‘best available scientific advice’”.<sup>1121</sup> The European Union went on to suggest that the Arbitration Tribunal may scrutinise the design and implementation of a measure to determine whether it

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<sup>1116</sup> Hearing, 30 January 2025, 11:14-20 (Norris); EU’s Responses to Questions, para. 172; EU’s Replies to the UK’s Responses to Questions, para. 94.

<sup>1117</sup> UK’s Written Submission, para. 214.

<sup>1118</sup> EU’s Written Submission, para. 455; Hearing, 30 January 2025, 104:5-6 (Norris).

<sup>1119</sup> UK’s Written Submission, para. 214; Hearing, 30 January 2025, 105:20-23 (Juratowitch),

<sup>1120</sup> EU’s Written Submission, para. 466.

<sup>1121</sup> EU’s Written Submission, para. 466.

respects the obligations in the TCA.<sup>1122</sup> This includes considering the degree to which the scientific advice supports the measure that has been adopted.<sup>1123</sup> To the contrary, the United Kingdom asserts that the inquiry of the Arbitration Tribunal does not require it to evaluate the degree to which the scientific advice supports the measures.<sup>1124</sup> Rather, the Tribunal needs to consider the science so far as necessary to determine whether it is the “best available”.<sup>1125</sup>

504. In determining whether the measure is “based on the best available scientific advice”, the Arbitration Tribunal must assess whether there is a rational or objective relationship between the measure and the scientific advice. The Arbitration Tribunal may also have to consider whether the advice upon which the measure is based constitutes best scientific advice. The Arbitration Tribunal has set out above the essential attributes that make advice scientific. Neither exercise requires or indeed permits the Arbitration Tribunal to offer advice of its own, nor may the Arbitration Tribunal engage in a speculative exercise as to how it would have gone about procuring advice and determining a measure that is thereby adequately based upon such advice. But the Arbitration Tribunal may be required, depending upon the challenge that is made, to determine whether the standard of what qualifies as scientific advice has been met, and whether a rational or objective relationship subsists between that advice and the measure such that the measure is objectively based on the evidential foundation of the advice.

### **3. Application of the Applicable Legal Standard**

505. The European Union does not challenge the ICES Technical Service, the Scottish Scientific Review, or the literature review contained in the Natural England/Cefas/JNCC Advice as not constituting “best available scientific advice”.<sup>1126</sup> The principal challenge is that the Natural England/Cefas/JNCC model contains alleged flaws which are such as to lead to the conclusion that it lacks scientific and methodological rigour and does not constitute “best available scientific advice”. The European Union also explains that its claim does not rest only on the “flaws and caveats” in the model used in the Natural England/Cefas/JNCC Advice.<sup>1127</sup> It submits that even if the scientific advice invoked by the United Kingdom constitutes the “best available scientific advice”, both the English and Scottish parts of the measure would not be based on the “best

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<sup>1122</sup> Hearing, 28 January 2025, 26:20-25 (Norris).

<sup>1123</sup> Hearing, 28 January 2025, 28:8-10 (Norris).

<sup>1124</sup> UK’s Written Submission, para. 214.

<sup>1125</sup> Hearing, 30 January 2025, 105:20-22 (Juratowitch).

<sup>1126</sup> EU’s Written Submission, para. 491.

<sup>1127</sup> EU’s Responses to Questions, para. 95.

available scientific advice” because there is no rational or objective relationship between the “scientific advice” and the full spatial scope of the measure, which covers all of the UK waters of the North Sea.<sup>1128</sup>

506. The European Union suggests that in the context of fisheries, scientific advice typically relies on large amounts of data and models may assist in arriving at “objectively verifiable and valid conclusions”.<sup>1129</sup> The United Kingdom disagrees with this characterisation and considers that modelling is a tool which can be used to try to assess and predict the impact of drivers on biodiversity and ecosystems and that they deal with a large number of parameters and uncertainties.<sup>1130</sup> Despite these differences, there is agreement between the Parties that the TCA does not require modelling for the purpose of “best available scientific advice”.<sup>1131</sup> And indeed the Scottish Literature Review, which the European Union agrees is “best available scientific advice” for the prohibition of sandeel fishing in Scottish waters, does not have recourse to modelling. However, the European Union argues that where such modelling is undertaken, it must be done on the basis of scientific and methodological rigour.<sup>1132</sup> In other words, it must have the essential attributes of what constitutes “scientific” advice.<sup>1133</sup> In the view of the European Union this means, in particular, that the modelling must be parameterised based on key observations from the scientific literature.<sup>1134</sup>
507. The European Union has identified a number of alleged flaws in the Natural England/Cefas/JNCC model used to simulate the impact of a full closure of UK waters to sandeel fishing. The Parties accept that any “flaws” in the Natural England/Cefas/JNCC Advice are subject to a requirement of materiality in that those flaws, assessed holistically, would need to make a material difference to the results.<sup>1135</sup> As the alleged flaws are the key point of departure for examination of this claim, the Arbitration Tribunal will commence its analysis with consideration of the modelling undertaken in the Natural England/Cefas/JNCC Advice.

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<sup>1128</sup> EU’s Responses to Questions, para. 95.

<sup>1129</sup> EU’s Written Submission, para. 413.

<sup>1130</sup> UK’s Written Submission, para. 211.3.4.

<sup>1131</sup> UK’s Written Submissions, paras 211.3.3 - 211.3.4; EU’s Responses to Questions, para. 88.

<sup>1132</sup> EU’s Responses to Questions, paras 88-90, 103-105.

<sup>1133</sup> EU’s Responses to Questions, paras 47-50.

<sup>1134</sup> EU’s Responses to Questions, para. 90.

<sup>1135</sup> EU’s Responses to Questions, para. 123; UK’s Responses to Questions, p. 29.

508. The Arbitration Tribunal will first set out its understanding of the 2015 EwE model of the North Sea and the process used in the Natural England/Cefas/JNCC Advice to update the 2015 model and run simulations. It will then consider the alleged flaws identified by the European Union before turning to the question of whether the sandeel fishing prohibition, including its constituent parts, was based on the best available scientific advice. In doing so it will assess whether there is a rational or objective relationship between the measure and the scientific advice on which it must be based.

**(a) *EwE Model in the North Sea and Its Update***

509. As explained by the United Kingdom, ecosystem modelling “seeks to represent all components of an ecosystem and their interconnected dependencies”.<sup>1136</sup> The initial EwE model of the North Sea, which was updated in the Natural England/Cefas/JNCC Advice, was developed by scientists Mackinson and Daskalov over the course of six years, peer-reviewed and published in 2007.<sup>1137</sup> In 2015, a version of this model was updated and calibrated using data from 1991 to 2013, reviewed by the ICES WGSAM and granted “Key Run” status. According to the ICES WGSAM: “A Key Run refers to a model parameterization and output that is agreed and accepted as a standard by the ICES WGSAM, and thus serves as a quality assured source for scientific input to ICES advice.”<sup>1138</sup>

510. In order to model the impact on the North Sea ecosystem of a closure of the waters of the United Kingdom to sandeel fishing, Natural England/Cefas/JNCC updated the 2015 EwE model of the North Sea by updating the underlying time series data.<sup>1139</sup> As indicated by the United Kingdom, the ICES WGSAM Report of 2015 included readily available data sources by which the model could be updated.<sup>1140</sup>

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<sup>1136</sup> UK’s Written Submission, para. 234.

<sup>1137</sup> Mackinson & Daskalov, *An Ecosystem Model of the North Sea to Support an Ecosystem Approach to Fisheries Management: Description and Parameterisation* (Science Series Technical Report No. 142, Cefas 2007), p. 9 (**Exhibit R-107**).

<sup>1138</sup> ICES, Report of the Working Group on Multispecies Assessment Methods (WGSAM), 9-13 November 2015, p. 40 and p. 104 (**Exhibit R-108**).

<sup>1139</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 21 (**Exhibit C-45**). According to the Natural England/Cefas/JNCC Advice, the EwE model of the North Sea was updated to 2020 with Driver time series: fishing effort and mortality and Calibration time series: catch and biomass.

<sup>1140</sup> UK’s Written Submission, para. 239.1; Hearing, 29 January 2025, 113:17-114:15 (Boileau).

511. The Parties differ as to whether this update resulted in the EwE model of the North Sea losing its Key Run status. The ICES WGSAM Report of 2015 contained a full description of the 2015 EwE model of the North Sea. This described the process undertaken to update and calibrate the 2007 EwE model of the North Sea.<sup>1141</sup> The Report notes that: “Where at all possible our intention in establishing a Key Run model was to avoid overcomplicating the model parameterisation – using readily available data and developing a process whereby the Key Run could be updated every few years.”<sup>1142</sup> This suggests that the Key Run could be updated with new data every few years. Indeed, according to the ICES WGSAM, “key runs are typically run every three years, or alternatively, when a substantive change is made to the model parameters, when sufficient new data becomes available, or when the previous key-run is deemed out of date”.<sup>1143</sup> The Arbitration Tribunal accepts that the EwE model of the North Sea used in the Natural England/Cefas/JNCC Advice was not the same as the EwE model that was granted Key Run status in 2015. There is no information on the record to suggest that a model that has been granted Key Run status would automatically be accorded the same status if the underlying data in the model were updated.<sup>1144</sup>
512. The updated EwE model was used to simulate a range of scenarios of sandeel depletion in the North Sea, ranging from 0% depletion in the North Sea (*i.e.*, no sandeel fishing in the entire North Sea) to 50% depletion of sandeel in the North Sea (*i.e.*, an increase in depletion from the current level of 20% sandeel depletion).<sup>1145</sup>
513. In order to simulate the impact of a reduction in sandeel fishing in UK waters, the Natural England/Cefas/JNCC Advice calculated a reference point for how much sandeel fishing in the entire North Sea might be expected to reduce as a result of a prohibition in UK waters.<sup>1146</sup> In doing so, one of the components of the model (fishing mortality on sandeel) was considered and the proportion of North Sea sandeel fishing taken from UK waters between 2003 and 2020 was

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<sup>1141</sup> ICES, Report of the Working Group on Multispecies Assessment Methods (WGSAM), 9-13 November 2015, Annex 6, pp. 102-206. (**Exhibit R-108**).

<sup>1142</sup> ICES, Report of the Working Group on Multispecies Assessment Methods (WGSAM), 9-13 November 2015, p. 172 (**Exhibit R-108**).

<sup>1143</sup> ICES, Report of the Working Group on Multispecies Assessment Methods (WGSAM), 9-13 November 2015, p. 41 (**Exhibit R-108**); EU’s Responses to Questions, para. 105(c); Hearing, 30 January 2025, 19:21-24 (Dawes).

<sup>1144</sup> See the process for acceptance of ‘key run’ status in ICES, Report of the Working Group on Multispecies Assessment Methods (WGSAM), 9-13 November 2015, pp. 40-41 (**Exhibit R-108**).

<sup>1145</sup> UK’s Written Submission, para. 239.3; UK’s Responses to Questions, p. 26.

<sup>1146</sup> UK’s Responses to Questions, p. 25.



calculated to arrive at an average of 58%.<sup>1147</sup> This reference point was used to simulate the effect on the North Sea ecosystem of the closure of UK waters to sandeel fishing.<sup>1148</sup>

514. The United Kingdom emphasised that this reference point was external to the EWE model for the North Sea, not a component of the model, nor a parameter of the model, an output of the model or data that is input into the model.<sup>1149</sup> According to the United Kingdom, the reference point (the 58% figure) was calculated in order to answer the question: “out of all the different levels of sandeel depletion that were simulated using the model, which is most likely to reflect the level of sandeel depletion that would result from a prohibition on sandeel fishing in UK waters”.<sup>1150</sup> In other words, according to the United Kingdom, it was used to assist in narrowing down which of the outputs of the model were relevant to the question under consideration.<sup>1151</sup>
515. A summary of the simulation results of the impact on the biomass of commercial stocks and functional groups in the North Sea was presented in Table 3 of the Natural England/Cefas/JNCC Advice, containing the biomass response to a prohibition in the North Sea, the biomass response to a prohibition in UK waters of the North Sea, and the confidence intervals for the biomass response to a prohibition in UK waters of the North Sea.<sup>1152</sup> Confidence intervals were given for the scenario of the biomass response to a prohibition of sandeel fishing in the UK waters of the North Sea, based on the average (58%), upper (73%) and lower (38%) proportions of landings taken from the EEZ of the United Kingdom between 2003 and 2020.<sup>1153</sup> Annex 2 of the Natural England/Cefas/JNCC Advice is a summary of the uncertainty associated with the simulated results, based on model parameter uncertainty.<sup>1154</sup> Table 7 of Annex 2 sets out the confidence intervals of the biomass response to a prohibition of sandeel fishing in UK waters of the North

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<sup>1147</sup> UK’s Written Submission, paras 239.2.

<sup>1148</sup> Hearing, 30 January 2025, 109:23-110:4 (Juratowitch).

<sup>1149</sup> Hearing, 29 January 2025, 121:5-8 (Boileau); Hearing, 30 January 2025, 114:5-13 (Juratowitch); UK’s Responses to Questions, p. 26.

<sup>1150</sup> UK’s Responses to Questions, p. 26.

<sup>1151</sup> UK’s Responses to Questions, p. 26.

<sup>1152</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 27, Table 3 (**Exhibit C-45**).

<sup>1153</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 27 (**Exhibit C-45**).

<sup>1154</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 27, 58, Annex 2 (**Exhibit C-45**).

Sea “based on average, lower, and upper estimates of the proportion of landings” from the United Kingdom EEZ.<sup>1155</sup> Table 7 shows that where the average landings proportion is used (58%), the confidence intervals for seabirds ranges from +6% to +8%.

**(b) *The Alleged Flaws in the EwE Model as Updated by Natural England/Cefas/JNCC***

516. The European Union has identified what it sees as four major flaws in the EwE model as updated by Natural England/Cefas/JNCC and the simulations generated based on that updated model arising from the way in which the model was parametrised by the United Kingdom, which in the view of the European Union lead to an overestimation of the results.<sup>1156</sup> These alleged flaws are as follows:<sup>1157</sup> (i) the assumptions made regarding fishing mortality;<sup>1158</sup> (ii) the aggregation of functional groups, in particular (a) aggregating sandeel according to its size/age structure and (b) aggregating seabird functional groups;<sup>1159</sup> (iii) not accounting for the spatial distribution of the predators, particularly seabirds and how this overlaps with the fishing grounds;<sup>1160</sup> and (iv) the assumption of a constant fishing pressure up until 2100.<sup>1161</sup>
517. With respect to this final alleged flaw, in the view of the European Union, the assumption in the ensemble model of a constant fishing pressure up until 2100 is a flaw because it fails to take into account the ICES escapement strategy for sandeel, which ensures that fishing pressure is reduced in years where the sandeel stock size is estimated to be lower.<sup>1162</sup> The United Kingdom responded to this argument by explaining the methodology used in ecosystem modelling, and in particular, the use of a modelling convention which allows for a comparison of ecosystem dynamics if the current sandeel fishing pressure were maintained, compared to a scenario in which sandeel fishing was to be prohibited.<sup>1163</sup> The United Kingdom suggested that the essence of the problem was that

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<sup>1155</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. 58-59, Annex 2 (**Exhibit C-45**).

<sup>1156</sup> EU’s Written Submission, paras 484-490; Hearing, 28 January 2025, 70:14-72:6 (Dr. Puccio).

<sup>1157</sup> These alleged flaws are presented in the order explained during the Hearing on 28 January 2025, 71:3-72:6 (Dr. Puccio) which are in a different order from those set out in the EU’s Written Submission.

<sup>1158</sup> EU’s Written Submission, para. 484.

<sup>1159</sup> EU’s Written Submission, paras 486 and 488. In the EU’s Written Submission this was split into two alleged flaws or caveats: EU’s Written Submissions, paras 487-489.

<sup>1160</sup> EU’s Written Submission, para. 489.

<sup>1161</sup> EU’s Written Submission, para. 485.

<sup>1162</sup> EU’s Written Submission, para. 485.

<sup>1163</sup> UK’s Written Submission, paras 283-285.

the European Union “had treated a standard modelling convention as if it were a prediction about fisheries management”.<sup>1164</sup>

518. The Arbitration Tribunal notes that the European Union has not expanded upon this alleged flaw (the assumption in the ensemble model of a constant fishing pressure up until 2100). The Arbitration Tribunal does not have sufficient evidence to be able to assess whether or not the assumption in the ensemble model of a constant fishing pressure up until 2100 is a flaw. The European Union has failed to prove that the assumption of constant fishing pressure is empirically unwarranted.

*(i) Fishing Mortality*

519. The EwE model of the North Sea updated and developed in the Natural England/Cefas/JNCC Advice was used to run scenarios of the potential impact of a closure of UK waters to sandeel fishing using data on the weight of sandeel landed within and outside the United Kingdom’s EEZ. This data was taken from data published by the STECF and split between sandeel landings from the United Kingdom EEZ and sandeel landings from the North Sea outside of the United Kingdom EEZ.<sup>1165</sup>
520. The European Union initially had difficulty with the calculation of the 58% reference point using data on landings from 2003 to 2020, whereas since 2011 the sandeel fishery in the North Sea was managed according to an escapement strategy.<sup>1166</sup> The United Kingdom showed in its Written Submission that even if a calculation of data on landings used the time period 2011-2020, there would be no material change to the 58% reference point.<sup>1167</sup>
521. The European Union responded by expressing concern as to the approach adopted by the United Kingdom, in that rather than comparing the average amount of sandeel caught in UK waters compared to total catches in the North Sea, the comparison was between the average amount of sandeel caught in UK waters to the average caught in EU and UK waters. No account was taken of Norwegian catches.<sup>1168</sup> Therefore, the European Union submits, the reference point for the

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<sup>1164</sup> Hearing, 29 January 2025, 143:6-9 (Boileau).

<sup>1165</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 9 (**Exhibit C-45**).

<sup>1166</sup> EU’s Written Submission, para. 484.

<sup>1167</sup> UK’s Written Submission, para. 282.1 and Table 2, p. 117.

<sup>1168</sup> EU’s Responses to Questions, paras 106-111.

simulations of the impact of a sandeel fishing prohibition in the waters of the United Kingdom (58%) underestimated the total sandeel catches in the North Sea and therefore overestimated the proportion of catch from UK waters.<sup>1169</sup> The European Union calculated that the correct reference point for the amount of sandeel catches in UK waters during the period (2011-2020) should have been 39%.<sup>1170</sup>

522. The United Kingdom explained that STECF data was used because it is not possible to calculate a reference point that took into account Norwegian catches because there is no publicly available information on the location of Norwegian catches.<sup>1171</sup> ICES data reports the total catch for EU, UK and Norwegian landings of sandeel caught in the North Sea, but not the location of those catches. The United Kingdom argues that the Natural England/Cefas/JNCC Advice uses actual historical data that was publicly available concerning where within the North Sea the United Kingdom and European Union catches have taken place from 2003 to 2020.<sup>1172</sup>
523. The European Union argues that this flaw, combined with other alleged flaws, deprives the Natural England/Cefas/JNCC model, and the simulations generated based on the model, of the necessary “methodological rigour” to be considered “reputable science”.<sup>1173</sup> The United Kingdom submits that the European Union “asserts without proving that non-inclusion of Norwegian catches would lead to an overestimation in the reference point”.<sup>1174</sup> The United Kingdom also notes that in any case, any such “limitation” identified by the European Union is not due to the model itself but to a factor external to the model which is used to simulate a prohibition of sandeel fishing in UK waters.<sup>1175</sup>
524. The United Kingdom repeated that the European Union has not explained how it has arrived at its posited 39% reference point.<sup>1176</sup> Indeed, it suggests that even using the method that it surmised was used by the European Union (*i.e.*, taking EU and UK landings from UK waters as a proportion of EU, UK and Norwegian landings from the North Sea), the United Kingdom arrived at a slightly

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<sup>1169</sup> Hearing, 28 January 2025, 72:2-74:2 (Dr. Puccio); EU’s Responses to Questions, para. 109.

<sup>1170</sup> Hearing, 28 January 2025, 74:2-18 (Dr. Puccio).

<sup>1171</sup> UK’s Responses to Questions, p. 27.

<sup>1172</sup> UK’s Responses to Questions, p. 27.

<sup>1173</sup> EU’s Responses to Questions, para. 112.

<sup>1174</sup> UK’s Replies to the EU’s Responses to Questions, p. 11.

<sup>1175</sup> Hearing, 29 January 2025, 117:16-23 (Boileau); UK’s Responses to Questions, pp. 24-25.

<sup>1176</sup> UK’s Replies to the EU’s Responses to Questions, p. 11.

different figure (41%) than the 39% figure posited by the EU.<sup>1177</sup> The United Kingdom contends that without knowing precisely where Norwegian vessels caught sandeel in the North Sea, it is not possible to calculate a reference point that accounts for Norwegian catches.<sup>1178</sup> If the European Union figures were used, an assumption would have to be made that 100% of Norwegian catches occurred outside the EEZ of the United Kingdom.<sup>1179</sup>

525. In its responses to questions from the Arbitration Tribunal, the European Union referred the Arbitration Tribunal to Table 9.1.1 of Exhibit R-238.<sup>1180</sup> This is a 2024 ICES Report of the Herring Assessment Working Group (HAWG) and Table 9.1.1, at pages 549-550, is a table of official sandeel catches by year and by country for FAO Statistical Areas 27.4 and 27.3.a (which cover the North Sea). It does not disaggregate according to where the catches are taken. The following table, Table 9.1.2, in the same document is a table of the total catch (tonnes) by year and by sandeel management area as estimated by ICES.<sup>1181</sup> However, that table does not disaggregate by country of catch.
526. It is not clear to the Arbitration Tribunal how the European Union calculated a 39% reference point which took into account Norwegian catches nor how the United Kingdom calculated a possible revised 41% reference point. ICES Table 9.1.1, to which the European Union referred the Arbitration Tribunal, disaggregates sandeel catches in the North Sea by fishing country but not by sandeel management area. The Arbitration Tribunal has no information on how the European Union calculated catches from UK waters using this Table.
527. It is also not clear to the Arbitration Tribunal why the Natural England/Cefas/JNCC Advice did not use alternative data and calculations which would have taken into account Norwegian catches. The European Union pointed to ICES data which might have been used and there is also evidence on the record showing total average catches in sandeel management areas in the North Sea, which are available from ICES.<sup>1182</sup>
528. The Arbitration Tribunal recalls that it has identified certain attributes of what constitutes “scientific advice”, including methodological rigour, and that it may determine whether the

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<sup>1177</sup> UK’s Responses to Questions, pp. 27-28, n. 9.

<sup>1178</sup> UK’s Replies to the EU’s Responses to Questions, p. 11.

<sup>1179</sup> UK’s Responses to Questions, p. 28.

<sup>1180</sup> EU’s Responses to Questions, para. 111, n. 19.

<sup>1181</sup> ICES, Report of the Herring Assessment Working Group (HAWG), 2024, pp. 550-553 (**Exhibit R-238**).

<sup>1182</sup> See ICES, Report of the Herring Assessment Working Group (HAWG), 2024, Table 9.1.2 (**Exhibit R-238**).

standard of what qualifies as scientific advice has been met. The existence of data on sandeel catches in the sandeel management areas of the North Sea, and the exclusion of Norwegian catches from the data of North Sea sandeel catches used in the Natural England/Cefas/JNCC Advice, raise questions as to the methodological rigour of the method used in the Natural England/Cefas/JNCC Advice to calculate the 58% reference point.

529. In any case, the United Kingdom argues that even using the 39% reference point of the European Union, the reference point was within the confidence interval identified in the Natural England/Cefas/JNCC Advice.<sup>1183</sup> In that scenario, according to the United Kingdom, there would still be predicted biomass increases for predators of sandeel, “albeit a percentage point or two smaller than those predicted using the 58% reference point”.<sup>1184</sup> During the oral hearing, the United Kingdom pointed the Arbitration Tribunal to the lower end of the confidence interval represented on the graphs in Figure 6 at page 26 of the Natural England/Cefas/JNCC Advice and Table 7.<sup>1185</sup>
530. The European Union argued in response that a change in the reference point would necessarily mean a shift in the “confidence levels”, so that the confidence in the simulated biomass outputs would also change.<sup>1186</sup> The United Kingdom responded that the confidence intervals are based on uncertainties in the assumptions made, one of which is where the Norwegian catches were taken. The United Kingdom went on to indicate that once the true position comes within a confidence interval, it remains within that confidence interval: the confidence intervals do not shift.<sup>1187</sup>
531. The Arbitration Tribunal does not have sufficient information to be able to properly assess the implications of the use by the United Kingdom of a 58% reference point. Based on the figures provided by the European Union, the omission of Norwegian catches from the external reference point in the Natural England/Cefas/JNCC model, used to simulate the effect of the closure of UK waters, is likely to overestimate the predicted impact on the biomass of various species. The Arbitration Tribunal notes that in assessing the impacts of sandeel depletion, the Natural England/Cefas/JNCC Advice presented three scenarios: the average (58%), lower (38%) and

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<sup>1183</sup> Hearing, 30 January 2025, 55:18-25; 115:3-10 (Juratowitch).

<sup>1184</sup> UK Replies to the EU’s Responses to Questions, p. 11.

<sup>1185</sup> Hearing, 30 January 2025, 114:14-115:10 (Juratowitch).

<sup>1186</sup> Hearing, 30 January 2025, 116:3-20 (Dawes). The European Union describes “confidence levels” as a degree of confidence of what is at the lower end and what is at the higher end of the reference point: Hearing, 30 January 2025, 116:11-13 (Dawes).

<sup>1187</sup> Hearing, 30 January 2025, 117:5-19 (Juratowitch).

upper (73%) proportion of landings taken from UK waters between 2003 and 2020.<sup>1188</sup> The results of the biomass response from commercial stocks and guilds to a prohibition of industrial fisheries in the UK waters of the North Sea, based on the average, lower and upper estimates of the proportion of landings from the UK EEZ, are presented in Table 7 of the Natural England/Cefas/JNCC Advice.<sup>1189</sup> This Table appears to provide evidence of the biomass response if a lower proportion of landings from the UK EEZ were used (*e.g.*, 39% as suggested by the European Union).

532. A further question is whether, had a lower reference point been used, this would have had a material bearing on the results of the simulations. The results set out in Table 3 and Table 7 of the Natural England/Cefas/JNCC Advice appear to show that if the lower bound were used (*i.e.*, the lower proportion of landings taken from the UK EEZ), the biomass responses for seabirds would reduce from 7% to 4%, with corresponding reductions in biomass responses for most fish species and marine mammals.<sup>1190</sup> The United Kingdom argues that it is the overall trend that the modelling represents which is important and that on the whole, the ecosystem may be expected to benefit from a prohibition on fishing for sandeel.<sup>1191</sup>
533. As noted above, the Arbitration Tribunal is not able to assess the alternative reference point proposed by the European Union. While there is data on total sandeel catches in the sandeel management areas of the North Sea, which might have been used to estimate catches in UK waters, the Arbitration Tribunal cannot determine what this means for the reference point adopted by the United Kingdom. Applying the standard of review set out above, the European Union has not made the case that the Norwegian data would have made a difference to the outcomes of the model and its confidence intervals. While the outcomes may have led to some overestimation of the impact on the biomass of various species, the Arbitration Tribunal has not been shown that the model was thus methodologically flawed. Only that the simulated results in the Natural

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<sup>1188</sup> Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, Figure 6 (mislabelled as Figure 5), p. 26 (**Exhibit C-45**).

<sup>1189</sup> Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, Table 7, p. 59-60 (**Exhibit C-45**).

<sup>1190</sup> Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, pp. 27-28, Table 3 and pp. 59-60, Table 7, (**Exhibit C-45**).

<sup>1191</sup> Hearing, 29 January 2025, 42:7-11 (Juratowitch).

England/Cefas/JNCC Advice appear to overestimate the biomass response to a closure of UK waters to sandeel fishing.

534. Although the Natural England/Cefas/JNCC Advice might have adopted an alternative, more methodologically rigorous, approach to calculating sandeel fishing mortality, the alleged flaw is not an error of such materiality as to call into question, on its own, that the Natural England/Cefas/JNCC Advice constitutes “best available scientific advice”.

(ii) *Aggregation of Functional Groups*

535. As explained by the European Union, in order to feed the information into the model, one needs to define functional groups which essentially define which predator will eat which prey.<sup>1192</sup> There are two criticisms of the model in this regard: first, sandeel is defined as one functional group;<sup>1193</sup> and second, seabirds are all considered as one category.<sup>1194</sup>

a. *Age/Size Structure of Sandeel*

536. One of the caveats to the EwE model acknowledged in the Natural England/Cefas/JNCC Advice is that it is not a “size structured model”, which means that:<sup>1195</sup>

Simulations may overestimate the impacts of forage fish depletion by not accounting for cases where:

1. predators take small forage fish that are unaffected by fishing.
2. forage fish and predators compete at different life stages (such as juvenile predator and adult forage fish).

537. The European Union argues that it was necessary to update the North Sea EwE model to account for the fact that predators take small forage fish that are unaffected by fishing.<sup>1196</sup> This was because according to the scientific literature, chick-rearing seabirds (*e.g.*, kittiwakes) for which sandeel comprises a substantial part of their diet take juvenile sandeel, which are not targeted by the sandeel fishery in the North Sea.<sup>1197</sup> The failure to divide the sandeel category into juveniles and adults “falsely represents the interaction between predators and prey in the ecosystem” and

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<sup>1192</sup> Hearing, 28 January 2025, 75:5-8 (Dr. Puccio).

<sup>1193</sup> Hearing, 28 January 2025, 75:9-11 (Dr. Puccio).

<sup>1194</sup> Hearing, 28 January 2025, 76:4-5 (Dr. Puccio).

<sup>1195</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit C-45**).

<sup>1196</sup> EU’s Written Submission, para. 488.

<sup>1197</sup> EU’s Written Submission, para. 488; Hearing, 28 January 2025, 75:16-18 (Dr. Puccio).



leads to an overestimation of the results.<sup>1198</sup> The European Union criticised the EwE model used in the Natural England/Cefas/JNCC Advice because the parameters of the model did not take into account the findings of the scientific literature. It argues that to have scientific and methodological rigour, the model must be parameterised based on the key observation shown in the literature.<sup>1199</sup>

538. The United Kingdom responded that the EwE model of the North Sea is not spatially structured. The model proceeds on the basis of an even distribution of the different functional groups, including sandeel and their predators, throughout the North Sea.<sup>1200</sup> The European Union agreed with this statement.<sup>1201</sup> Furthermore, the United Kingdom contended, the caveat as expressed in the Natural England/Cefas/JNCC Advice was able to be identified as a caveat “precisely because the modelling was coupled with the wider scientific evidence which does include elements relative to predator species’ preferences for different sizes and ages of sandeel”.<sup>1202</sup> The United Kingdom pointed to the various pieces of scientific evidence related to age/size classes of sandeel and the feeding habits of various seabirds.<sup>1203</sup> Included within this evidence is the response of the authors of the Natural England/Cefas/JNCC Advice to the comment that there is no direct competition between kittiwakes and the sandeel fishery, in which the authors noted that this comment was “not entirely correct” and provided a justification for their view by referring to relevant scientific papers.<sup>1204</sup>
539. The principal response of the United Kingdom to this challenge is that the disaggregation of sandeel age/size classes would have required a substantive change to the functional groups in the EwE model and would be an “immense undertaking”.<sup>1205</sup> Among other things, the United Kingdom claims, it would require restructuring of the model, require new parameter inputs for growth, mortality, and recruitment, and introduce complexity in predator-prey interactions. This would likely require the parameters of the other functional groups to be revisited and would

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<sup>1198</sup> Hearing, 28 January 2025, 75:12-76:3 (Dr. Puccio).

<sup>1199</sup> EU’s Responses to Questions, para. 90.

<sup>1200</sup> UK’s Responses to Questions, p. 18.

<sup>1201</sup> EU’s Replies to the UK’s Responses to Questions, para. 167.

<sup>1202</sup> UK’s Responses to Questions, p. 20.

<sup>1203</sup> UK’s Responses to Questions, pp. 20-22.

<sup>1204</sup> UK’s Responses to Questions, p. 20; Natural England, Cefas and JNCC, Summary review of the evidence presented by respondents to the consultation to prohibit industrial fishing in UK waters, p. 2 (**Exhibit C-76**).

<sup>1205</sup> Hearing, 29 January 2025, 133:14-18 (Boileau).

change the structure and function of the model, which in turn would have required the model calibration to be revisited.<sup>1206</sup>

540. The Arbitration Tribunal recalls that the 2015 EwE model of the North Sea did not disaggregate sandeel into age/size classes, according to the European Union because it was “unnecessary for the EwE model of the North Sea to take into account these elements”.<sup>1207</sup> According to the United Kingdom, the European Union has not explained why it was unnecessary for the 2015 EwE model of the North Sea to be size-structured but necessary for the model used in the Natural England/Cefas/JNCC Advice to be size-structured.<sup>1208</sup>
541. The European Union suggests that the Arbitration Tribunal needs to look at the evidence presented and in particular, whether credible evidence has been presented that there was available science that could have addressed the caveats and the problems identified in the Natural England/Cefas/JNCC Advice.<sup>1209</sup> The Arbitration Tribunal considers that this is an appropriate approach to the consideration of evidence in these circumstances.
542. It is not clear to the Arbitration Tribunal that disaggregated data on age/size classes of sandeel were “reasonably obtainable” such that the United Kingdom could have constructed a new functional group in the EwE model of the North Sea to assist in its modelling of the effect of a closure of UK waters to sandeel fishing. Although there was scientific evidence placed before the Arbitration Tribunal that kittiwakes and fishers often target different sandeel age groups,<sup>1210</sup> there was also evidence that many seabirds display seasonal shifts in diet composition from larger adult to smaller juvenile sandeel through the breeding season.<sup>1211</sup> The Arbitration Tribunal notes that there was additional scientific evidence contained in the Scottish Scientific Review relating to

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<sup>1206</sup> UK’s Replies to the EU’s Responses to Questions, p. 8.

<sup>1207</sup> EU’s Responses to Questions, para. 119.

<sup>1208</sup> UK’s Replies to the EU’s Responses to Questions, p. 11.

<sup>1209</sup> Hearing, 28 January 2025, 62:7-14 (Dr. Hofstötter).

<sup>1210</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 13, (**Exhibit C-45**) citing Frederiksen *et al.*, ‘The role of industrial fisheries and oceanographic change in the decline of North Sea black-legged kittiwakes’ (2004) Vol. 41 Journal of Applied Ecology 1129 (**Exhibit R-34**).

<sup>1211</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 38 (**Exhibit C-50**).

predation on different age classes of sandeel.<sup>1212</sup> This information is drawn from a North Sea Stochastic Multispecies Model (hereinafter “SMS”) considered by the ICES WGSAM.<sup>1213</sup>

543. The Arbitration Tribunal is not able to assess whether the information from a run of an SMS model is sufficient to enable the Natural England/Cefas/JNCC modellers to separate sandeel into two or more different age/size functional groups. With respect to the SMS North Sea model, the ICES WGSAM noted that “no size preference in predation is implemented in the model at the moment” and concluded that with more stomach data, it would be possible to test the impact of such an assumption.<sup>1214</sup> This seems to suggest that even if separation into sandeel age/size classes were attempted, different assumptions would have had to be made concerning the relationship between different age/size classes of sandeel and different predators, not just seabirds. It is also not clear whether it would have made a material difference to the results, nor whether its absence would lead to an overestimation in the results.

544. The Arbitration Tribunal recalls that the “available” advice includes advice, or evidence on which the advice is based, that is reasonably obtainable. The Arbitration Tribunal considers that there is an element of reasonableness which should be taken into account in such an assessment. Although evidence of different predators taking different ages of sandeel existed, it did not exist in a reasonably obtainable form such that the EwE model could be parameterised to create one or more new functional groups of sandeel. The Arbitration Tribunal therefore considers the lack of parameterisation into sandeel size/age classes does not lead to a conclusion that the advice based on the EwE model of the North Sea is not “best available scientific advice”.

*b. Aggregation of Seabird Functional Groups*

545. The European Union also alleges that seabirds are all considered as one category, without distinction, whereas in the scientific literature, a distinction is made between the different characteristics of seabirds in terms of surface feeding, diving and their foraging range.<sup>1215</sup> The United Kingdom responded that the ICES 2015 EwE Key Run model did not disaggregate seabirds into species, and the EwE model of sprat, to which the European Union referred and

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<sup>1212</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 26-27 and Figure 7 (**Exhibit C-50**). See also UK’s Responses to Questions, pp. 20-22.

<sup>1213</sup> ICES, Working Group on Multispecies Assessment Methods (WGSAM), 2021 (**Exhibit R-236**).

<sup>1214</sup> ICES, Working Group on Multispecies Assessment Methods (WGSAM), 2021, p. 6 (**Exhibit R-236**).

<sup>1215</sup> EU’s Written Submission, para. 486; Hearing, 28 January 2025, 76:4-13 (Dr. Puccio).

which did disaggregate by seabird species,<sup>1216</sup> was published in 2024 and took one year to develop.<sup>1217</sup>

546. The European Union also referred to the existing seabird disaggregation in the 2015 EwE model of the North Sea.<sup>1218</sup> The United Kingdom noted that this model, used in the Natural England/Cefas/JNCC Advice, was disaggregated into two categories: diving seabirds and surface-feeding seabirds. Although the model did have separate information for diving seabirds and surface-feeding seabirds, in compiling the Natural England/Cefas/JNCC Advice, “those outputs were added together to present the information for seabirds as a whole”.<sup>1219</sup> It was suggested that the justification for this was because the purpose of the Natural England/Cefas/JNCC Advice was to look at the impacts of sandeel depletion on the ecosystem as a whole, and therefore they were not particularly concerned with the specific benefits to diving seabirds compared to surface-feeding seabirds.<sup>1220</sup>
547. The Arbitration Tribunal finds it difficult to understand why the Natural England/Cefas/JNCC Advice did not present information on the disaggregation of seabirds into the two categories already existing in the 2015 EwE Key Run model. To do so would have produced more precise information on the impacts of a sandeel fishing prohibition in UK waters on the biomass of diving or surface feeding seabirds, which may have been of assistance to the decision-maker. However, it is accepted that the results of the impact on total seabird biomass (of both diving and surface feeding seabirds together) were presented in the Natural England/Cefas/JNCC Advice. The failure to present information on both categories of seabirds separately would not have affected the total predicted impact on seabird biomass which was presented in the Natural England/Cefas/JNCC Advice. The Arbitration Tribunal therefore concludes that this was not an error of such materiality that the Natural England/Cefas/JNCC Advice is not “best available scientific advice”.

(iii) *Spatial Distribution of Predators*

548. The European Union criticises the model used in the Natural England/Cefas/JNCC Advice because it does not address the spatial distribution of predators and assumes that predators that

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<sup>1216</sup> Hearing, 28 January 2025, 76:19-25 (Dr. Puccio) *citing* Report: The importance of sprat to the wider marine ecosystem in the North Sea and English Channel (ICES Subarea 4 and Divisions 7.d-e), 28 March 2024 (**Exhibit R-128**).

<sup>1217</sup> Hearing, 29 January 2025, 136:22-137:12 (Boileau).

<sup>1218</sup> Hearing, 28 January 2025, 76:21-22 (Dr. Puccio).

<sup>1219</sup> Hearing, 29 January 2025, 137:22-138:1 (Boileau).

<sup>1220</sup> Hearing, 29 January 2025, 141:9-15 (Boileau).

compete with the North Sea sandeel fishery “are uniformly and homogeneously distributed throughout the North Sea”.<sup>1221</sup> This “flaw”, the European Union alleges, is probably “the most important one”.<sup>1222</sup> The European Union contends that in order to simulate predator biomass responses associated with a prohibition on sandeel fishing in UK waters, the parameters of the EwE model of the North Sea would need to account for predator spatial distribution.<sup>1223</sup>

549. The United Kingdom indicates that this caveat was recognised in the Natural England/Cefas/JNCC Advice, which noted that not accounting for this spatial component could mean an overestimation or an underestimation of some specific ecosystem impacts of fishing.<sup>1224</sup>
550. The European Union argues that there was an Ecospace module available since 2013, which could have been used by the Natural England/Cefas/JNCC Advice to evaluate possible spatial management measures on the distribution of species and fishing activity.<sup>1225</sup> The European Union also noted that it was unnecessary for the EwE model of the North Sea that was granted key run status to contain an Ecospace dimension because the purpose of the model was not to evaluate spatial management measures such as predator biomass responses associated with a prohibition on sandeel fishing.<sup>1226</sup> Where a model is to be considered “best available scientific advice” the European Union argues that it should be parameterised based on the key observations from the scientific literature.<sup>1227</sup> Furthermore, the European Union argues that a spatially disaggregated model was reasonably obtainable.
551. The United Kingdom explains that developing a spatially explicit model of the North Sea which focuses on the ecosystem role of sandeel would be a significant task.<sup>1228</sup> Furthermore, the United Kingdom argued, adding spatial structure via Ecospace would be complex and would require the

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<sup>1221</sup> EU’s Written Submission, para. 486; EU’s Responses to Questions, para. 86.

<sup>1222</sup> Hearing, 28 January 2025, 76:14-16 (Dr. Puccio).

<sup>1223</sup> EU’s Responses to Questions, para. 85.

<sup>1224</sup> UK’s Responses to Questions, p. 22; Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 33 (**Exhibit 45**).

<sup>1225</sup> Hearing, 30 January 2025, 16:21-18:16 (Dawes); EU’s Responses to Questions, para. 83. The European Union pointed the Arbitration Tribunal to ICES, Interim Report of the Working Group on Multispecies Assessment Methods (WGSAM), 2013, pp. 81-83 (**Exhibit R-161**) which describes the Ecopath with Ecosim (EwE) and Ecospace Model.

<sup>1226</sup> EU’s Responses to Questions, para. 84.

<sup>1227</sup> EU’s Replies to the UK’s Responses to Questions, para. 171.

<sup>1228</sup> Hearing, 29 January 2025, 135:17-20 (Boileau).

definition of habitat layers, movement rules, and spatially explicit predator-prey interactions.<sup>1229</sup> More specifically, the United Kingdom pointed out, *inter alia*, that Ecospace is a generalised modelling suite, not specific to the North Sea, and the Ecospace plug-in requires specific application and data to be made operational.<sup>1230</sup>

552. The Arbitration Tribunal is not required to conclusively assess or evaluate whether the Ecospace plug-in module could have been employed in the updated 2015 EwE to simulate spatial closures. Rather it will consider whether the European Union has met its burden to provide credible evidence that scientific evidence was reasonably available to address the identified caveat of a lack of spatial distribution of predators. The information on the record explains that Ecospace “extends Ecosim capabilities to account for spatial dynamics of species and fishing fleets”.<sup>1231</sup> The EwE model which incorporates the Ecospace extension and is broadly described in Exhibit R-161 is not the 2015 EwE model of the North Sea. As pointed out by the United Kingdom, neither the 2015 EwE Key Run model of the North Sea nor the 2011 EwE Key Run model of the North Sea which was updated in 2015 contain the Ecospace components.<sup>1232</sup> The United Kingdom argues that adding an Ecospace component would require an overhaul of the model’s structure, validation, and testing.<sup>1233</sup>
553. The United Kingdom has also pointed to the data that would be needed for Ecospace under the “Data used” heading.<sup>1234</sup> This shows that the data used for specification of spatial distributions in Ecospace include, in addition to the location of protected areas, “habitat” layers (*e.g.*, depth, substrate), environmental condition layers (*e.g.*, temperature, salinity), fishing costs, dispersal rates, advection and migration patterns.<sup>1235</sup> The European Union alleges that the United Kingdom has the necessary data to add the parameterised extension to the EwE model.<sup>1236</sup> However, it is

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<sup>1229</sup> UK’s Replies to the EU’s Responses to Questions, p. 9.

<sup>1230</sup> UK’s Replies to the EU’s Responses to Questions, pp. 7-8.

<sup>1231</sup> ICES, Interim Report of the Working Group on Multispecies Assessment Methods (WGSAM), 2013, p. 81 (**Exhibit R-161**).

<sup>1232</sup> UK’s Replies to the EU’s Responses to Questions, p. 9.

<sup>1233</sup> UK’s Replies to the EU’s Responses to Questions, p. 9.

<sup>1234</sup> UK’s Replies to the EU’s Responses to Questions, p. 8.

<sup>1235</sup> ICES, Interim Report of the Working Group on Multispecies Assessment Methods (WGSAM), 2013, pp. 81-82 (**Exhibit R-161**).

<sup>1236</sup> Hearing, 30 January 2025, 14:6-9; 16:21-18:16 (Dawes); EU’s Responses to Questions, para. 83.

not at all clear that data for parameterisation is available for the North Sea,<sup>1237</sup> let alone whether it would be available for UK waters.

554. In the view of the Arbitration Tribunal, the European Union has not demonstrated its assertion that “the United Kingdom has the necessary data to take into account the spatial distribution” of predators, or that the Ecospace module “is something which can be taken, which is reasonably available, and can be plugged into a model”.<sup>1238</sup> The European Union has not met its burden in respect of this alleged flaw in the model used in the Natural England/Cefas/JNCC Advice.
555. The Arbitration Tribunal does not reach this conclusion on the basis that the European Union did not provide the Arbitration Tribunal with a competing body of evidence or an expert scientific witness or other scientific documents on which it relies.<sup>1239</sup> The Arbitration Tribunal agrees with the European Union that it may bring a claim challenging the consistency of a measure with the obligations under Article 496(2) of the TCA, by identifying methodological and other flaws in the scientific advice relied upon such that it does not have the attributes of “scientific advice”. It may also explain why other, better scientific advice could reasonably have been obtained based on existing scientific evidence.<sup>1240</sup> However, with respect to this alleged flaw, the Arbitration Tribunal considers that spatial parameterisation of the model was not “reasonably available”.

*(iv) Conclusion with Respect to the Updated EwE Model in the Natural England/Cefas/JNCC Advice*

556. To recall, the claim of the European Union is that the updated EwE model of the North Sea in the Natural England/Cefas/JNCC Advice was not the “best available scientific advice” on two main grounds: it did not have the requisite scientific and methodological rigour to be considered “scientific advice” and it was not “best available” scientific advice because there was evidence that was reasonably available which could have been used to address the caveats and flaws in the model.
557. The Arbitration Tribunal has concluded that there were some deficiencies with the data on sandeel fishing mortality in UK waters that was used for the EwE model simulations of the impact on the North Sea of a full closure of sandeel fishing in UK waters. In addition, the representation of the results of the simulations could have better shown the impact on the different functional groups

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<sup>1237</sup> UK’s Replies to the EU’s Responses to Questions, p. 8.

<sup>1238</sup> Hearing, 30 January 2025, 14:9-11; 18:14-16 (Dawes).

<sup>1239</sup> Hearing, 29 January 2025, 75:11-20 (Juratowitch).

<sup>1240</sup> EU’s Supplementary Written Submission, para. 27.

of seabirds that were already included within the EwE model of the North Sea. The question for the Arbitration Tribunal is whether this leads to the conclusion that the decision by the United Kingdom in respect of English waters (leaving aside for now the question of the Scottish measure) was not based on “best available scientific advice”.

558. The Arbitration Tribunal notes that following the call for evidence made on 22 October 2021, DEFRA commissioned further advice from scientific experts at Natural England, JNCC and Cefas.<sup>1241</sup> As noted by the European Union, Cefas was one of the authors of the paper on ecosystem modelling which referred to the Ecospace plug-in module.<sup>1242</sup> It may be considered, therefore, to have some expertise in ecosystem modelling. The Arbitration Tribunal agrees with the United Kingdom that ecosystem-informed advice involves not only a quantitative approach using empirical methods and potentially modelling, but also a qualitative synthesis of available knowledge and information.<sup>1243</sup> Ecosystem modelling is a tool, based on assumptions, which can be used to show long term trends using simulations of what might happen under certain scenarios. It is also a tool that is generally used in conjunction with other scientific evidence. It is always possible to highlight flaws in ecosystem models. However, to conclude that as a result of any such flaws, advice based on an ecosystem model does not constitute “scientific advice” would be to denigrate the potential for ecosystem models to complement other advice to which decision-makers may have recourse. This is particularly where, as here, the decision on sandeel management was the first opportunity taken to introduce significant fisheries management measures based on ecosystem advice.<sup>1244</sup> The Arbitration Tribunal does not consider that the alleged flaws in the model, either individually or collectively, are such as to lead to a conclusion that the EwE model as used in the Natural England/Cefas/JNCC Advice is not “scientific advice”.

(c) *Is the Measure in Respect of English Waters “Based on” the “Best Available Scientific Advice”?*

559. The Arbitration Tribunal recalls (*see* paragraph 487 above) that it considers that scientific advice has certain attributes including being scientifically objective, transparent, evidence-based, and have methodological rigour within a scientific discipline. The Arbitration Tribunal also recalls (*see* paragraph 504 above) that it is to assess whether there is a rational or objective relationship

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<sup>1241</sup> UK’s Written Submission, para. 141.

<sup>1242</sup> Hearing, 30 January 2025, 17:8-11 (Dawes); ICES, Interim Report of the Working Group on Multispecies Assessment Methods (WGSAM), 2013, p. 81 (**Exhibit R-161**).

<sup>1243</sup> UK’s Responses to Questions, p. 25, *citing* ICES Framework for Ecosystem-Informed Science and Advice (FEISA), March 2024, p. 10 (**Exhibit R-103**).

<sup>1244</sup> Ministerial Submission, 14 September 2023, para. 15 (**Exhibit R-77**).



between the measure and the scientific advice such that the measure is objectively based on the evidential foundation of the advice.

560. The measure in respect of the English waters, namely the closure of English waters to sandeel fishing, was based on the Natural England/Cefas/JNCC Advice and the ICES Technical Service Response. There is agreement between the Parties that the ICES Technical Service Response constitutes “best available scientific advice”. The Arbitration Tribunal will therefore consider whether the Natural England/Cefas/JNCC Advice constitutes “best available scientific advice” and then whether there is a rational or objective relationship between the English measure and the scientific advice.
561. In addition to the EwE model of the North Sea, the Natural England/Cefas/JNCC Advice includes a literature review, which the European Union does not challenge as not constituting “best available scientific advice”. The United Kingdom has summarised the scientific literature contained in the Natural England/Cefas/JNCC Advice.<sup>1245</sup> Relevant evidence from the Natural England/Cefas/JNCC Advice that can be highlighted is the following:
- Sandeel have been described as the most important forage fish in the North Sea.
  - The impacts of extraneous factors on sandeel recruitment mean that even with low fishery exploitation pressure, the risk of population collapse still exists.
  - The distribution and occurrence of marine mammals have been linked to the availability of sandeel prey.
  - Sandeel are particularly important in the diets of many seabird species, especially during the breeding season and as food for growing chicks.
  - The diet “flexibility” and ability of predatory commercial fish to substitute diet shortfalls with other prey species suggest that they are less crucially dependent on local sandeel abundance than, for example, seabirds off the Scottish coast. Further, the condition of some fish species is positively correlated with the number of sandeel consumed.
  - Ecosystem model simulations “predict that a full prohibition of sandeel fishing in the UK waters of the North Sea would lead to an increase in seabird biomass of 7% in around 10 years, albeit under constant prevailing environmental conditions”.<sup>1246</sup>

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<sup>1245</sup> UK’s Written Submission, paras 232-233.

<sup>1246</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, pp. i, 11-14 (**Exhibit C-45**). It should be noted that these are high level highlights and should not detract from the detailed advice contained in the Natural England/Cefas/JNCC Advice.

562. The European Union criticises both the results of the EwE model simulations, addressed in the previous section, and the suggestion that there is a risk of sandeel stock collapse, even with low levels of fishing.<sup>1247</sup> The United Kingdom referred to the risk of stock collapse in its Written Submission as a relevant consideration with respect to the importance of the objective and the gravity of the situation to be addressed.<sup>1248</sup> The European Union argued that this is not the case because ICES has used an escapement strategy since 2011 which is designed to avoid the risk of stock collapse.<sup>1249</sup> In addition, according to the European Union, the United Kingdom's reference to "stock collapse" is based on a 2004 study which does not reflect how the fishery is currently managed.<sup>1250</sup> At first glance, the failure to use the most recent data appears to be related to the argument of the European Union that the Natural England/Cefas/JNCC Advice did not have the requisite methodological rigour to be considered "best available scientific evidence". However, the European Union clarified at the Hearing that its concerns regarding the scientific advice on which the United Kingdom based its measure do not relate to an assertion that more recent data should have been taken into account.<sup>1251</sup>
563. The Arbitration Tribunal has found that the EwE model of the North Sea used in the Natural England/Cefas/JNCC Advice is "scientific advice". The Arbitration Tribunal also considers that the Natural England/Cefas/JNCC Advice, both the 2015 EwE model simulations and the literature review, constitutes "best available scientific advice" as it was the best advice that was reasonably obtainable in the circumstances.
564. The Arbitration Tribunal will now turn to whether there is a rational or objective relationship between the advice and the closure of English waters to sandeel fishing. Having considered the key elements of the advice, the Arbitration Tribunal will consider what the decision-maker took into account in deciding on the prohibition of sandeel fishing in English waters, whether the measure was based on the evidential foundation of the scientific advice on which it relies.
565. The Ministerial Submission on which the United Kingdom based the English measure referred to the ecosystem modelling by stating that "a full prohibition of sandeel fishing in the UK waters of the North Sea could lead to an increase in seabird biomass of 7% in around 10 years as well as

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<sup>1247</sup> Hearing, 28 January 2025, 156:4-158:12 (Dawes).

<sup>1248</sup> UK's Written Submission, paras 392-392.1.

<sup>1249</sup> Hearing, 28 January 2025, 156:10-21 (Dawes).

<sup>1250</sup> Hearing, 28 January 2025, 157:15-158:27 (Dawes), *citing* Poloczanska *et al.*, 'Fishing vs. natural recruitment variation in sandeel as a cause of seabird breeding failure at Shetland: a modelling approach' (2004) Vol. 61 ICES Journal of Marine Science 788 (**Exhibit R-27**).

<sup>1251</sup> Hearing, 28 January 2025, 48:15-17 (Dr. Hofstötter).

delivering benefits to other fish species and marine mammals.”<sup>1252</sup> The Arbitration Tribunal has found that the 7% increase in seabird biomass is likely to be an overestimation. However the recommendation to prohibit sandeel fishing in English waters “acknowledges there is uncertainty when adopting ecosystem based management actions”.<sup>1253</sup> The Ministerial Submission noted that notwithstanding the evidential difficulties, the advice is the best available evidence about the likely ecosystem benefits of a full closure and introducing the measure is consistent with the precautionary approach to fisheries management.<sup>1254</sup> It went on to state that: “There are currently no known alternative management interventions that could produce the same potential beneficial effect as closing the sandeel fishery.”<sup>1255</sup>

566. The European Union argues that the scientific literature essentially indicates that to the extent there is either no localised depletion or that predators can forage outside of any locally depleted areas, a prohibition on sandeel fishing cannot bring about additional benefits.<sup>1256</sup> This point was considered in the Ministerial Submission which indicated that “the evidence suggests that the benefit of the closure would be greater where there is a greater predator dependence and overlap”. However, the Ministerial Submission went on to note that a more extensive closure “would have a higher chance of success when prioritising the need for seabird recovery.”<sup>1257</sup>
567. Following the request to ICES to clarify how ecosystem considerations are factored into and applied in single stocks advice for forage fish species (such as sandeel), the ICES Technical Service was reviewed by DEFRA, Natural England, Cefas and JNCC and a supplementary note provided to the UK Minister as follows:

It confirms predator needs are not fully accounted for. The response supports the use of national regulation and suggests that the annual advice should be only part of an overall management regime to ensure that local food availability is preserved. It advocates for local regulation to ensure management delivers for ecosystem needs. This supports our strategy for a more precautionary approach to sandeel management such as the introduction of spatial closures.<sup>1258</sup>

568. To recall, the ICES Technical Service (Reviewer One) indicated at p. 2:

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<sup>1252</sup> Ministerial Submission, 14 September 2023, para. 13 (**Exhibit R-77**).

<sup>1253</sup> Ministerial Submission, 14 September 2023, para. 14 (**Exhibit R-77**).

<sup>1254</sup> Ministerial Submission, 14 September 2023, para. 16 (**Exhibit R-77**).

<sup>1255</sup> Ministerial Submission, 14 September 2023, para. 16 (**Exhibit R-77**).

<sup>1256</sup> Hearing, 28 January 2025, 143:12-16 (Dawes).

<sup>1257</sup> Ministerial Submission, 14 September 2023, para. 24 (**Exhibit R-77**).

<sup>1258</sup> Supplementary note to sandeel submission: Sandeel management in English waters of the North Sea, 4 December 2023, p. 1 (**Exhibit R-86**).

For nesting seabirds in particular, the local abundance of forage fish (especially sandeel) at specific times of the year is likely to matter more than the abundance in the North Sea as a whole (or even in a single management area). It is never going to be feasible for ICES to provide catch advice at a sufficiently fine scale to account for this local food requirement, and therefore the responsibility to ensure the provision of these local ecosystem services relies on national regulations (for example using permanent or timed closures or setting restricted quotas in given areas).<sup>1259</sup>

569. The ICES Technical Service went on to state:

ICES advice on fishing opportunities is given at stock level and cannot function at the level of individual feeding grounds, which goes beyond the detail level of the stock assessment models. Therefore, a large part of the question of whether management is supporting ecosystem functions should occur at the level of national regulations, which is outside the scope of this technical service.<sup>1260</sup> [...] There are several closed sandeel areas, and this is one possible example of measures to provide ecosystem services that sits alongside the overall quota. However, it would make sense to evaluate the degree to which such closures could be targeted to maximize the benefits while minimizing the costs.<sup>1261</sup>

570. The European Union interprets this as meaning that “to the extent that there is a localised depletion of sandeel and that the relevant predators that are dependent on sandeel cannot forage outside of any such locally depleted area”, this should be addressed by fisheries management measures.<sup>1262</sup>

The United Kingdom rejects any implication that if a particular predator population is able to forage outside a specific sandbank or sandbanks, they are not suitable for protection by national fisheries management measures.<sup>1263</sup> The United Kingdom considers that what is “local” will vary depending on the foraging habits and ranges of different predator species, the concept of “local” requirements for particular predator populations is relative, and an assessment of whether management is supporting ecosystem functions should be undertaken by national authorities, rather than by ICES.<sup>1264</sup>

571. This brief review shows that the Parties differ on how the ICES Technical Service should be interpreted. In particular, the Parties differ over the interpretation of the ICES Technical Service with respect to what should be considered the “local” requirements of the predator populations that are to be protected. Nevertheless, the advice provided to the UK Ministers, and on which the prohibition of sandeel fishing in English waters was confirmed, is a reasonable conclusion in line

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<sup>1259</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 2 (**Exhibit C-22**).

<sup>1260</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 1 (**Exhibit C-22**).

<sup>1261</sup> ICES Technical Service, ‘Greater North Sea ecoregion, EU-UK request on ecosystem considerations in the provision of single-stock advice for forage fish species’, 28 November 2023, p. 7 (**Exhibit C-22**).

<sup>1262</sup> EU’s Responses to Questions, para. 125.

<sup>1263</sup> UK’s Replies to the EU’s Responses to Questions, p.12.

<sup>1264</sup> UK’s Responses to Questions, pp. 30-31.

with the ICES Technical Service such that there is an objective connection between the advice and the closure of sandeel fishing in English waters.

572. Advice presented to the decision-maker included the expected ecosystem benefits of a predicted increase in seabird biomass and benefits to other fish species and marine mammals, and that predator needs are not fully accounted for in ICES advice. On this basis, the Arbitration Tribunal finds that the scientific advice to which the decision-maker had regard provided the evidential foundation for the closure of English waters to sandeel fishing and that there is an objective relationship between the advice and the English measure. There is therefore no need for the Arbitration Tribunal to consider whether the Natural England/Cefas/JNCC Advice would have satisfied the test of “best available scientific advice” even without the modelling and its results.

**(d) *Is the Measure in Respect of Scottish Waters “Based on” the “Best Available Scientific Advice”?***

573. As with the Natural England/Cefas/JNCC Advice, the Arbitration Tribunal will first consider whether the Scottish Scientific Review constitutes “best available scientific advice” and whether there is a rational or objective relationship between the scientific advice and the Scottish measure.
574. The Scottish Scientific Review is a comprehensive review of available scientific evidence on the potential effects of sandeel fisheries management on the marine environment. According to its introduction:

It includes information on the drivers of sandeel distribution and abundance, the importance of sandeel to other fish species, seabirds and marine mammals, and the potential effects of sandeel fisheries management measures upon these species.<sup>1265</sup>

575. The European Union does not criticise the Scottish Scientific Review as not constituting “best available scientific advice”.<sup>1266</sup> However, it argues that the model used in the Natural England/Cefas/JNCC Advice and the simulated biomass responses “are an integral part of the base” for the Scottish measure.<sup>1267</sup> The reason for this, it claims, is that the model is not parameterised based on key observations in the Scottish Scientific Review regarding the age of sandeel, the location of sandeel and the location of predators.<sup>1268</sup> The Arbitration Tribunal has found that parameterisation of the EwE model of the North Sea according to the age of sandeel,

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<sup>1265</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023 para. 1 (**Exhibit C-50**).

<sup>1266</sup> EU’s Written Submission, para. 491.

<sup>1267</sup> EU’s Responses to Questions, para. 121.

<sup>1268</sup> EU’s Responses to Questions, para. 96.

the location of sandeel and location of predators was not “available” in the sense of reasonably obtainable. It is also clear from the record that the Scottish part of the measure was not “based on” the Natural England/Cefas/JNCC Advice, but on the Scottish Scientific Review.<sup>1269</sup>

576. The European Union further argues that even if the Scottish Scientific Review constitutes the “best available scientific advice”, the Scottish parts of the measure are not based on the best scientific advice because there is no rational or objective relationship between the scientific advice and the full spatial scope of the sandeel fishing prohibition.<sup>1270</sup> The Arbitration Tribunal will first consider the question of whether there is a rational or objective relationship between the advice and the prohibition of sandeel fishing in Scottish waters, before turning to the full prohibition in UK waters in the following subsection.

577. The European Union repeats that the Scottish scientific advice essentially indicates that:

(i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent that there is a localised depletion of sandeel and that the relevant predators for which sandeel comprise a substantial proportion of their diet cannot forage outside of any such locally depleted area; and (ii) the only predators for which sandeel comprise a substantial proportion of their diet and cannot forage outside of any locally depleted area are chick-rearing black-legged kittiwakes.<sup>1271</sup>

578. Therefore, in the view of the European Union, a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits. The European Union points to various paragraphs in the Scottish Scientific Review in support of its view.<sup>1272</sup> The United Kingdom has also pointed to paragraphs in the Scottish Scientific Review in support of the full prohibition in Scottish waters.<sup>1273</sup>

579. In order to assess whether there is a rational or objective relationship between the advice and the prohibition of sandeel fishing in Scottish waters, the Arbitration Tribunal will first consider the key elements of the advice, and then what the Scottish decision-maker took into account in deciding on the prohibition and whether the measure was based on the evidential foundation of the scientific advice on which it relies.

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<sup>1269</sup> Ministerial Submission, 26 January 2024 (**Exhibit R-98**).

<sup>1270</sup> EU’s Responses to Questions, para. 95.

<sup>1271</sup> EU’s Responses to Questions, para. 98; EU’s Replies to the UK’s Responses to Questions, para. 177; EU’s Supplementary Written Submission, para. 35.

<sup>1272</sup> EU’s Responses to Questions, paras 99-101.

<sup>1273</sup> Hearing, 29 January 2025, 47:23-55:18 (Juratowitch).

580. The United Kingdom has summarised the key elements of the Scottish Scientific Review.<sup>1274</sup> Relevant evidence from the Scottish Scientific Review that can be highlighted is the following:

- Sandeel play a key role in North Atlantic marine food webs.<sup>1275</sup>
- Local depletion of sandeel aggregations is unlikely to be compensated by the movement of adult sandeel from neighbouring sandbanks, with replenishment more likely to be dependent on the dispersal of sandeel larvae.<sup>1276</sup> It is likely to take several years for full recovery after local depletion due to fishing.<sup>1277</sup>
- Sandeel are likely to benefit from spatial management measures aimed at reducing fishing mortality due to their life-long attachment to particular sand banks and limited dispersal and movements.<sup>1278</sup>
- The importance of sandeel as a food source is more variable for predatory fish than for seabirds and mammals.<sup>1279</sup>
- Scotland holds internationally important numbers of breeding seabirds.<sup>1280</sup>
- A number of seabird species have a high proportion of sandeel in their diets and a high degree of sensitivity to sandeel abundance, especially kittiwake, puffin, razorbill, shag, guillemot, and tern species.<sup>1281</sup>
- During breeding season, seabirds are constrained to foraging within a certain distance from their breeding site.<sup>1282</sup> During the non-breeding period, seabirds are not so constrained and

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<sup>1274</sup> UK's Written Submission, paras 253-260.

<sup>1275</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 1 (**Exhibit C-50**). It should be noted that these are high level highlights and should not detract from the detailed advice contained in the Scottish Scientific Review.

<sup>1276</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, pp. 5-6 (**Exhibit C-50**).

<sup>1277</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 8 (**Exhibit C-50**).

<sup>1278</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 25 (**Exhibit C-50**).

<sup>1279</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 35 (**Exhibit C-50**).

<sup>1280</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023 p. 36 (**Exhibit C-50**).

<sup>1281</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 43, Table 3 (**Exhibit C-50**). The Scottish SEA provides further information on the population and distribution of these seabirds: Scottish Government, 'Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report', July 2023, pp. 30-38 (**Exhibit C-52**).

<sup>1282</sup> Scottish Government, 'Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment', July 2023, p. 51 (**Exhibit C-50**).

maintenance of sandeel stocks may confer some benefits to and resilience in seabird populations.<sup>1283</sup>

- Sandeel appear to form an important part of seal and porpoise diet.<sup>1284</sup> Given this, an increase in sandeel abundance might be beneficial to several populations of marine mammals.<sup>1285</sup>

581. In addition to the Scottish Scientific Review, the decision-maker also had regard to the Scottish SEA and the ICES Technical Service. The Scottish SEA considered much the same scientific evidence as the Scottish Scientific Review and concluded that the increased protection that will result from the extension of the existing sandeel fishery closure to all Scottish waters will potentially provide environmental benefits.<sup>1286</sup>

582. The Scottish Marine Directorate recommended that Ministers agree to close fishing for sandeel in all Scottish waters “based on the potential wider ecosystem benefits that such measures could bring to a range of species in the longer term as well as resilience to the marine environment.”<sup>1287</sup> The evidence relied upon “shows that restricting fishing for sandeel has the potential to lead to an increase in sandeel abundance, survival and potentially availability, thereby providing benefits to predators, including whitefish, seabirds and marine mammal species.”<sup>1288</sup> It is acknowledged that the evidence base is not definitive, and the complexity and high degree of variability in the system means that predictions of the benefits of closing fishing for sandeel “will have a high degree of uncertainty”.<sup>1289</sup> However, reliance is placed on the precautionary approach which takes account of this uncertainty.<sup>1290</sup>

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<sup>1283</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 53 (**Exhibit C-50**). *See also* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 56 (**Exhibit C-50**): “However, despite these uncertainties, maximising abundance and availability of sandeel stocks as prey for seabirds in Scotland remains a key mechanism by which resilience in seabird populations might be achieved.”

<sup>1284</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 57-61 (**Exhibit C-50**).

<sup>1285</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 74 (**Exhibit C-50**).

<sup>1286</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, pp. 5-6 (**Exhibit C-52**).

<sup>1287</sup> Ministerial Submission, 26 January 2024, para. 8 (**Exhibit R-98**).

<sup>1288</sup> Ministerial Submission, 26 January 2024, Annex F (p. 1) (**Exhibit R-98**).

<sup>1289</sup> Ministerial Submission, 26 January 2024, Annex F (p. 1) (**Exhibit R-98**).

<sup>1290</sup> Ministerial Submission, 26 January 2024, Annex F (p. 1) (**Exhibit R-98**).



583. With regard to the ICES advice, the recommendations from the Scottish Marine Directorate noted that ICES includes provision to keep sandeel stocks above a given precautionary level, but does not include analysis of whether this precautionary level is sufficient to provide adequate food levels for predator populations. It was considered that this supported the justification for a more precautionary approach to sandeel management at the national level when considering the wider ecosystem and ensuring that food availability is preserved.<sup>1291</sup>
584. The Arbitration Tribunal finds that there is an objective relationship between the scientific advice relied upon by Scotland and the prohibition of sandeel fishing in Scottish waters. The evidence pointed to wider environmental benefits of a closure of Scottish waters to sandeel fishing including in terms of the resilience of the marine environment. It was on this basis, and taking into account the precautionary approach to fisheries management, that the Scottish decision-maker decided to prohibit sandeel fishing in Scottish waters.

**(e) *Is the Sandeel Fishing Prohibition “Based on” the “Best Available Scientific Advice”?***

585. The Arbitration Tribunal recalls that there are two parts to the sandeel fishing prohibition: a decision in respect of a prohibition in English waters, and a decision in respect of a prohibition in Scottish waters. The Arbitration Tribunal has found that both the English and the Scottish parts of the measure were based on best available scientific advice and that there is an objective connection between the scientific advice relied upon by the United Kingdom and Scotland and the prohibition of sandeel fishing in English and Scottish waters respectively. The decision-makers based their decisions on different bodies of scientific advice, but both were separately found by the Arbitration Tribunal to be consistent with the requirements of Articles 496 (1) and (2), read together with Article 494(3)(c) of the TCA. It would seem on a logical basis that if the parts comply so does the whole, the sandeel fishing prohibition is also consistent with the requirements of Articles 496 (1) and (2), read together with Article 494(3)(c).
586. However, the European Union submits that the “scientific advice” on which a measure is based must be assessed holistically.<sup>1292</sup> It argues that only one of the pieces of scientific advice, the “North Sea Ecopath with Ecosim model” as updated by Natural England/Cefas/JNCC and the simulations generated based on that updated model, is sufficient to justify or address the full spatial scope of the sandeel fishing prohibition covering all waters of the United Kingdom of the

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<sup>1291</sup> Ministerial Submission, 26 January 2024, Annex F (p. 2) (**Exhibit R-98**).

<sup>1292</sup> EU’s Written Submission, para. 478.

North Sea.<sup>1293</sup> Stemming from its arguments relating to the “flaws and caveats” in the Natural England/Cefas/JNCC model, the European Union submits that the body of evidence on which the United Kingdom relies to support the full spatial scope of the sandeel fishing prohibition cannot be considered “best available scientific advice”.<sup>1294</sup>

587. The Arbitration Tribunal has already found that the advice on which the closures of English waters and Scottish waters to sandeel fishing was based on “best available scientific advice”. The Arbitration Tribunal acknowledges that the data on fishing mortality that formed the basis of the simulations of the effect of a closure of UK waters has proved difficult to verify and is likely to have overestimated the biomass response to a closure of UK waters to sandeel fishing. In addition, maintaining the distinction between surface feeding and diving seabirds that was in the EwE model of the North Sea may have produced results of the impact on seabirds at a more granular level. Nevertheless, the Arbitration Tribunal acknowledges that ecosystem modelling is a complex exercise which requires data and assumptions to be made where data is lacking. When considered holistically, the EwE modelling, the literature contained in the Natural England/Cefas/JNCC Advice and in the Scottish Scientific Review, and the ICES Technical Service combine to constitute “best available scientific evidence” on which the sandeel fishing prohibition was based.
588. The Arbitration Tribunal reaches a similar conclusion in its consideration of whether there was an objective connection between the advice and the sandeel fishing prohibition in UK waters. It does so not only on the basis of logic (*i.e.*, if the parts comply, so does the whole), but through considering the scientific advice as a whole. The literature provided a comprehensive review of the contribution of sandeel to the North Sea ecosystem and the interaction between sandeel and different predator groups, including in terms of breeding success and resilience. As articulated by the United Kingdom, the purpose of the use of the EwE model of the North Sea in the Natural England/Cefas/JNCC Advice was to explore broad trends with respect to the impact of different amounts of sandeel depletion on the North Sea ecosystem.<sup>1295</sup> The simulated outcomes appear to be reasonably consistent with the trends indicated in the scientific literature, although with high levels of uncertainty and likely some overestimation of biomass responses.
589. The European Union, however, considers that the emphasis by the United Kingdom on “trends” downplays the stated purpose of the modelling of the North Sea ecosystem as well as the manner

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<sup>1293</sup> EU’s Written Submission, para. 479.

<sup>1294</sup> EU’s Written Submission, para. 480.

<sup>1295</sup> UK’s Responses to Questions, p. 18.

in which it was relied upon.<sup>1296</sup> The Natural England/Cefas/JNCC Advice states that “[t]he evidence presented within this advice presents the current state of understanding of the role of sandeels and the potential impacts of a prohibition of industrial fishing for them in UK waters.”<sup>1297</sup> The authors of the Natural England/Cefas/JNCC Advice also stated that the Advice “attempts to quantify the potential impacts of a sandeel fishery closure”.<sup>1298</sup>

590. The European Union suggests that the scientific advice indicates that a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits.<sup>1299</sup> In other words, in the view of the European Union, there is no rational or objective relationship between the scientific advice and the full closure of sandeel fishing in UK waters.<sup>1300</sup> The main scientific advice relied upon by the United Kingdom for the full closure was the EwE model of the North Sea and the simulated responses to such a closure. According to the European Union, the correction of the alleged flaws in the model would have decreased the average simulated biomass responses from the sandeel fishing prohibition.<sup>1301</sup> Indeed, assuming the fishing mortality for sandeel in UK waters was 39%, using the lower bound of the predicted seabird biomass response to a closure of UK waters to sandeel fishing, as set out in Table 7 of the Natural England/Cefas/JNCC Advice, would have reduced the seabird biomass response in the North Sea over 10 years from 7% to 4%.

591. The European Union also argues that the scientific advice identified by the United Kingdom as the base for the sandeel fishing prohibition:

[...] essentially indicates that a prohibition of sandeel fishing beyond the foraging ranges of chick-rearing black-legged kittiwakes would not be expected to produce any additional ecosystem benefits because: (i) a prohibition on sandeel fishing can bring about ecosystem benefits to the extent that there is a localised depletion of sandeel and that the relevant predators for which sandeels comprise a substantial proportion of their diet cannot forage outside of an such locally depleted area; and (ii) the only predators for which sandeels comprise a substantial proportion of their diet and cannot forage outside of any such locally depleted area are chick-rearing black-legged kittiwakes.<sup>1302</sup>

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<sup>1296</sup> EU’s Replies to the UK’s Responses to Questions, para. 170.

<sup>1297</sup> Natural England/Cefas/JNCC, ‘What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice’, 7 March 2023, p. 5 (**Exhibit C-45**).

<sup>1298</sup> Natural England, Cefas and JNCC, ‘Summary review of the evidence presented by respondents to the consultation to prohibit industrial fishing in UK waters’, p. 1 (**Exhibit R-76**).

<sup>1299</sup> EU’s Supplementary Written Submission, para. 35.

<sup>1300</sup> EU’s Responses to Questions, para. 95; EU’s Replies to the UK’s Responses to Questions, para. 175(b).

<sup>1301</sup> EU’s Responses to Questions, para. 124.

<sup>1302</sup> EU’s Supplementary Written Submissions, para. 35.

592. In the view of the Arbitration Tribunal, the scientific advice (other than the modelling) is not as limited as the European Union suggests. Neither did the decision-makers base their decision on the sandeel fishing prohibition solely on the EwE model's simulated results of the impact of a closure of UK waters. For example, the DMA indicated that the primary environmental benefit is improvements in the resilience of sandeel stocks.<sup>1303</sup> The UK Ministerial Submission noted that DEFRA's general approach to sandeel and protecting the marine environment "is part of a wider strategy to protect the environment and marine ecosystems including seabirds stretching back over a number of years" and considered that a full closure would be the best option to support delivery on their aims.<sup>1304</sup> In the view of the Arbitration Tribunal, there is an objective connection between the scientific advice and the sandeel fishing prohibition in UK waters.
593. The Arbitration Tribunal therefore finds that the European Union has failed to demonstrate that the sandeel fishing prohibition in UK waters is inconsistent with the United Kingdom's obligations under Article 496(1) and 496(2) of the TCA, read together with Article 494(3)(c) of the TCA.

#### **D. PROPORTIONATE AND NON-DISCRIMINATORY CLAIM**

594. The European Union submits that in deciding to adopt and apply a measure, the sandeel fishing prohibition, for the conservation of marine living resources and the management of fisheries resources pursuant to Article 496 of the TCA, the United Kingdom has acted inconsistently with its obligations by failing to have regard to the principle that measures applied for that purpose must be "proportionate and non-discriminatory" within the meaning of Article 494(3)(f) of the TCA.<sup>1305</sup> The United Kingdom disputes this contention.

##### **1. Applicable Legal Standard**

595. The Arbitration Tribunal will consider the interpretation (in turn) of "having regard" to the "principle of applying" a "proportionate" and "non-discriminatory" measure before turning to the standard of review and the application of the legal standard to the facts before it.

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<sup>1303</sup> DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, pp. 3-4 (**Exhibit C-44**).

<sup>1304</sup> Ministerial Submission, 14 September 2023, paras 10, 24 (**Exhibit R-77**).

<sup>1305</sup> EU's Written Submission, para. 513.

**(a) *The Meaning of “Having Regard to ...”***

*(i) Positions of the Parties*

596. The Parties differ on their interpretation of the phrase “having regard to” in Article 496(1), which requires that each Party “shall decide on any measures applicable in its waters [...] having regard to the principles referred to in Article 494(3).” The Parties agree that “have regard to” means “to heed”,<sup>1306</sup> to “take into account in determining action or conduct”,<sup>1307</sup> and “having regard to” means “taking into account” or “giving consideration to”.<sup>1308</sup> However, the extent of their agreement ends there.

597. The European Union submits that “having regard to” requires active consideration of the principles set out in Article 494(3).<sup>1309</sup> According to the European Union, this language is intended to create a link between the right of the Parties to decide on fisheries management measures in their waters and the principles in Article 494(3): those principles must inform the outcome of the decision-making process,<sup>1310</sup> and the outcome of that decision-making process should reflect the application of those principles.<sup>1311</sup> The words in Article 496(1) “[e]ach Party shall decide on any measures [...]” do not establish exclusively an obligation of conduct (as argued by the United Kingdom) but link to the actual measures which are the output of the decision-making process.<sup>1312</sup> In the view of the European Union, the obligation in Article 496(1) relates to the decision-making process (“shall decide”) and the measures themselves that are the outcome of the process. The obligation of “having regard to the principles referred to in Article 494(3)” applies to both.<sup>1313</sup>

598. The United Kingdom has summarised its position as follows:

Article 496(1) read with Article 494(3) sets forth a mandatory obligation of conduct; specifically, an obligation that requires the Parties to give good faith consideration to the principles identified under Article 494(3), but which does not mandate a particular outcome or result of such consideration.<sup>1314</sup>

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<sup>1306</sup> EU’s Written Submission, para. 516.

<sup>1307</sup> EU’s Written Submission, para. 255.

<sup>1308</sup> UK’s Written Submission, paras. 322, 327.

<sup>1309</sup> Hearing, 28 January 2025, 117:22-24 (Norris).

<sup>1310</sup> Hearing, 28 January 2025, 117:24-118:6 (Norris); EU’s Responses to Questions, para. 140.

<sup>1311</sup> EU’s Replies to the UK’s Responses to Questions, para. 224.

<sup>1312</sup> Hearing, 28 January 2025, 120:3-11 (Norris).

<sup>1313</sup> EU’s Responses to Questions, para. 130.

<sup>1314</sup> UK’s Responses to Questions, p. 34.

599. The United Kingdom argues that Article 496(1) concerns a decision-making process,<sup>1315</sup> that it is a procedural obligation, not a substantive obligation,<sup>1316</sup> and an obligation of conduct, not of result.<sup>1317</sup> As a question of process, not of outcome, this has the corollary that once a Party has had regard to applying the principles of proportionality and non-discrimination, “they are free under the TCA to adopt measures that do not accord with them”.<sup>1318</sup> Such regard must, however, be “good faith regard” in the sense that the decision-maker is meaningfully to consider the relevant factors with an open mind.<sup>1319</sup> The United Kingdom accepts that as a procedural tool, it must make a difference, but not to the extent of making a difference to the outcome of the decision-making.<sup>1320</sup>
600. Both Parties have referred to the *travaux préparatoires* to support their positions. The United Kingdom recalls that the European Union’s Draft TCA included Article FISH.5(2) which stated:
- New technical measures, or changes to existing technical measures shall be based on the best available scientific advice and shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1 [Objectives].<sup>1321</sup>
601. This draft provision, which would have required fisheries measures to be proportionate and non-discriminatory, was not included in the final draft of the TCA which, the United Kingdom argues, confirms the correctness of its interpretation,<sup>1322</sup> and the intention of the Parties not to impose a more stringent obligation than taking the principles into account.<sup>1323</sup>
602. The European Union disagrees that the mere fact that Article 494(3) of the TCA uses the expression “have regard to” downgrades the principles in Article 494(3) to purely facilitative and “aspirational goals”.<sup>1324</sup> Indeed, the UK draft negotiating text, to which the United Kingdom referred, included in draft Article 4(1), a broad right to take fisheries management measures in its waters “as it considers appropriate to ensure the rational and sustainable management of

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<sup>1315</sup> UK’s Written Submission, para. 324.

<sup>1316</sup> Hearing, 29 January 2025, 154:18-20 (Westaway).

<sup>1317</sup> Hearing, 29 January 2025, 154:10 (Westaway); Hearing, 30 January 2025, 82:5-7 (Juratowitch).

<sup>1318</sup> UK’s Written Submission, para. 332.

<sup>1319</sup> Hearing, 30 January 2025: 83:17-18 (Juratowitch).

<sup>1320</sup> Hearing, 30 January 2025: 84:5-8 (Juratowitch).

<sup>1321</sup> Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020, p. 95 (**Exhibit R-120**).

<sup>1322</sup> UK’s Written Submission, para. 337.

<sup>1323</sup> UK’s Responses to Questions, p. 33.

<sup>1324</sup> EU’s Replies to the UK’s Responses to Questions, para. 82.

fisheries.”<sup>1325</sup> This was not included in the final text of the TCA.<sup>1326</sup> According to the European Union, to the extent that the *travaux préparatoires* are considered relevant as a supplementary means of interpretation, they show that Article 494(3) of the TCA “is intended to ensure that meaningful limits are placed on the exercise of regulatory autonomy when deciding on fisheries management measures”.<sup>1327</sup>

(ii) *The Arbitration Tribunal’s Interpretation*

603. The Arbitration Tribunal agrees that the ordinary meaning of “having regard to” is “taking into account”. In the context of the TCA, the *chapeau* to Article 494(3) requires the Parties to “have regard to” the listed principles, and Article 496(1) provides for the Parties to decide on any measures “having regard to” the listed principles. In both cases, an obligation is cast upon a Party, when it decides upon any measures of the kind falling within the provision, to have regard to, in the sense of “take account of”, the principles referred to in Article 494(3). A link is thus formed between the requirement to have regard to the principles and the decision to take fisheries management measures. The difference between the Parties concerns the nature of this link.
604. The Arbitration Tribunal considers that “having regard to” in the context of the TCA cannot be relegated to a purely procedural obligation with no connection between the decision-maker turning its mind to the principles listed in Article 494(3) and the outcome of the decision. The process of decision-making, which takes into account the principles in Article 494(3), must lead to a reasoned outcome, namely the decision on fisheries management measures. As suggested by the European Union, the principles inform that decision-making process.<sup>1328</sup>
605. What then is the relationship between the process of decision-making that must have regard to the principles and the decision that results from this process? The decision-maker is required to have regard to the principles and will enjoy the benefit of that consideration. In then deciding on a measure, the consideration will be informative but not determinative of the decision to adopt a measure. The decision need not comply with the yield derived from taking account of the principles. But neither is the duty to have regard a matter of notional or merely formal procedural observance. Rather, the duty to have regard may yield relevant considerations with which the

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<sup>1325</sup> UK’s Written Submission, para. 338, citing Article 4(1) of the Draft Working Text for a Fisheries Framework Agreement Between the United Kingdom of Great Britain and Northern Ireland and the European Union, published 19 May 2020 (**Exhibit R-121**).

<sup>1326</sup> EU’s Replies to the UK’s Responses to Questions, para. 84.

<sup>1327</sup> EU’s Replies to the UK’s Responses to Questions, para. 86.

<sup>1328</sup> Hearing, 28 January 2025, 125:22-23 (Norris).

decision-maker must engage in coming to a decision as to a measure. Such considerations may, ultimately, be unavailing, but they cannot be ignored. Nor, however, does the duty to have regard to the principles determine what measure a Party may take. There should be a reasoned engagement with the yield of the application of the principles. This interpretation neither consigns the duty to empty procedural formalism, nor does it render the measure subject to a test of conformity to the principles.

606. The Parties have each referred to the *travaux préparatoires* to support their interpretations: on the one hand, that “having regard to” does not mean the same as “conform to”;<sup>1329</sup> and on the other hand, that there are limits to the exercise of a decision-maker’s autonomy.<sup>1330</sup> The Arbitration Tribunal notes that, under Article 32 of the VCLT, the *travaux préparatoires* are a supplementary means of interpretation which the Arbitration Tribunal may consider in order to confirm the meaning resulting from the application of Article 31 of the VCLT, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Given the negotiation framework in which the *travaux préparatoires* are situated, the Arbitration Tribunal does not find the *travaux préparatoires* determinative in confirming the meaning to be ascribed to Article 496(1) and Article 494(3) of the TCA. Nevertheless, they appear to support the Arbitration Tribunal’s interpretation that neither must a measure be subject to a test of conformity nor is the exercise of a decision-maker’s autonomy without limit.
607. The Arbitration Tribunal notes that “having regard to” must be read in the context of the remainder of Article 494(3), to which the Arbitration Tribunal now turns.

**(b) The Meaning of the “Principle” of “Applying” Proportionate and Non-Discriminatory Measures**

*(i) Positions of the Parties*

608. The Parties differ over the meaning to be ascribed to the term “principles” in Article 494(3) and Article 496(1). From the perspective of the European Union, a “principle” may have “binding normative force”, as for example where they are referred to in Article 38(1)(c) of the Statute of

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<sup>1329</sup> UK’s Written Submission, paras 330, 334.

<sup>1330</sup> EU’s Replies to the UK’s Responses to Questions, paras 84-86.



the ICJ.<sup>1331</sup> Further, the reference to “principles” may provide a framework against which compliance is assessed.<sup>1332</sup>

609. The United Kingdom contends that the term “principles” has no special meaning.<sup>1333</sup> It argues that the term “principles” captures a series of the provisions in Article 494(3) which set out “goals or standards that it would be desirable to strive for” in adopting measures under Article 496(1).<sup>1334</sup> They are “decision-making principles”, or factors that go into decision-making.<sup>1335</sup> In response, the European Union disagrees that the term “principles” should be “downgraded to purely facultative and aspirational ‘goals’”.<sup>1336</sup>
610. The Parties also differ over the interpretation to be ascribed to “applying” proportionate and non-discriminatory measures. The European Union considers that the use of the word “applying” shows that “having regard to” is not limited to the conduct of the decision-making process,<sup>1337</sup> but relates to what comes out of that process.<sup>1338</sup> In their view, the term “applying” implies that there is an obligation that extends beyond “grappling” with factors that would inform an assessment of whether a measure would be proportionate or non-discriminatory.<sup>1339</sup> The obligation in Article 496(1) and Article 494(3) “requires regard to be had to the attributes or qualities that the measure that is decided on should have – i.e. that what is applied is proportionate (and non-discriminatory)”.<sup>1340</sup>
611. The United Kingdom does not consider that the inclusion of the word “applying” immediately before “proportionate and non-discriminatory measures” alters its analysis of the meaning of “having regard to” the principles in Article 494(3).<sup>1341</sup> The United Kingdom explains that in its view whatever verb commences each sub-paragraph of Article 494(3), “they all come under the umbrella of the obligation in Article 496(1) to decide ‘having regard to’ the principles referred to

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<sup>1331</sup> EU’s Replies to the UK’s Responses to Questions, paras 69-70.

<sup>1332</sup> EU’s Replies to the UK’s Responses to Questions, para. 71.

<sup>1333</sup> Hearing, 30 January 2025, 90:11 (Westaway).

<sup>1334</sup> UK’s Responses to Questions, p. 7.

<sup>1335</sup> Hearing, 30 January 2025, 140:25-141:1 (Westaway).

<sup>1336</sup> EU’s Replies to the UK’s Responses to Questions, para. 82.

<sup>1337</sup> EU’s Responses to Questions, para. 42.

<sup>1338</sup> Hearing, 28 January 2025, 120:17 (Norris).

<sup>1339</sup> EU’s Responses to Questions, para. 132.

<sup>1340</sup> EU’s Responses to Questions, para. 137.

<sup>1341</sup> UK’s Responses to Questions, p. 32.

in Article 494(3), which in turn lists the principles to which the Parties ‘shall have regard’.”<sup>1342</sup> While indicating that the verbs at the start of the sub-paragraphs in Article 494(3) are “outcome-oriented”, the United Kingdom considers that this does not alter their nature as factors that each Party must have regard to when deciding on a measure.<sup>1343</sup>

612. In response, the European Union contends that the interpretation of the United Kingdom does not attach sufficient weight to the choice of the term “applying” which is different from “promoting” which is also one of the prefatory verbs in the sub-paragraphs of Article 494(3).<sup>1344</sup> In this regard, the Arbitration Tribunal notes the United Kingdom’s suggestion that it would not make a significant difference if Article 494(3)(f) read “hav[ing] regard to [...] applying proportionate measures” and “hav[ing] regard to [...] proportionality”.<sup>1345</sup>
613. The European Union also argues that within the decision-making process, it is not sufficient for a decision-maker to demonstrate “engagement” with the principle by simply referring to relevant factors: “There should be evidence that those different factors have both been correctly identified and then weighed and balanced.”<sup>1346</sup> The United Kingdom considers that the word “applying” suggests that the focus should be on what the impacts and benefits of the measure are expected to be.<sup>1347</sup> But in its view this does not extend to requiring any particular outcome from the decision-making process.<sup>1348</sup>

(ii) *The Arbitration Tribunal’s Interpretation*

614. The Arbitration Tribunal recalls that Article 496(1) of the TCA sets out that each Party “shall decide” on any measures applicable to its waters “in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3).” Article 494(3) repeats that:

The Parties shall have regard to the following principles:  
[...]

- (f) applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties.

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<sup>1342</sup> UK’s Written Submission, para. 334 [emphasis in the original].

<sup>1343</sup> UK’s Responses to Questions, p. 7.

<sup>1344</sup> EU’s Replies to the UK’s Responses to Questions, para. 225.

<sup>1345</sup> Hearing, 30 January 2025, 140:7-11 (Westaway).

<sup>1346</sup> EU’s Replies to the UK’s Responses to Questions, para. 218.

<sup>1347</sup> UK’s Responses to Questions, p. 32.

<sup>1348</sup> UK’s Responses to Questions, p. 7; Hearing, 30 January 2025, 84:6-8 (Westaway).

[...]

615. Both the objectives set out in Articles 494(1) and (2) and the principles referred to in Article 494(3) each play a role in the decision-making of a Party. There is, however, a distinction between their functions. Articles 494(1) and (2) are cast in terms of the objectives which a decision-maker is to pursue in deciding on fisheries management measures. The principles serve to guide how the decision-maker is to undertake its task. Furthermore, the reference to “principles” must be interpreted in light of the terms in which they have been formulated, namely the use of the term “applying” in Article 494(3)(f). The Arbitration Tribunal agrees with the European Union in this regard.<sup>1349</sup>
616. The Arbitration Tribunal considers that full meaning must be given to the verb “apply” in Article 494(3). “Having regard to [...] applying” connotes that the decision-maker must have regard to how the measure is going to be applied and the consequences of its application. That is, the obligation to have regard to applying a principle is relevant not only to the design and content of the measure, but also to its likely application in the real world. This means, following the Arbitration Tribunal’s interpretative exposition set out above (paragraph 605), that having regard to applying a principle requires an engagement with the following: does the contemplated measure, in its design, content, and likely application reflect the principle, and if so, to what extent? Consideration must be given to the answers to these questions in taking the decision to adopt the measure. This does not require that the measure must comply with the principle because there may be reasons to deviate from the considerations yielded by having regard to the principle. But neither does it give the decision-maker the flexibility to merely have regard to the principle as an “aspirational goal”.

### **(c) The Meaning of “Proportionality”**

#### *(i) Positions of the Parties*

617. The Parties are in agreement that a “proportionate” measure for the purposes of Article 494(3)(f) contains certain elements. First, the measures must be adopted “for the conservation of marine living resources and the management of fisheries resources” and be apt or appropriate to secure or contribute to that objective in the sense of being “not incapable of contributing to the objective”.<sup>1350</sup> The European Union accepts that the measures were adopted for “the conservation of marine living resources and the management of fisheries resources and that they are apt to

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<sup>1349</sup> Hearing, 28 January 2025, 25:21-25 (Norris).

<sup>1350</sup> EU’s Written Submission, paras 636-637; UK’s Written Submission, paras 345, 389.

contribute to this objective”.<sup>1351</sup> Furthermore, there is a relationship of “means and ends”, that is between the legal instruments that comprise the sandeel fishing prohibition and the objectives set out in Article 494 of the TCA.<sup>1352</sup> The Parties therefore agree that the means must contribute to the ends.<sup>1353</sup>

618. Second, the Parties agree that the term “proportionate” implies that there should be a weighing and balancing of the contribution of the measure to the objective and the economic and social impacts of the measure,<sup>1354</sup> or in more general terms a weighing and balancing of the costs and benefits of the measure.<sup>1355</sup> The European Union adds that in carrying out the weighing and balancing, regard should also be had to the impairment of other rights, including “those provided in the same Heading of the same Agreement”.<sup>1356</sup> Further, the European Union argues, it is not sufficient to identify such impacts, but they must be taken into account and given “due weight”.<sup>1357</sup> The United Kingdom considers that the character of any rights or interests likely to be adversely affected is an important consideration, with different weight to be ascribed to “interests” as compared to “unqualified rights” (such as sovereign rights in respect of living resources in its waters).<sup>1358</sup>
619. In the context of the weighing and balancing exercise, the Parties also appear to agree that this exercise entails two relevant questions: what is to be weighed and how that weighing exercise is to be carried out by the Parties.<sup>1359</sup>
620. A possible third element identified by the European Union is that in carrying out the weighing and balancing exercise, a measure may not go beyond what is “necessary” to meet the objective that is being pursued, the assessment of which may involve the consideration of whether there was a reasonably available alternative measure that would contribute to the objective, but in a manner commensurate with that objective with fewer economic and social impacts and

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<sup>1351</sup> EU’s Written Submission, paras 692, 694 and 698-699.

<sup>1352</sup> EU’s Written Submission, para. 694.

<sup>1353</sup> Hearing, 29 January 2025, 167:17-18 (Westaway).

<sup>1354</sup> EU’s Written Submission, para. 639; UK’s Written Submission, paras 345 and 352.

<sup>1355</sup> UK’s Written Submission, para. 352; Hearing, 28 January 2025, 128:10-14 (Norris).

<sup>1356</sup> EU’s Written Submission, para. 640.

<sup>1357</sup> EU’s Written Submission, para. 734.

<sup>1358</sup> UK’s Written Submission, para. 353.

<sup>1359</sup> UK’s Written Submission, para. 351; Hearing, 28 January 2025, 128:15-18 (Norris).

impairment of other rights.<sup>1360</sup> The Parties agree that the term “proportionality” establishes a different legal standard to that of “necessity”, which is the language that applies in various provisions of the WTO Agreements.<sup>1361</sup> However, the European Union argues that if a measure goes beyond what is necessary, in the sense that it is more restrictive than would be necessary to achieve the legitimate aim, then it will not be proportionate.<sup>1362</sup> This leads it to the conclusion that:

[...] the weighing and balancing in the framework of proportionality requires a holistic assessment 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.<sup>1363</sup>

621. The United Kingdom contests the relevance of a “necessity test”.<sup>1364</sup> However, the United Kingdom admits that alternative measures may be a “relevant” tool to consider whether or not a measure is proportionate, but there is no requirement to have regard to alternative measures.<sup>1365</sup> Likewise, the European Union is not arguing in this dispute that there is a binding legal obligation always to consider whether there is a reasonable, proportionate alternative measure.<sup>1366</sup> Rather an alternative measure is a useful framework of assessment<sup>1367</sup> and an analytical tool that may be advanced by a complainant asserting that a measure is not proportionate.<sup>1368</sup> Furthermore, in this case, the European Union argues that there is an alternative measure that would meet the United Kingdom’s regulatory objectives without fully impairing the rights of the European Union and this is part of the necessary framework for the assessment of proportionality.<sup>1369</sup>
622. There is no disagreement between the Parties that when conducting the weighing and balancing assessment, both quantitative and qualitative factors are relevant.<sup>1370</sup> According to the European Union, “[w]here there is a nullification of the rights, the benefits must be commensurate with that

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<sup>1360</sup> EU’s Written Submission, paras 639-641.

<sup>1361</sup> UK’s Written Submission, para. 349; Hearing, 28 January 2025, 129:17-25 (Norris).

<sup>1362</sup> Hearing, 28 January 2025, 131:2-7 (Norris).

<sup>1363</sup> Hearing, 28 January 2025, 131:8-14 (Norris).

<sup>1364</sup> UK’s Written Submission, paras 349-350.

<sup>1365</sup> Hearing, 29 January 2025, 160:12-19 (Westaway).

<sup>1366</sup> Hearing, 28 January 2025, 190:4-6 (Norris).

<sup>1367</sup> Hearing, 28 January 2025, 190:3 (Norris).

<sup>1368</sup> EU’s Supplementary Written Submission, para. 60.

<sup>1369</sup> Hearing, 28 January 2025, 190:6-18 (Norris).

<sup>1370</sup> Hearing, 28 January 2025, 132:11-12 (Norris).

level of impairment.”<sup>1371</sup> Moreover, it is the differential between the costs and benefits,<sup>1372</sup> or the “delta” between the two, which should be considered.<sup>1373</sup> In other words, proportionality is about the magnitude of the imbalance between the costs and benefits.<sup>1374</sup> The United Kingdom accepts that consideration should be given to whether the magnitude of the imbalance between social and economic costs is so great that one cannot reasonably conclude that the measure is proportionate.<sup>1375</sup>

(ii) *The Arbitration Tribunal’s Interpretation*

623. The Arbitration Tribunal agrees with the Parties that measures must be adopted “for the conservation of marine living resources and the management of fisheries resources” and be apt or appropriate to secure or contribute to that objective in the sense of being “not incapable of contributing to the objective”.<sup>1376</sup> There is no dispute between the Parties that the measure meets this element of proportionality. Second, “proportionality” entails a relationship of “means and ends” between the measure and its objectives. The European Union does not contest that there is a relationship of “means and ends” between the sandeel fishing prohibition and the objectives set out in Article 494 of the TCA.<sup>1377</sup> Given this agreement between the Parties, the Arbitration Tribunal will focus its attention on the element of proportionality where there is disagreement between the Parties.
624. Proportionality also entails a weighing and balancing of the likely contribution of the measure to the objective of the measure and the likely economic, social and other consequences (costs and benefits) of taking the measure and its likely application. This does not mean that a measure is only proportionate if the benefits outweigh the costs. First, the weighing may not be entirely capable of being measured according to a common metric. Second, certain consequences may be difficult to weigh or warrant different weights or may resist ready comparison. Third, weighing may engage value judgements as to the weight to be attached to various consequences of taking the measure. Fourth, even where commensurability is achievable, this does not mean that the

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<sup>1371</sup> Hearing, 28 January 2025, 131:14-16 (Norris).

<sup>1372</sup> Hearing, 28 January 2025, 131:20-21 (Norris).

<sup>1373</sup> Hearing, 28 January 2025, 134:11, 188:11 (Norris).

<sup>1374</sup> Hearing, 28 January 2025, 188:14-16 (Norris).

<sup>1375</sup> Hearing, 29 January 2025, 189:2-7 (Westaway).

<sup>1376</sup> EU’s Written Submission, paras 636-637; UK’s Written Submission, paras 345, 389.

<sup>1377</sup> EU’s Written Submission, para. 694.

benefits must be greater than the harm. But rather, the greater the margin by which the harm exceeds the benefit, the more the proportionality of the measure may be cast into doubt.

625. In this regard, the Arbitration Tribunal recognises the difficulties of weighing and balancing non-monetised benefits to the environment and monetised social and economic costs and of weighing short term social and economic costs versus long term environmental benefits. Different costs and benefits may to a certain extent be incommensurable.<sup>1378</sup> In such situations, consideration may be paid to both qualitative and quantitative factors and the extent of the disparity between the benefits and the economic, social and other consequences of the measure.
626. Article 496(1), read together with Article 494(3)(f), requires a Party deciding whether to take a measure applicable in its waters to have regard to applying proportionate (and non-discriminatory) measures. In the view of the Arbitration Tribunal, the decision-maker must have regard to the various considerations that have a bearing on the proportionality of a measure and which are to be taken into account in a weighing and balancing exercise, apply these considerations in its decision-making process, and come to a conclusion on the measure and its application that has regard to the yield of this process.
627. The Arbitration Tribunal does not consider that the WTO necessity test or WTO jurisprudence is particularly helpful in assessing proportionality under Heading Five of Part Two of the TCA. However, in undertaking the weighing and balancing exercise, consideration can usefully be given to whether there are alternative measures which would meet the objectives of the measure and have less adverse impacts or impairment of rights, not as a requirement of a proportionality assessment, but as a useful tool or analytical framework in which to consider whether regard has been paid to applying a proportionate measure.

**(d) *The Meaning of “Non-Discriminatory”***

*(i) Positions of the Parties*

628. The term “non-discriminatory” is not defined in the TCA, although it is used in the TCA more than 115 times.<sup>1379</sup> The Parties agree that the term “non-discriminatory” in Article 494(3)(f)

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<sup>1378</sup> UK’s Written Submission, para. 354.2.

<sup>1379</sup> EU’s Written Submission, para. 643.

relates to discrimination based on origin or nationality,<sup>1380</sup> and extends to discrimination *de jure* and *de facto*.<sup>1381</sup>

629. There is agreement between the Parties on the general notion that whether there is *de facto* discrimination requires consideration of whether the differential impacts stem from a measure that pursues a legitimate regulatory objective,<sup>1382</sup> but that differential treatment, without more, is not enough to establish discrimination.<sup>1383</sup> However, they differ once non-discrimination is addressed at a more granular level. According to the European Union, “a difference in treatment, giving rise to a differential impact that stems exclusively from a legitimate regulatory distinction that is designed and applied in an even-handed manner, would be permissible”.<sup>1384</sup> The United Kingdom accepts that a measure that has differential effects will not be *de facto* discriminatory where those effects stem from pursuing a legitimate regulatory objective,<sup>1385</sup> but does not agree with the notion that such differential impact must stem *exclusively* from a legitimate regulatory distinction to be permissible,<sup>1386</sup> or with the notion of “even-handedness”.<sup>1387</sup> According to the United Kingdom, differential treatment that is founded on a legitimate regulatory objective is permissible.<sup>1388</sup> The European Union responds that although differential treatment is not enough to establish *de facto* discrimination, the analysis should not stop there but should consider whether there is a nexus between the objective and any differentiation.<sup>1389</sup>
630. There is one final matter on which the Parties agree. Although the tests of non-discrimination and proportionality are different, the factors which may be taken into account in a proportionality assessment and a non-discrimination analysis may be relevant for both.<sup>1390</sup>

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<sup>1380</sup> EU’s Written Submission, para. 655; UK’s Written Submission, para. 356.1.

<sup>1381</sup> EU’s Written Submission, para. 656; UK’s Written Submission, para. 356.2.

<sup>1382</sup> UK’s Written Submission, para. 356.3.

<sup>1383</sup> EU’s Written Submission, para. 761; EU’s Responses to Questions, para. 66; Hearing, 29 January 2025, 185:23-186:2 (Westaway).

<sup>1384</sup> EU’s Responses to Questions, para. 63.

<sup>1385</sup> UK’s Written Submission, para. 360.

<sup>1386</sup> UK’s Written Submission, para. 360; Hearing, 29 January 2025, 186:8-10 (Westaway).

<sup>1387</sup> UK’s Written Submission, para. 357.3; UK’s Replies to the EU’s Responses to Questions, p. 5.

<sup>1388</sup> UK’s Responses to Questions, p. 11.

<sup>1389</sup> EU’s Replies to the UK’s Responses to Questions, para. 131.

<sup>1390</sup> EU’s Written Submission, para. 763; UK’s Written Submission, para. 357.5.



(ii) *The Arbitration Tribunal's Interpretation*

631. The Arbitration Tribunal recalls its interpretation of “having regard to applying the principle” of proportionality and non-discrimination. The principle of non-discrimination applies to the measure itself, its application and its consequences, and refers to both *de jure* and *de facto* discrimination. This requires consideration of whether the design, content and application of the measure reflects the principle of non-discrimination. This does not require that the measure must conform to the principle of non-discrimination but the decision-maker must have regard to it. However, a measure, its application or consequences that differentiate by reason of origin or nationality would offend the principle of non-discrimination, unless such differentiation is justified due to it serving a legitimate regulatory objective.
632. The Arbitration Tribunal considers that the Fisheries Heading of the TCA cannot be divorced from the rest of the TCA where there is frequent recourse to the term “non-discrimination”. Neither can the interpretation of non-discrimination be divorced from the relevant rules of international law applicable between the Parties, which include the WTO Agreement. However, the Arbitration Tribunal does not consider it is necessary to opine on the relevance of particular decisions of WTO panels or the WTO Appellate Body. Rather, for the purposes of its analysis in this matter, the Arbitration Tribunal considers that *de facto* discrimination occurs where there is differential treatment that is not based on a legitimate regulatory objective or where there is a lack of a clear nexus between the differential treatment and the regulatory objective.<sup>1391</sup>

(e) *The Meaning of “While Preserving the Regulatory Autonomy of the Parties”*

633. The Arbitration Tribunal has addressed the overarching issue of regulatory autonomy in Section V.B.2 above. Article 494(3)(f) specifically refers to applying proportionate and non-discriminatory measures “while preserving the regulatory autonomy of the Parties”. The European Union indicates that the use of the present tense “while preserving” shows that the Parties considered that regulatory autonomy does not have primacy but must be considered concurrently with the principle of applying proportionate and non-discriminatory measures.<sup>1392</sup> The Arbitration Tribunal agrees that as the conjunction “while” is used in Article 494(3)(f), regulatory autonomy does not take precedence, but that regard must be had to applying

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<sup>1391</sup> The Arbitration Tribunal is not suggesting that this is a comprehensive interpretation of *de facto* discrimination, but it captures the salient interpretation for the purposes of this dispute.

<sup>1392</sup> EU's Written Submission, para. 559.

proportionate and non-discriminatory measures at the same time as preserving regulatory autonomy.

634. Thus, Article 494(3)(f) recognises the need to have regard to the principle of applying proportionate and non-discriminatory measures while preserving regulatory autonomy, without primacy of one over the other. In the context of Article 494(3)(f), regulatory autonomy is a factor to which regard may be had as a balancing consideration, together with proportionality and non-discrimination, in relation to the measure, its application and its consequences.

## 2. Standard of Review

635. The Arbitration Tribunal recalls that according to the general standard of review described in Section V.B.3 above, the Arbitration Tribunal must “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity of the measures at issue with, the covered provisions.”
636. The Parties differ on the intensity of the review that the Arbitration Tribunal is to undertake under Article 742 of the TCA. The European Union referred to a UK Supreme Court decision to the effect that the intensity of review will depend on the nature of the right that has been impaired.<sup>1393</sup> The European Union concluded on this point that “the intensity of review is a function of the substantive provisions of the specific Agreement at issue in a dispute as well as the specific claims(s) put forth by a complainant”.<sup>1394</sup>
637. The European Union goes on to argue that the requirement in Article 742 of the TCA to “make an objective assessment of the matter before it” cannot be understood to preclude the Arbitration Tribunal from assessing the reasoning of a Party deciding on a fisheries management measure or from carrying out an examination of the explanations provided.<sup>1395</sup> With regard to proportionality, the European Union considers that the Arbitration Tribunal should scrutinise not only whether the social and economic impacts of the sandeel fishing prohibition were taken into account by the United Kingdom in the process of deciding on the sandeel fishing prohibition, “but also whether

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<sup>1393</sup> EU’s Written Submission, para. 625, citing *Kennedy (Appellant) v The Commission (Respondent)* [2014] UKSC 20, para. 57 (**Exhibit CLA-62**).

<sup>1394</sup> EU’s Supplementary Written Submission, para. 53.

<sup>1395</sup> EU’s Supplementary Written Submission, para. 59.

those impacts were properly weighed” by the United Kingdom, and if so, whether the measure could or could not have been adopted.<sup>1396</sup>

638. The United Kingdom argues that the phrase “having regard to” in Article 494(3) implies a deferential review by the Arbitration Tribunal, which can be limited to monitoring the decision-making process.<sup>1397</sup> In the United Kingdom’s view, it is sufficient if the Party taking the measure has “properly grappled” with the question and has come to the conclusion, considering the relevant factors, that the measure is proportionate (or non-discriminatory). If so, that is the end of the analysis.<sup>1398</sup>
639. With respect to any examination of the weighing and balancing in a proportionality assessment, the Parties appear to agree that it is the magnitude of the imbalance between social and economic costs and benefits which should be looked at.<sup>1399</sup> The United Kingdom suggests that the standard that the Arbitration Tribunal should adopt is whether the social and economic costs and benefits are “clearly disproportionate”, “out of all proportion” or “manifestly inappropriate”.<sup>1400</sup> The European Union recognises that the costs and benefits will be on a scale and what is to be assessed is “the delta” between the two,<sup>1401</sup> or where the imbalance between the costs and benefits is “clear”.<sup>1402</sup>
640. The Arbitration Tribunal considers that the requirement in Article 742 of the TCA to “make an objective assessment of the matter before it” cannot be understood to preclude the Arbitration Tribunal from examining whether the measure and the reasons that support it objectively meet the standard of proportionality and the regard that must be had to it, as the Arbitration Tribunal has explained above (paragraph 626). This requires more than simply monitoring the decision-making process.
641. However, the Arbitration Tribunal agrees with the United Kingdom that an objective assessment does not mean that the Arbitration Tribunal should “stand in the shoes” of the original decision-

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<sup>1396</sup> EU’s Responses to Questions, para. 58.

<sup>1397</sup> Hearing, 29 January 2025, 166:13-20 (Westaway).

<sup>1398</sup> Hearing, 29 January 2025, 165:19-25 (Westaway).

<sup>1399</sup> Hearing, 29 January 2025, 189:6-13 (Westaway).

<sup>1400</sup> Hearing, 30 January 2025, 76:1 (Westaway); UK’s Written Submission, para. 354.5.

<sup>1401</sup> EU’s Supplementary Written Submission, para. 48.

<sup>1402</sup> EU’s Supplementary Written Submission, para. 47.

maker and seek to re-make the decision for themselves.<sup>1403</sup> But on the other hand, this does not lead to a standard of total deference to the decision-maker. The Arbitration Tribunal must objectively review whether a Party had regard to applying the principle of proportionality (or non-discrimination). With respect to proportionality, this entails a review of whether the various factors bearing on the proportionality of a measure were considered and whether these considerations were applied in the actual weighing and balancing such that what was done satisfies the requirement to “have regard” to the principle of applying a proportionate measure.

642. This does not lead to a prescriptive assessment of how the decision-maker has undertaken the weighing and balancing, nor an assessment of whether the decision-maker was correct in its weighing and balancing. An Arbitration Tribunal should not seek to replace the decision-maker’s judgements on the weighing of costs and benefits with its own judgements. Nor is this standard of review such as to render the measure subject to conformity with proportionality and non-discrimination.

### **3. Application of the Legal Standard to Applying a Proportionate Measure**

#### **(a) *The Arbitration Tribunal’s Approach***

643. The Arbitration Tribunal will first explain its approach to the application of the legal standard of “having regard to the principle of applying a proportionate” measure.

644. The Arbitration Tribunal notes that according to the European Union, in undertaking a proper weighing and balancing of the benefits and adverse impacts of a measure in order to assess whether regard has been had to applying the principle of proportionality, there are two analytical steps: first, the identification of what is to be weighed, and second, how the Party then weighed and balanced those benefits and costs.<sup>1404</sup> The United Kingdom appeared to agree with this approach in its Written Submission,<sup>1405</sup> but clarified that it does not accept that it is necessary, or will always be possible, for a Party to provide evidence of *how* a decision-maker balances different factors. Rather, all that can be shown is that relevant benefits and impacts were considered in light of the legitimate objective and a judgement taken on that basis.<sup>1406</sup>

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<sup>1403</sup> UK’s Written Submission, para. 354.4.

<sup>1404</sup> EU’s Responses to Questions, paras 142-143.

<sup>1405</sup> UK’s Written Submission, para. 351.

<sup>1406</sup> UK’s Responses to Questions, p. 38.

645. The Arbitration Tribunal agrees that it is required first to consider the factors that go into a weighing and balancing exercise, and whether all the relevant benefits and adverse consequences were taken into account. This is required by the duty “to have regard” which generates the relevant considerations with which the decision-maker must engage in order to come to a decision as to a measure. However, the analysis of whether a Party has had regard to the principle of applying a proportionate measure should not stop there. As explained above (paragraph 616), applying a principle requires an engagement with whether the contemplated measure, in its design, content, and likely application, reflects the principle. According to our standard of review explained above (paragraph 641) the Arbitration Tribunal is to review objectively whether the various factors bearing on the proportionality of a measure were considered and whether these considerations were applied in the actual weighing and balancing such that what was done satisfies the requirement to “have regard to” the principle of applying a proportionate measure.
646. The Arbitration Tribunal accepts that it may not be possible for a tribunal in an inter-State arbitration to have a perfect understanding of the thought processes of the relevant Minister making the decision after having considered all the relevant advice and information.<sup>1407</sup> It is also accepted that it is difficult to weigh costs and benefits which may not be commensurable or where value judgements are made as to the weight to be applied to different considerations and the objectives that are sought to be achieved. In such circumstances, it is the extent of disparity between the benefits and the economic, social and other consequences of the measure to which attention may be paid.
647. The Arbitration Tribunal recalls the arguments of the European Union set out in Section IV.C.2(a) alleging that the United Kingdom has not had regard to applying the principle of proportionality on the grounds that the economic and social impacts and the degree of impairment to rights granted under the TCA are not commensurate with the degree of contribution of the measure to the legitimate objectives it pursues.<sup>1408</sup> In summary, there are five main arguments articulated by the European Union. First, the European Union argues that there is insufficient evidence to support the United Kingdom’s claim that it will achieve all the environmental effects identified and that therefore the contribution of the measure to its objectives is overstated. Second, the United Kingdom did not adequately consider the social and economic impacts of the measure on EU vessels and the fishmeal and fish oil sectors of the EU industry. Third, the European Union argues that these social and economic impacts could not be mitigated to the extent claimed by the

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<sup>1407</sup> UK’s Responses to Questions, p. 38.

<sup>1408</sup> EU’s Written Submission, para. 685.

United Kingdom. Fourth, the United Kingdom failed to properly account for the impairment of the rights of the European Union under the TCA during the adjustment period. Fifth, there was a reasonably available and potentially proportionate measure that the United Kingdom could have applied to meet its objectives.

648. The Arbitration Tribunal will consider these arguments first for the decision of the United Kingdom to prohibit sandeel fishing in English waters and then for the decision in respect of Scottish waters.

649. In doing so, the Arbitration Tribunal will consider the evidence on the record of the factors that were taken into account in the weighing and balancing exercise that was carried out, before considering whether the actual weighing and balancing that was done satisfies the requirement to “have regard to applying” the principle of proportionality, and coming to a conclusion on whether regard was had to the principle of applying a proportionate measure.

**(b) *The Measure in Respect of English Waters***

650. In its examination of the decision to prohibit sandeel fishing in English waters, the Arbitration Tribunal will adopt the approach set out in the previous paragraph (paragraph 649). In doing so, the Arbitration Tribunal will consider each of the arguments of the European Union described above (paragraph 647).

**(i) *Weighing and Balancing the Benefits and Costs***

651. The Parties have pointed the Arbitration Tribunal to a number of documents which in their view describe how the decision-maker had regard to the principle of applying a proportionate measure with respect to English waters. The Arbitration Tribunal will first consider those documents related to the consultation process on the prohibition in English waters, then the documents that were considered by the decision-maker.<sup>1409</sup>

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<sup>1409</sup> This is also the approach that the United Kingdom took during the hearing: Hearing, 29 January 2025, 169:20-22 (Westaway).

652. The documents related to the consultation process to which the Arbitration Tribunal was referred,<sup>1410</sup> are the DMA,<sup>1411</sup> and the Ministerial Submission of 15 February 2023,<sup>1412</sup> which attached the DEFRA Consultation Document.<sup>1413</sup> The DMA sets out the rationale for intervention, noting the importance of the sandeel contribution to the marine ecosystem, the vulnerable state of sandeel biomass and the consequent impact on predators, including seabirds.<sup>1414</sup> The policy objective is stated as: “To increase the biomass of sandeel stocks and therefore increase the food available for higher trophic level predators such as seabirds within the wider ecosystem within English waters of the North Sea”.<sup>1415</sup> It identifies and considers a number of policy options, but does not consider that any would meet the policy objectives except a spatial closure, of which three options were identified: a full closure of English waters, a closure of English waters within Sandeel Management Areas 4 and 3r, and a closure of English waters within Sandeel Management Area 1r.<sup>1416</sup> The benefits of a closure were identified as ecosystem benefits and, in summary: increased sandeel resilience, increased seabird resilience, increased occurrence of marine mammals within English waters, improved condition of other commercial fish and progress towards GES.<sup>1417</sup> The DMA noted in passing that seabirds were the biggest beneficiaries and “[e]cosystem model simulations predict a full prohibition in UK waters could lead to an increase in seabird biomass of 4-8%”.<sup>1418</sup> The impact of a closure on EU vessels was recognised and monetised economic costs were estimated for both UK businesses and non-UK vessels.<sup>1419</sup> The

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<sup>1410</sup> UK’s Responses to Questions, pp. 10-11; Hearing, 29 January 2025, 170:8-172:5 (Westaway).

<sup>1411</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023 (**Exhibit C-44**).

<sup>1412</sup> Ministerial Submission, 15 February 2023 (**Exhibit R-74**). As explained by the United Kingdom, this submission was wrongly dated 16 January 2023, *see* UK’s Written Submission, n. 224.

<sup>1413</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023 (**Exhibit R-61**).

<sup>1414</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 1, paras 1-9 (**Exhibit C-44**).

<sup>1415</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para. 10 (**Exhibit C-44**).

<sup>1416</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 2, paras 13-25 (**Exhibit C-44**).

<sup>1417</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, paras 58-64 (**Exhibit C-44**).

<sup>1418</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, para 61 (**Exhibit C-44**). Although the reference was to the Natural England/Cefas/JNCC Advice, there was no indication given that the figures cited were estimates over a 10 year timeframe for the North Sea as a whole.

<sup>1419</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 3, paras 34-51 and Annex 1 (**Exhibit C-44**).

value of sandeel landings from EU vessels was estimated at GBP 41.2 million *per annum*.<sup>1420</sup> The adverse impact on the Danish fishmeal and fish oil factories was also referenced.<sup>1421</sup>

653. The DEFRA Consultation Document provided background on the importance of sandeel and of industrial sandeel fishing in the North Sea. It referred in general to the estimated impact on non-UK businesses, including reduced profits from the annual GBP 41.2 million revenue for non-UK fishers, and noted that a more detailed assessment was contained in the DMA.<sup>1422</sup> The lost revenue and the indirect employment impacts on overseas factories, for example in Denmark, which would have otherwise processed sandeel, was also raised in the Ministerial Submission of 16 February 2023, to which the Arbitration Tribunal was referred.<sup>1423</sup>
654. The documents relating to the decision-making process to which the United Kingdom referred the Arbitration Tribunal,<sup>1424</sup> are the Ministerial Submission of 14 September 2023,<sup>1425</sup> the UK Government's response to Defra's consultation<sup>1426</sup> and the Letter from the UK Minister to the Danish Minister of 27 February 2024, which attached the Government's response to Defra's consultation.<sup>1427</sup> The Arbitration Tribunal notes that the UK Government's response to Defra's consultation and the Letter from the UK Minister to the Danish Minister identify some of the considerations that the decision-maker took into account in deciding on the closure. However, neither appears to show any weighing and balancing of these considerations. The Arbitration Tribunal agrees with the European Union on this point.<sup>1428</sup>

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<sup>1420</sup> DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, paras 45, 65, and Annex 1 (**Exhibit C-44**).

<sup>1421</sup> DMA for Self-Certified Measures in DEFRA, regarding 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing', 1 February 2023, Annex 1 (**Exhibit C-44**).

<sup>1422</sup> DEFRA, 'Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea', March 2023, p. 7 (**Exhibit R-61**).

<sup>1423</sup> Ministerial Submission, 15 February 2023, para. 19 (**Exhibit R-74**).

<sup>1424</sup> UK's Responses to Questions, p. 11; Hearing, 29 January 2025, 172:6-174:9 (Westaway).

<sup>1425</sup> Ministerial Submission, 14 September 2023 (**Exhibit R-77**).

<sup>1426</sup> DEFRA, 'Consultation outcome: Government response', updated 31 January 2024 (**Exhibit R-87**).

<sup>1427</sup> Letter from UK Minister of State for Food, Farming and Fisheries to Danish Minister for Food, Agriculture and Fisheries, 27 February 2024 (**Exhibit R-85**).

<sup>1428</sup> EU's Replies to the UK's Responses to Questions, para. 123.



*a. Factors Relevant to a Consideration of Whether Regard Was Had to the Principle of Applying a Proportionate Measure*

655. In considering the various factors that are relevant to a consideration of whether regard was had to the principle of applying a proportionate measure, the Ministerial Submission of 14 September 2023 is, as the United Kingdom indicates, the “key document”.<sup>1429</sup> The recommendation is to close the English waters of the North Sea to fishing for sandeel by all vessels for the benefit of the wide marine ecosystem.<sup>1430</sup> There is some consideration of the potential ecosystem benefits of a closure, which “could lead to an increase in seabird biomass of 7% in around 10 years”.<sup>1431</sup> Weight seems to have been placed on this as the Ministerial Submission states: “In light of the potential ecosystem benefits (such as an increase in seabird biomass over 10 years), we are recommending a prohibition on fishing for sandeel in English waters of the North Sea by all vessels”.<sup>1432</sup> The Ministerial Submission also notes that there is uncertainty in the forecasts of outcomes from ecosystem based management actions.<sup>1433</sup> However, it considers that notwithstanding the evidentiary difficulties, introducing this measure is consistent with “the aim of taking an ecosystem-based, precautionary approach to fisheries management and adopt a balanced, proportionate approach to achieving, or contributing to the achievement of the fisheries objectives in a manner that contributes towards achieving and maintaining GES”.<sup>1434</sup>
656. In terms of costs, the Ministerial Submission highlights the adverse impact of a prohibition on the EU fishing industry as well as EU fishmeal and fish oil factories.<sup>1435</sup> In response to questioning from the European Commission “whether a full closure could lead to a large negative impact on industry compared to the possible proposed benefits outlined in the report”, the Ministerial Submission maintained the position that a full closure would be the best available option to support delivery on their aims and deliver GES for seabirds and marine food webs.<sup>1436</sup> In terms of adverse impacts on the EU industry, the submission noted that these were difficult to quantify.<sup>1437</sup> It considered that it is likely that vessels targeting sandeel likely also fish for other

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<sup>1429</sup> Hearing, 29 January 2025, 172:10 (Westaway).

<sup>1430</sup> Ministerial Submission, 14 September 2023, para. 4 (**Exhibit R-77**).

<sup>1431</sup> Ministerial Submission, 14 September 2023, para. 13 (**Exhibit R-77**).

<sup>1432</sup> Ministerial Submission, 14 September 2023, para. 14 (**Exhibit R-77**).

<sup>1433</sup> Ministerial Submission, 14 September 2023, para. 15 (**Exhibit R-77**).

<sup>1434</sup> Ministerial Submission, 14 September 2023, para. 16 (**Exhibit R-77**).

<sup>1435</sup> Ministerial Submission, 14 September 2023, paras 19-20 (**Exhibit R-77**).

<sup>1436</sup> Ministerial Submission, 14 September 2023, para. 24 (**Exhibit R-77**).

<sup>1437</sup> Ministerial Submission, 14 September 2023, para. 25 (**Exhibit R-77**).

pelagic and industrial stocks, would continue to do so and would also continue to be able to fish their sandeel quota in EU waters.<sup>1438</sup>

657. The Arbitration Tribunal recalls that the European Union argues that the United Kingdom failed to properly account for the impairment of the rights of the European Union under the TCA during the adjustment period. The European Union argues that the nature of the rights of the other Party under Annex 38 to the TCA must be considered when assessing whether a measure decided upon and applied during the adjustment period is justified.<sup>1439</sup> As set out in Recital 3 to Annex 38, the rationale of the period of adjustment until 30 June 2026, during which fishers are permitted to access the waters of the other Party as before entry into force of the TAC, is the “social and economic benefits of a further period of stability”.<sup>1440</sup> The European Union also criticises the United Kingdom’s lack of adherence to the principle of cooperation underpinning the TCA as a whole and Heading Five in particular.<sup>1441</sup> This is especially the case considering the fact that sandeel is a shared stock.<sup>1442</sup> Furthermore, the European Union argues, an impairment of the rights of the European Union to “full access” to UK waters to fish during the adjustment period cannot be justified by “mere reference” to regulatory autonomy.<sup>1443</sup>
658. The United Kingdom does not dispute the relevance of taking account of the adverse effects of the measure on the rights or interests of the other Party.<sup>1444</sup> However, it argues that in light of the “numerous considerations” to be weighed, “broad discretion” should be reserved to the decision-maker.<sup>1445</sup> Furthermore, according to the United Kingdom, the character of the rights and interests likely to be adversely affected is an important consideration. The United Kingdom argues that it has sovereign rights in respect of living resources in its own waters, with the corollary that appropriately lesser weight should be given to the economic and social interests of the EU fishing industry and to the qualified right of access for EU vessels, “which operates within the confines of the UK’s consent in the terms of the TCA.”<sup>1446</sup>

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<sup>1438</sup> Ministerial Submission, 14 September 2023, paras 25-26 (**Exhibit R-77**).

<sup>1439</sup> EU’s Supplementary Written Submission, para. 85.

<sup>1440</sup> *See also* EU’s Written Submission, para. 739; EU’s Responses to Questions, paras 79-81; EU’s Supplementary Written Submission, paras 83-85.

<sup>1441</sup> EU’s Written Submission, paras 740-742.

<sup>1442</sup> EU’s Replies to the UK’s Responses to Questions, paras 255-258.

<sup>1443</sup> EU’s Responses to Questions, paras 173-176.

<sup>1444</sup> UK’s Written Submission, para. 352.2.

<sup>1445</sup> UK’s Written Submission, para. 352.2.

<sup>1446</sup> UK’s Written Submission, para. 353.

659. The Arbitration Tribunal considers that the adjustment period is a relevant consideration to be taken into account in reviewing whether regard was had to the principle of applying a proportionate measure. As the European Union notes, prior to 2021 the European Union and the United Kingdom jointly managed shared fish stocks in their waters pursuant to the European Union’s Common Fisheries Policy.<sup>1447</sup> Following the United Kingdom’s withdrawal from the European Union, the Parties agreed on a framework for joint management of shared fish stocks in their waters, which is set out in Heading Five of Part Two of the TCA. Heading Five falls under the overall purpose of the TCA which “establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties’ autonomy and sovereignty.”<sup>1448</sup> Cooperation between the Parties underpins the management of shared stocks, as defined in the TCA.<sup>1449</sup>
660. As part of this framework, a Protocol to the TCA on Access to Waters was concluded and is contained in Annex 38. The Common Fisheries Policy provided stability in the access arrangements to the waters of each Party for EU and UK vessels. With the withdrawal of the United Kingdom from the European Union, Annex 38 provided, as indicated in its Preamble, “a further period of stability” until 30 June 2026. The mention of a “further” period of stability is a reference to the stability of fishing access due to the application of the Common Fisheries Policy. Article 2(1)(a) of Annex 38 provides that “during the adjustment period each Party shall grant to vessels of the other Party full access to its waters to fish” for stocks listed in Annex 35 “at a level that is reasonably commensurate with the Parties’ respective share of fishing opportunities”. Annex 35 provides context for the interpretation of “a further period of stability” in the Preamble to Annex 38. Annex 35 lists a range of stocks, including sandeel, and the quota shares split between the European Union and United Kingdom for each stock. The Annex includes specific adjustments in the proportionate shares of quotas between 2021 and 2026, with a gradual increase in the proportion of quota allocated to the United Kingdom over that period. This is indicative of the degree of stability envisaged by the Parties in concluding the Protocol on Access to Waters. Articles 2(2) and 2(3) of Annex 38 set out the regime following the end of the adjustment period, in which the level and conditions of access may differ. Thus, the rationale for a transitional

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<sup>1447</sup> EU’s Written Submission, para. 1.

<sup>1448</sup> Article 1 of the TCA.

<sup>1449</sup> See Articles 498-511 of the TCA; EU’s Written Submission, paras 224-229.

“adjustment period” is to provide a bridge between the Common Fisheries Policy and the post 30 June 2026 regime.

661. According to the language of the Preamble, the Parties “not[e] the social and economic benefits of a further period of stability”. The Ministerial Submission of 14 September 2023 included reference to the consideration that was given to the impact on EU vessels.<sup>1450</sup> However, any consideration given to the adverse social and economic impacts of a fisheries management measure implemented during the adjustment period does not equate to consideration being given to the rights and interests of a Party during the adjustment period. There is a distinction between the social and economic impacts on the fishing and processing industry of a Party and the impact on the rights of a Party to an international agreement. A diminution of rights requires the consideration, not only of the social and economic impacts of such diminution, but also the stability and predictability of the agreements made under the TCA, expressed as rights, which have a systemic benefit to the Parties and must be taken into account. This does not mean that “full access” is absolute, as acknowledged by the European Union.<sup>1451</sup> However, neither does it mean that there has been no impairment to the rights of the European Union on the grounds that the right of access is subject to the ability to adopt measures under Article 496 of the TCA.<sup>1452</sup> Indeed, the United Kingdom accepts that the rights and interests of a Party are a relevant consideration, but argues that they should be given lesser weight than the sovereign rights of a coastal State over its waters.

662. The question arises for the Arbitration Tribunal as to whether the UK decision-maker had regard to the rights and interests of the European Union during the adjustment period as a factor to be considered in relation to the principle of applying a proportionate measure. None of the decision documents to which the Arbitration Tribunal was referred by the United Kingdom raise Annex 38 or the adjustment period. There is one reference to “access” in the Ministerial Submission of 14 September 2023 which, after referring to the European Commission’s allegations that the measure “could be in breach of obligations relation to discrimination and access” in the TCA states:

We consider that the proposed measures are not discriminatory towards the EU as these measures will apply equally to all vessels operating in English waters of the North Sea nor contravene any access or other obligations in the TCA.<sup>1453</sup>

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<sup>1450</sup> Ministerial Submission, 14 September 2023, para. 8 (**Exhibit R-77**).

<sup>1451</sup> EU’s Written Submission, para. 379.

<sup>1452</sup> UK’s Written Submission, para. 424-425.

<sup>1453</sup> Ministerial Submission, 14 September 2023, para. 27 (**Exhibit R-77**).

663. It appears to the Arbitration Tribunal that the United Kingdom either did not take account of the rights and interests of the European Union and the value of stability during the adjustment period in its decision-making on the prohibition of sandeel fishing in English waters, or those rights and interests were given no relevance in the decision-making process.

*b. Weighing and Balancing in Relation to Whether Regard Was Had to the Principle of Applying a Proportionate Measure*

664. It will be recalled that the Arbitration Tribunal is also to review whether objectively relevant considerations were taken into account and applied in the actual weighing and balancing such that what was done satisfies the requirement to “have regard to” the principle of applying a proportionate measure. In doing so, the Arbitration Tribunal will consider these issues in line with the approach adopted above (paragraph 649).

665. The European Union argues that the documents identified by the United Kingdom “do not either properly consider or weigh those impacts”.<sup>1454</sup> More specifically, according to the European Union, the United Kingdom overstated the benefits of the measure that it adopted, underestimated the costs arising from the measure and failed to properly weigh those benefits and costs.<sup>1455</sup>

666. When looking at the benefits, the European Union considers that the benefits of the measure are overstated.<sup>1456</sup> The European Union argues that the scientific basis for the measure is a factor that should be taken into account in the weighing and balancing.<sup>1457</sup> In its view, the scientific basis does not support the full range of environmental effects claimed by the United Kingdom.<sup>1458</sup>

667. The United Kingdom argues that as the closure of waters to sandeel fishing was decided for the purposes of meeting its chosen objective and apt to contribute towards it, the United Kingdom Government was entitled to place considerable weight on the ecosystem benefits arising from the closure.<sup>1459</sup> The Arbitration Tribunal notes that the Ministerial Submission of 14 September 2023 recognised that the ICES single species catch advice did not take into account wider ecological needs or benefits, whereas the Natural England/Cefas/JNCC Advice provided a broader evidence

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<sup>1454</sup> EU’s Replies to the UK’s Responses to Questions, para. 122; Hearing, 28 January 2025, 175:22-176:8 (Dawes);

<sup>1455</sup> EU’s Replies to the UK’s Responses to Questions, para. 236; Hearing, 28 January 2025, 183:2-11 (Dawes).

<sup>1456</sup> Hearing, 28 January 2025, 185:14-18 (Norris).

<sup>1457</sup> Hearing, 28 January 2025, 132:12-15 (Norris).

<sup>1458</sup> EU’s Written Submission, para. 707.

<sup>1459</sup> UK’s Responses to Questions, p. 35.

base and analysis relating to the wide ecosystem which the proposed closure is intended to support.<sup>1460</sup>

668. The Arbitration Tribunal has already found that the calculation of sandeel fishing mortality in the EwE model simulations, and therefore the potential impact of a closure of UK waters to sandeel fishing, is likely to be an overestimation of the likely benefits from a full closure. As indicated above (paragraph 655), the decision-maker appears to have placed some reliance on the predicted ecosystem impacts of a full prohibition in waters of the United Kingdom. However, the Arbitration Tribunal does not consider that this on its own impugns the requirement to have regard to applying the principle of proportionality.
669. With respect to the social and economic costs of the closure of English waters to sandeel fishing, the European Union argues that the United Kingdom has understated the economic and social impacts of the sandeel fishing prohibition.<sup>1461</sup> The European Union does not seek to question the quantifiable social and economic costs to which the decision-maker had regard, but rather the extent to which they can be attenuated. The United Kingdom has placed some weight on the potential mitigation of the economic and social impacts of the closure of English waters to sandeel fishing through the displacement of fishing effort to other stocks in the waters of the United Kingdom and the continuation of fishing for sandeel in EU waters.<sup>1462</sup> According to the European Union, this was not a factor that the United Kingdom should have taken into account in the weighing and balancing.<sup>1463</sup>
670. Explaining further, the European Union argues that when identifying the economic and social impacts of the sandeel fishing prohibition, the United Kingdom “was not entitled to consider that those impacts were mitigated by the ability of EU vessels to access UK waters of the North Sea to fish stocks other than sandeel and to access EU waters of the North Sea to fish sandeel”.<sup>1464</sup> This is because Article 2(1)(a) of Annex 38 to the TCA grants a Party the right of full access to the waters of the other Party to fish for every stock for which a TAC has been agreed, including sandeel.<sup>1465</sup> The European Union explains that it was the economic and social impacts associated with the nullification of the European Union’s right of full access to UK waters of the North Sea

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<sup>1460</sup> Ministerial Submission, 14 September 2023, para. 23 (**Exhibit R-77**).

<sup>1461</sup> Hearing, 28 January 2025, 164:7-8 (Dawes).

<sup>1462</sup> UK’s Written Submission, paras 396.3-396.4.

<sup>1463</sup> Hearing, 28 January 2025, 171:6-14 (Dawes).

<sup>1464</sup> EU’s Responses to Questions, para. 59.

<sup>1465</sup> EU’s Responses to Questions, paras 59, 152-154.

to fish sandeel that the United Kingdom was required to identify and weigh against the benefits of the measure.<sup>1466</sup>

671. The European Union goes on to dispute from a factual perspective that EU vessels would be able to attenuate the costs and impacts to the extent argued by the United Kingdom.<sup>1467</sup> Further, it contends that the burden was on the United Kingdom to demonstrate this and that there is no evidence on the record that the costs to European vessels could be attenuated or mitigated in the way suggested.<sup>1468</sup>
672. The Arbitration Tribunal notes that fisheries displacement has a bearing on the weighing and balancing of social and economic benefits and costs of a measure. This is because theoretically, if fishing vessels can be displaced to other species or other fishing areas, the social and economic impacts for those vessels are not likely to be as great as if they did not have such flexibility.
673. Displacement to other sandeel fishing grounds and to other species was raised in the Natural England/Cefas/JNCC Advice, which reviewed some of the literature on the possibility of displacement.<sup>1469</sup> The Ministerial Submission of 14 September 2023 considered that a full closure reduces the risk of displacement of sandeel fishing within UK waters.<sup>1470</sup>
674. The United Kingdom argues that the discussion in the Ministerial Submission shows that careful consideration was given to the impact on EU vessels and industry.<sup>1471</sup> The United Kingdom Ministers were clearly alive to the concerns of the European Union over the adverse social and economic impacts of a closure of UK waters to sandeel fishing on EU vessels and fishing and processing industry.<sup>1472</sup> The United Kingdom sought to quantify the adverse impact of a closure on the EU industry and the potential for displacement. It considered the 2022 annual economic report produced by the European Commission suggesting that the portion of the Danish fleet that targets sandeel also targets other stocks as well as information provided by the Marine Maritime Organisation on the operation of Swedish vessels in UK waters. The Ministerial Submission

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<sup>1466</sup> EU's Responses to Questions, para. 59; EU's Replies to the UK's Responses to Questions, para. 233.

<sup>1467</sup> EU's Responses to Questions, para. 155.

<sup>1468</sup> EU's Responses to Questions, para. 155.

<sup>1469</sup> Natural England/Cefas/JNCC, 'What are the ecosystem risks and benefits of full prohibition of industrial Sandeel fishing in the UK waters of the North Sea (ICES Area IV)? – Defra request for advice', 7 March 2023, pp. 34-37 (**Exhibit C-45**).

<sup>1470</sup> Ministerial Submission, 14 September 2023, para. 24 (**Exhibit R-77**).

<sup>1471</sup> Hearing, 29 January 2025, 174:7-9 (Westaway).

<sup>1472</sup> Ministerial Submission, 14 September 2023, paras 19-27 (**Exhibit R-77**).

concluded that the EU sandeel fleet does not rely solely on sandeel for their fishing activities or revenues and would target other species outside the sandeel season.<sup>1473</sup>

675. It is difficult on the evidence before it for the Arbitration Tribunal to assess whether the prospect that EU vessels would be able to fish in other areas or for other species, and thus mitigate the adverse social and economic impacts of the closure of English waters to sandeel fishing, was a relevant factor that should have been taken into account in the weighing and balancing. Although it was a factor that was taken into account, in doing so, the social and economic costs to the EU fishing industry may have been underestimated. The Arbitration Tribunal recognises that errors of under- or overestimation alone do not give rise to a failure to have regard to the principle of proportionality. However, a failure to have any regard to a relevant material consideration that bears upon the costs and benefits of a measure, or a serious error of estimation that may alter the balance of considerations relevant to the proportionality of the measure, requires careful assessment in accordance with the applicable standard of review. With regard to the factor of displacement, the Arbitration Tribunal is not able to conclude that there was a failure to have regard to a material consideration or a serious error of estimation which altered the balance of considerations relevant to proportionality.
676. The next matter to be considered is the allegation of the European Union that the United Kingdom failed to properly account for the impairment of rights during the adjustment period. The European Union suggests that consideration of costs in a weighing and balancing are typically assessed by reference to the degree of impairment to economic and social rights.<sup>1474</sup> The European Union argues that the degree of the impairment of rights associated with a measure is a factor to be weighed in the balance.<sup>1475</sup> In the view of the European Union, the factual situation in this case is “the maximum possible impairment of rights”.<sup>1476</sup> It was, in the view of the European Union, a nullification of a specific right of access to fish that was negotiated and agreed on a stock by stock basis.<sup>1477</sup>
677. As noted above (paragraph 658), the United Kingdom considers that the qualified rights of access for European Union vessels which are derived from the TCA are “necessarily” to be given less weight when balanced against the sovereign right of the United Kingdom to exercise its regulatory

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<sup>1473</sup> Ministerial Submission, 14 September 2023, paras 25-26 (**Exhibit R-77**).

<sup>1474</sup> Hearing, 28 January 2025, 131:12-14 (Norris).

<sup>1475</sup> Hearing, 28 January 2025, 130:1-4 (Norris).

<sup>1476</sup> Hearing, 28 January 2025, 136:24-25 (Norris).

<sup>1477</sup> Hearing, 28 January 2025, 168:3-10 (Dawes); EU’s Reponses to Questions, paras.152-154.



autonomy in deciding on measures within its own waters.<sup>1478</sup> The European Union argues that the degree of impairment of rights must be taken into account and accorded “due weight in the assessment”.<sup>1479</sup> In other words, it is not sufficient simply to identify or pay lip service to such impacts.<sup>1480</sup> The European Union contends that had the United Kingdom done the weighing and balancing exercise properly, it simply could not have concluded that a total prohibition on EU access to waters to fish for sandeel was possible, because of the full impairment of the EU’s rights.<sup>1481</sup>

678. The Arbitration Tribunal notes 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. However, the Arbitration Tribunal agrees with the European Union that the adverse impact on the EU’s rights and interests during the adjustment period was a factor of such import that it had to be taken into account in the weighing and balancing exercise. Moreover, the Arbitration Tribunal must assess whether the various considerations bearing on the proportionality of a measure were taken into account and applied in the actual weighing and balancing. There is a reference to “access” in a single paragraph of the Ministerial Submission of 15 February 2023. There 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. Nor does that exercise reflect what trade-offs would eventuate if there was some delay in the implementation of the measure so as to give effect to the full rights of access that were agreed upon.

(ii) *The Availability of an Alternative Measure*

679. The European Union has pointed to an alternative proportionate measure that it believes would have contributed to the stated objectives of the United Kingdom, namely a spatially targeted prohibition on sandeel fishing in parts of UK waters of the North Sea “that would coincide with the feeding range of chick-rearing seabirds for which sandeels comprise a substantial proportion

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<sup>1478</sup> UK’s Written Submission, para. 397.2.

<sup>1479</sup> EU’s Written Submission, para. 734.

<sup>1480</sup> EU’s Written Submission, para. 734.

<sup>1481</sup> Hearing, 28 January 2025, 186:20-25 (Norris).

of their diet”.<sup>1482</sup> According to the European Union, where a Party is evidently going to nullify economic rights granted under the TCA through a full prohibition, one should give consideration to whether there is a proportionate measure which would have better reflected the balance of rights and obligations between the Parties.<sup>1483</sup>

680. The DMA considered alternative options, including alternative spatial closures of Sandeel Management Areas 4 and 3r and Sandeel Management Area 1r.<sup>1484</sup> These options were also considered in the DEFRA Consultation Document. However, DEFRA considered that these options were unlikely to achieve their stated aim because a partial closure would lead to displacement of fishing effort which is “likely to increase fishing activity outside the closed area creating a risk of sandeel depletion in certain locations”.<sup>1485</sup> It was noted in the DEFRA Consultation Document that this issue was recognised by ICES, and DEFRA concluded 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.<sup>1486</sup>

681. The options included in the consultations of partial closures were raised in the Ministerial Submission of 14 September 2023, with the results showing a “very strong public support (98%) to close all English waters of the North Sea to sandeel fishing”.<sup>1487</sup> The United Kingdom indicates that the degree of public support is a factor that a decision-maker may take into account as part of the policy goal to achieve GES.<sup>1488</sup> In the view of the decision-maker, the benefits of a full closure of English waters to sandeel fishing appear to have outweighed consideration of any partial closure.

682. As the Parties agree, consideration of alternative measures is a useful tool which may be used to assess whether a measure has been adopted “having regard to applying the principle of proportionality”. After the English consultation and during the decision-making process, the

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<sup>1482</sup> EU’s Written Submission, para. 746.

<sup>1483</sup> Hearing, 28 January 2024, 136:4-10; 138:19-22 (Norris).

<sup>1484</sup> DMA for Self-Certified Measures in DEFRA, regarding ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing’, 1 February 2023, p. 2 (**Exhibit C-44**).

<sup>1485</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, p. 9 (**Exhibit R-61**).

<sup>1486</sup> DEFRA, ‘Consultation on Spatial Management Measures for Industrial Sandeel Fishing - Consulting on management measures for industrial sandeel fishing in English waters of the North Sea’, March 2023, p. 10 (**Exhibit R-61**).

<sup>1487</sup> Ministerial Submission, 14 September 2023, para. 13 (**Exhibit R-77**).

<sup>1488</sup> Hearing, 29 January 2025, 193:16-194:3 (Westaway).

United Kingdom did not give consideration to whether any partial closure might have achieved its objectives. This lack of consideration of possible alternative measures makes any assessment of whether the objectives of the measure could have been achieved through an alternative measure impracticable. Neither is the Arbitration Tribunal in a position to assess the alternative measure proposed by the European Union, particularly due to its lack of specificity or definition.<sup>1489</sup>

*(iii) Conclusion on the Measure in Respect of English Waters*

683. The Arbitration Tribunal agrees with the United Kingdom that the closure of English waters was intended to produce broader ecosystem benefits, not only for sandeel and its resilience, but also for predators including seabirds, marine mammals and predatory fish, and to make progress towards Good Environmental Status. In this regard, a full closure was apt to achieve the objectives of the United Kingdom. The European Union does not question the validity of the United Kingdom's objective.
684. The question at issue is whether the United Kingdom had regard to applying the principle of proportionality in deciding on the closure of English waters to sandeel fishing. The standard the Arbitration Tribunal adopts is to review whether the various factors bearing on the proportionality of a measure were considered and whether these considerations were applied in the actual weighing and balancing such that what was done satisfies the requirement to "have regard to" the principle of applying a proportionate measure. In doing so, the Arbitration Tribunal does not seek to review the weighing and balancing to see if it would have come to a different decision on the balancing. Rather, the Arbitration Tribunal must assess whether there has been a failure to have regard to some weighty element of the costs and benefits such that the weighing and balancing becomes distorted due to deficiencies which affect the weighing exercise and gives rise to the risk that the disparity between costs and benefits may be significant. In doing so, the Arbitration Tribunal will make an objective assessment of the record and will not seek to remake the decision or stand in the shoes of the decision-maker.
685. With regard to the social and economic benefits of the closure of English waters, the decision-maker relied upon the Natural England/Cefras/JNCC Advice. Weight was placed in particular on the predicted 7% increase in seabird biomass over ten years from a prohibition of sandeel fishing in UK waters as well as benefits to other fish species and marine mammals.<sup>1490</sup> However, it was also recognised that there was uncertainty in forecasts of ecosystem based management

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<sup>1489</sup> See UK's Responses to Questions, p. 42.

<sup>1490</sup> Ministerial Submission, 14 September 2023, paras 13-14 (**Exhibit R-77**).

actions,<sup>1491</sup> and the benefits of the closure would be greater where there was greater predatory dependence and forage overlap.<sup>1492</sup> As the Arbitration Tribunal has already concluded (*see* Section V.C.3(b) above), the predicted benefits from the model of a full closure were overestimated. As noted above (paragraph 675), the Arbitration Tribunal recognises that errors of under- or overestimation alone do not give rise to a failure to have regard to the principle of proportionality. However, a failure to have any regard to a relevant material consideration that bears upon the costs and benefits of a measure, or a serious error of estimation that may alter the balance of considerations relevant to the proportionality of the measure, requires careful assessment in accordance with the applicable standard of review.

686. With regard to the social and economic costs of the full closure, the quantifiable social and economic costs were acknowledged in the decision documents. There is evidence on the record that the economic costs to EU vessels were GBP 41.2 million *per annum* (although these costs were based on revenue not profit), as well as additional economic costs to the Danish fishmeal and fish oil processing industry. However, the adverse impacts 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. There is some, but limited, evidence on the record that EU vessels could indeed fish for other species or in other areas such that this was a relevant factor to be weighed in applying the principle of proportionality. The decision-maker concluded, after having considered the impact on the industry, that the measure was proportionate.<sup>1493</sup>
687. The Arbitration Tribunal notes, however, that there is no evidence on the record that the rights and interests of the European Union during the adjustment period were specifically considered by the decision-maker, as compared to the economic interests of the sandeel fishing and processing industries of the European Union. 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. The Arbitration Tribunal understands that the Ministerial Submission referred to the views of Birdlife International that there “is an urgent need to build resilience” in seabird populations.<sup>1494</sup> However, the record does not show any analysis as to why the matter was so urgent that it required action

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<sup>1491</sup> Ministerial Submission, 14 September 2023, para. 15 (**Exhibit R-77**).

<sup>1492</sup> Ministerial Submission, 14 September 2023, para. 24 (**Exhibit R-77**).

<sup>1493</sup> Ministerial Submission, 14 September 2023, para. 24 (**Exhibit R-77**).

<sup>1494</sup> Ministerial Submission, 14 September 2023, para. 17 (**Exhibit R-77**).

during the adjustment period. 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. However, the failure to take into consideration the rights and interests of the European Union during the adjustment period is a factor that calls into question whether regard was had to the principle of applying a proportionate measure.

688. In the view of the Arbitration Tribunal, the United Kingdom weighed the benefits and costs of the closure, but in doing so it did not take into consideration the impairment of the rights and interests of the European Union during the adjustment period. In the design, content and likely application of the prohibition of sandeel fishing in English waters, which are taken into account in applying the principle of proportionality, the application of the prohibition failed to take into account the rights of the European Union to full access to UK waters during the adjustment period. The regulatory autonomy of the United Kingdom was given primacy but at the expense of the rights and interests of the European Union under the TCA and the systemic value of stability during the adjustment period.
689. The failure to take into account the rights of the European Union under the TCA and the systemic importance of stability during the adjustment period compromised the weighing and balancing exercise such that the Arbitration Tribunal cannot conclude that the decision-maker had regard to the principle of applying a proportionate measure.
690. For the above reasons, the Arbitration Tribunal finds that the United Kingdom's decision to close English waters to sandeel fishing was inconsistent with the requirement in Article 496(1), read together with Article 494(3)(f) of the TCA, to have regard to the principle of applying a proportionate measure for the conservation of marine living resources and the management of fisheries resources.

**(c) *The Measure in Respect of Scottish Waters***

691. The Arbitration Tribunal will adopt the same approach as it took to considering the United Kingdom's decision to close English waters to sandeel fishing in considering the decision to close Scottish waters to sandeel fishing. The Parties have pointed to a number of different documents to demonstrate that the Scottish decision-maker weighed the social and economic benefits and costs of the closure of Scottish waters to sandeel fishing.

(i) *Weighing and Balancing the Benefits and Costs*

692. The United Kingdom highlighted a number of documents relating to the Scottish decision, both during the oral hearing and in response to the questions of the Arbitration Tribunal, which it argues shows the weighing and balancing exercise that was undertaken in respect of the Scottish decision.<sup>1495</sup> These include the Scottish Consultation Document,<sup>1496</sup> the Scottish Partial Impact Assessment,<sup>1497</sup> the Scottish SEA,<sup>1498</sup> Ministerial Submissions of February and April 2023,<sup>1499</sup> the final Ministerial Submission of 26 January 2024,<sup>1500</sup> and the Final Business and Regulatory Impact Assessment.<sup>1501</sup> In considering these documents, the Arbitration Tribunal will examine first those documents published as part of the consultation on options including a full closure of Scottish waters to sandeel fishing, followed by those documents that were part of the decision-making process on the final closure.
693. The Scottish Partial Impact Assessment notes that the seas around Scotland have a wide variety of wildlife, sandeel form a particularly important component of the North Sea ecosystem, and Scotland is committed to the protection of marine biodiversity and an ecosystem based approach to management of fisheries.<sup>1502</sup> It sets out the objectives of the consultation “to consider and implement a closure of the sandeel fishery in all Scottish waters that meets as far as possible” threefold aims: (i) To seek effective protection of sandeel; (ii) To provide the opportunity for wider ecosystem benefits to a range of species that will also improve resilience to changes in the marine environment; and (iii) To complement existing sandeel management measures.<sup>1503</sup>

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<sup>1495</sup> UK’s Responses to Questions, p. 11; Hearing, 29 January 2025, 174:14-178:23 (Westaway).

<sup>1496</sup> Scottish Government, ‘Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023 (**Exhibit C-49**).

<sup>1497</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023 (**Exhibit C-51**).

<sup>1498</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023 (**Exhibit C-52**).

<sup>1499</sup> Ministerial Submission, 6 February 2023 (**Exhibit R-91**); Ministerial Submission, 27 April 2023 (**Exhibit R-92**).

<sup>1500</sup> Ministerial Submission, 26 January 2024 (**Exhibit R-98**).

<sup>1501</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024 (**Exhibit C-66**).

<sup>1502</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 2-4 (**Exhibit C-51**).

<sup>1503</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 2 (**Exhibit C-51**).

694. The Scottish Partial Impact Assessment provided information on sandeel management, including the inclusion in the TCA of the adjustment period, the setting of TAC, the EU sandeel fishery including the average value of Denmark’s quota, the UK sandeel fishing and the existing sandeel closure.<sup>1504</sup> The document compares the benefits and costs of the *status quo* (do nothing) option with four other options: complete closure of Scottish waters; closure of Sandeel Management Area 4 only; seasonal closure of the sandeel fishery; and voluntary closure.<sup>1505</sup> The benefits of a full closure were expressed in terms of the benefit to the stock, the benefit to prey species including seabirds, whitefish and marine mammals, and the contribution to marine protected areas and GES, especially for breeding seabirds and harbour seals in the North Sea. The option of a closure of Sandeel Management Area 4 was not expected to bring the same benefits of a full closure of Scottish waters because while there could be a reduction in pressure on the sandeel stock, this could be offset by displacement into other areas.<sup>1506</sup> There were environmental concerns with the option of a seasonal closure as the seasonal nature of the fishery could change over time, and the benefits of a voluntary option could vary depending on industry buy-in.<sup>1507</sup>
695. The costs of the various options were evaluated in terms of the economic costs to the Scottish catching sector, the costs to EU vessels catching sandeel in Scottish waters, the costs of the non-UK catching sector landing sandeel into Scottish ports, costs to the Scottish onshore processors and other administrative costs.<sup>1508</sup> The summary table of costs and benefits compares the potential environmental benefits to sandeel stocks, seabirds, whitefish species and marine mammals and the costs of the options, with the options other than a full closure having fewer benefits and lower costs. One of the benefits noted with regard to the full closure was that it removed the potential for displacement of activity to other Scottish waters.<sup>1509</sup>
696. The Scottish SEA accompanied the Scottish Partial Impact Assessment and is consistent with its assessment as well as with the Scottish Scientific Review. The Scottish SEA provides “a high-

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<sup>1504</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 6-7 (**Exhibit C-51**).

<sup>1505</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 8 (**Exhibit C-51**).

<sup>1506</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 11 (**Exhibit C-51**).

<sup>1507</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 11 (**Exhibit C-51**).

<sup>1508</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, pp. 12-14 (**Exhibit C-51**).

<sup>1509</sup> Scottish Government, ‘Partial Business and Regulatory Impact Assessment – Consultation on proposals to close fishing for sandeel in all Scottish waters’, July 2023, p. 17 (**Exhibit C-51**).

level and qualitative assessment of the potential environmental effects” that are likely to result from a full closure of Scottish waters to sandeel fishing and the potential effects that may arise from “reasonable alternatives”.<sup>1510</sup> These are the same alternatives as considered in the Scottish Partial Impact Assessment. The Environmental Assessment (Scotland) Act 2005 under which the Scottish SEA was undertaken, includes a requirement to consider “reasonable alternatives”.<sup>1511</sup>

697. The main decision-making documents for the Scottish closure are the Ministerial Submission of 26 January 2024, together with the earlier Ministerial Submissions of February and April 2023, and the Final Business and Regulatory Impact Assessment. The Ministerial Submission of 26 January 2024 recommends that Ministers agree to close fishing for sandeel in all Scottish waters “based on the potential wider ecosystem benefits that such measures could bring to a range of species in the longer term as well as resilience to the marine environment”.<sup>1512</sup> Key considerations in assessing the options are set out in Annex F of the Ministerial Submission.<sup>1513</sup> The Annex summarised the scientific evidence regarding the environmental effects of a closure and acknowledged the uncertainty in the predictions of the benefits of closing fishing for sandeel, due to the high degree of variability in the system.<sup>1514</sup> It also referred to financial considerations and the expected impact on EU vessels, primarily the Danish fleet, calculating the estimated net present cost of the closure to these vessels at GBP 32.8 million over a ten-year period.<sup>1515</sup>
698. Further information on environmental and financial considerations is contained in the Final Business and Regulatory Impact Assessment, which accompanied the Ministerial Submission. This document recalls the importance of the Scottish marine ecosystem and the role of sandeel in the food web, repeats the objectives of the closure as in the Scottish Partial Impact Assessment, describes the outcome of the consultations and reviews the full closure against the “do nothing” option.<sup>1516</sup> The other options were ruled out on the grounds that the preferred option was most

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<sup>1510</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, p. 3 (**Exhibit C-52**).

<sup>1511</sup> UK’s Written Submission, para. 380, n. 745.

<sup>1512</sup> Ministerial Submission, 26 January 2024, para. 8 (**Exhibit R-98**).

<sup>1513</sup> Ministerial Submission, 26 January 2024, Annex F (**Exhibit R-98**).

<sup>1514</sup> Ministerial Submission, 26 January 2024, Annex F, p. 1 (**Exhibit R-98**).

<sup>1515</sup> Ministerial Submission, 26 January 2024, Annex F, p. 3 (**Exhibit R-98**).

<sup>1516</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024 (**Exhibit C-66**).



likely to achieve the aims, “as the potential ecosystem benefits are expected to outweigh the negative impacts identified”.<sup>1517</sup>

699. The Final Business and Regulatory Impact Assessment has a more comprehensive assessment of the monetisable and non-monetisable benefits and costs of the closure of Scottish waters to sandeel fishing than the Scottish Partial Impact Assessment. This includes data on catch by Danish vessels in Scottish waters, resulting in an estimated impact to EU vessels of between GBP 3.1 million and GBP 4.0 million annually. It was also noted that this estimation is based on revenue, not profit, and therefore would be an overestimation of business impact. There was also no assessment of the potential for these vessels to move their fishing of sandeel to other waters and therefore offset the loss of a closure of Scottish waters.<sup>1518</sup>

700. The summary and recommendation Final Business and Regulatory Impact Assessment states:

In recognition of the role that sandeel play in the marine environment and after weighing up the above business and environmental costs and benefits, the Scottish Government’s position is to prohibit fishing for sandeel. [...] This recommendation is made on the basis of the expected costs and benefits set out in this report. Primarily, the recommendation to proceed with the preferred option is based on the expected benefits to the sandeel stock and the wider marine ecosystem. The monetary costs associated with the closure are deemed to not outweigh the potential non-monetary gains expected.<sup>1519</sup>

701. The Parties differ on whether these documents show that a weighing of benefits and costs was undertaken. The European Union argues that the Ministerial Submission of 26 January 2024 does not disclose any actual weighing by the decision-maker,<sup>1520</sup> and that the same is true for the other documents identified by the United Kingdom on the record.<sup>1521</sup> The United Kingdom takes the contrary position.<sup>1522</sup>

702. The Arbitration Tribunal recalls that it is not the role of the Arbitration Tribunal to stand in the shoes of the decision-maker or to reconsider the decision. Rather, the Arbitration Tribunal is to make an objective assessment of whether consideration of the various factors bearing on the proportionality of a measure were taken into account and whether these considerations were

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<sup>1517</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, section 4.3 (**Exhibit C-66**).

<sup>1518</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, sections 5-6 (**Exhibit C-66**).

<sup>1519</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, section 16 (**Exhibit C-66**).

<sup>1520</sup> Hearing, 28 January 2025, 177:23-25 (Dawes).

<sup>1521</sup> EU’s Replies to the UK’s Responses to Questions, paras 122-123.

<sup>1522</sup> Hearing, 29 January 2025, 178:14-23 (Westaway).

applied in the actual weighing and balancing such that what was done satisfies the requirement to “have regard to” the principle of applying a proportionate measure.

703. The Arbitration Tribunal will first consider the various factors bearing on the proportionality of the measure, before turning to the application of these considerations in the weighing and balancing by the decision-maker. It will do so in line with the arguments of the European Union, summarised above (paragraph 647).

*a. Factors Relevant to a Consideration of Whether Regard Was Had to the Principle of Applying a Proportionate Measure*

704. The evidence on the record shows that the Scottish decision-maker considered various environmental factors, including that Scotland has a wide variety of marine wildlife, sandeel form a particularly important component of the North Sea ecosystem and there were potential environmental benefits of a closure to sandeel stocks, seabirds, whitefish species and marine mammals. The uncertainty in the predictions of the benefits of closing Scottish waters to fishing for sandeel and the high levels of natural fluctuation in sandeel stocks were acknowledged, but the decision-maker considered that the expected benefits justified the measure.
705. The economic impact on the UK catching sector, the EU catching sector and the processing sector arising from a closure were considered in some detail by the Scottish decision-maker. Expected economic costs, including on EU vessels, were quantified, while noting that these may be an overestimation.
706. With regard to the potential for displacement of EU vessels to other areas and fisheries, the phenomenon of fisheries displacement was referenced in the Scottish consultation and decision-making documents. The Scottish SEA noted that because the TAC for sandeel in Management Area 4 covers the whole area, some fishing effort is currently displaced without regard to the potential effects on local depletion.<sup>1523</sup> It also noted that the option of a spatial closure of Sandeel Management Area 4 may have detrimental effects on the areas outside Sandeel Management Area 4, “due to the potential for displaced fishing activity to these areas”.<sup>1524</sup>
707. With respect to the impairment of the rights of the European Union during the adjustment period, the evidence on the record to which the Arbitration Tribunal has been referred by the Parties

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<sup>1523</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, section 2.3.4 (**Exhibit C-52**).

<sup>1524</sup> Scottish Government, ‘Strategic Environmental Assessment of proposals to close fishing for sandeel in all Scottish waters – Environmental Report’, July 2023, section 5.3.2 (**Exhibit C-52**).

indicates that the Scottish decision-maker was aware of the adjustment period under the TCA.<sup>1525</sup> They were also alive to the sensitivities of the European Union over the potential sandeel fishing prohibition in Scottish waters.<sup>1526</sup> Among the factors leading to the decision, consideration was given to the urgency of the issue, particularly arising from the impact of the outbreak of Highly Pathogenic Avian Influenza (HPAI) which had resulted in substantial mortality in some seabird species during 2022.<sup>1527</sup> This provides the basis for why the prohibition of sandeel fishing in Scottish waters was of sufficient urgency for the value of stability and the rights of the Parties during the adjustment period and enshrined in the TCA to yield to it. This assists in explaining why the decision to close Scottish waters to sandeel fishing was undertaken during the adjustment period which continues until 30 June 2026.

*b. Weighing and Balancing in Relation to Whether Regard Was Had to the Principle of Applying a Proportionate Measure*

708. The Arbitration Tribunal will now turn to whether these considerations were applied in the actual weighing and balancing such that what was done satisfies the requirement to “have regard to” the principle of applying a proportionate measure.
709. There is evidence that the Scottish decision-maker undertook a weighing and balancing and applied the relevant considerations in the weighing and balancing exercise. The Final Business and Regulatory Impact Assessment concluded that “the monetary costs associated with the closure are deemed to not outweigh the potential non-monetary gains expected”.<sup>1528</sup> As this document was attached to the Ministerial Submission of 26 January 2024, the Arbitration Tribunal considers that the Scottish decision-maker weighed the environmental benefits and the economic costs to EU vessels of the closure of Scottish waters to sandeel fishing. They also came to the conclusion that the estimated economic costs to the EU fishing industry of between GBP 3.1 and GBP 4.0 million annually were not out of proportion to the potential environmental benefits in terms of an increase in sandeel stock abundance, and potential benefits to predators, including whitefish, seabirds and marine mammals.

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<sup>1525</sup> Ministerial Submission, 6 February 2023, para. 16 (**Exhibit R-91**); Ministerial Submission, 27 April 2023, para. 5 (**Exhibit R-92**).

<sup>1526</sup> Ministerial Submission, 26 January 2024, paras 27-30, Annex F (**Exhibit R-98**).

<sup>1527</sup> Ministerial Submission, 6 February 2023, paras 1-2, 4, 12-14 (**Exhibit R-91**); Ministerial Submission, 27 April 2023, paras. 7-9 (**Exhibit R-92**).

<sup>1528</sup> Scottish Government, The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment, January 2024, section 16 (**Exhibit C-66**). This sentence was highlighted by the United Kingdom, *see* Hearing, 29 January 2025, 176:20-22 (Westaway).

710. In terms of decision-making and the assessment of the impact on EU vessels, the Ministerial Submission of 26 January 2024 suggested that the financial impact “does not account for the likelihood that EU vessels will move their fishing of sandeel to other waters and therefore offset the loss of a closure in Scottish waters”.<sup>1529</sup>
711. According to the United Kingdom, the existing partial closures have resulted in what it terms “fishing the line”.<sup>1530</sup> It pointed as evidence of this to certain heatmaps in the Scottish Scientific Review of fishing around the Turbot Bank, part of which is closed to sandeel fishing.<sup>1531</sup> The European Union disputes that this is evidence of “fishing the line” as it only shows one year between 2013 and 2021 where fishing took place “closer” to the border between the closed and open part of Sandeel Management Area 4.<sup>1532</sup>
712. The European Union argues that displacement can be addressed by fisheries management measures other than a prohibition on all sandeel fishing in UK waters in the North Sea, for example by setting TACs at a lower level in the area or areas into which the displacement occurs or where displacement occurs into other fish stocks, or by prohibiting fishing for those other stocks in the part or parts of the area into which displacement occurs.<sup>1533</sup>
713. The Arbitration Tribunal considers that fisheries displacement is relevant to a consideration of the economic impact of a spatial closure of a fishery. The part of the existing closed area in Sandeel Management Area 4 located in Scottish waters is estimated to cover 9.48% of the Scottish waters of the North Sea.<sup>1534</sup> The closed area in Sandeel Management Area 4 also covers English waters, estimated at approximately 2.8% of English waters.<sup>1535</sup> The Parties agree that ICES’ advice does not take account of the existence of a closed area within the overall sandeel area for which the advice was being given.<sup>1536</sup> The consequence of this is that the TAC for sandeel in Sandeel Management Area 4 must be taken from a smaller area, which according to ICES raises

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<sup>1529</sup> Ministerial Submission, 26 January 2024, Annex F (**Exhibit R-98**).

<sup>1530</sup> Hearing, 29 January 2025, 96:15-25 (Juratowitch).

<sup>1531</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, pp. 17-18 (**Exhibit C-50**).

<sup>1532</sup> EU’s Responses to Questions, para. 23.

<sup>1533</sup> EU’s Responses to Questions, para. 157; EU’s Replies to UK’s Responses to Questions, para. 28.

<sup>1534</sup> UK’s Responses to Questions, p. 3.

<sup>1535</sup> UK’s Responses to Questions, p. 3.

<sup>1536</sup> Hearing, 29 January 2025, 44:17-45:6; 49:16-50:1 (Juratowitch); EU’s Replies to the UK’s Responses to Questions, para. 12.

concerns of local depletion.<sup>1537</sup> According to the Scottish Scientific Review, this situation would be exacerbated if the closure was extended.<sup>1538</sup>

714. The Arbitration Tribunal recalls that Scottish waters are included within Sandeel Management Area 4, and part of Sandeel Management Area 3r (the rest of which is in Norwegian waters). The Turbot Bank is an area where sandeel fishing takes place outside the closed area of Sandeel Management Area 4.<sup>1539</sup> In light of the evidence presented by the United Kingdom, some fishing displacement has already occurred in Scottish waters. There is no reason to doubt that it may also occur in the future, especially in response to a partial closure of Scottish waters to sandeel fishing.
715. With respect to the impairment of the rights of the European Union during the adjustment period, the Arbitration Tribunal has already found that this was a factor considered by the decision-maker. Annex F of the Ministerial Submission of 26 January 2024 sets out the key considerations in assessing options, including the requirements of the TCA relating to the joint management and setting of TAC for sandeel, the requirements for full mutual access to respective waters during the adjustment period, and the ability to decide on fisheries management measures under Article 496 of the TCA to achieve relevant objectives and principles.<sup>1540</sup> There was therefore recognition by the decision-maker of the rights of the European Union during the adjustment period, although balanced against the regulatory autonomy of a Party and other relevant benefits and costs.
716. The Arbitration Tribunal notes that according to its interpretation of the TCA, it is not necessary for a decision-maker to determine that the measure must comply with the principle of proportionality. Nor would it be consistent with the standard of review for the Arbitration Tribunal to consider whether the decision-maker was correct in its assessment of the proportionality of the measure. The Arbitration Tribunal therefore simply notes that the Ministerial Submission of 26 January 2024 took into account the various relevant factors, had regard to applying the principle of proportionality and considered that the recommended approach is “proportionate”.<sup>1541</sup>

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<sup>1537</sup> UK’s Responses to Questions, pp. 3-4 *citing* ICES, ‘Herring Assessment Working Group for the Area South of 62° N (HAWG)’ (2024) Vol. 6(24) ICES Scientific Reports, para. 9.5.11 (**Exhibit C-37**).

<sup>1538</sup> Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, p. 36 (**Exhibit C-50**).

<sup>1539</sup> Hearing, 29 January 2025, 96:11-14 (Juratowitch) *citing* Scottish Government, ‘Review of Scientific Evidence on the Potential Effects of Sandeel Fisheries Management on the Marine Environment’, July 2023, Figure 12, p. 19 (**Exhibit C-50**).

<sup>1540</sup> Ministerial Submission, 26 January 2024, Annex F (**Exhibit R-98**).

<sup>1541</sup> Ministerial Submission, 26 January 2024, para. 9 (**Exhibit R-98**).

(ii) *The Availability of an Alternative Measure*

717. The European Union suggests that when a Party is contemplating a measure which is “evidently going to nullify economic rights” granted under the TCA, then one should consider whether the objective could be achieved in another way.<sup>1542</sup> In this regard, the European Union has pointed to an alternative proportionate measure that it believes would have contributed to the stated objectives of the United Kingdom.<sup>1543</sup>
718. The Arbitration Tribunal recalls that consideration can usefully be given to whether there are alternative measures which would meet the objectives of the measure and have less adverse impacts, not as a requirement of a proportionality assessment, but as a useful tool or analytical framework in which to consider whether regard has been paid to the principle of applying a proportionate measure.
719. The Arbitration Tribunal notes that alternative options to a full closure were considered during the Scottish consultation process, including the spatial closure of Sandeel Management Area 4 to sandeel fishing.<sup>1544</sup> It was considered that these options would be expected to bring costs and benefits similar to those of the closure option, but of a smaller magnitude.<sup>1545</sup> The United Kingdom argued that a partial closure may lead to displacement of fishing effort from one area to another and that this is a rational and objective basis for preferring a full prohibition to a partial one.<sup>1546</sup>
720. The Arbitration Tribunal recalls that a closure of Scottish waters in Sandeel Management Area 4 would leave part of Scottish waters in Sandeel Management Area 3r open to sandeel fishing. The relevance of the phenomenon of displacement has been noted. The Arbitration Tribunal is of the view that an alternative measure was considered by the Scottish decision-maker but it came to the conclusion that a partial prohibition would not meet the objectives of the Scottish Government, which were wider than the protection of chick-rearing seabirds. The Arbitration Tribunal notes its view expressed above (paragraph 682) that it is not in a position to assess the alternative measure proposed by the European Union, particularly due to its lack of specificity or definition.

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<sup>1542</sup> Hearing, 28 January 2025, 136:3-10 (Norris).

<sup>1543</sup> EU’s Written Submission, para. 746.

<sup>1544</sup> See para. 694 above.

<sup>1545</sup> Scottish Government, *The Sandeel (Prohibition of Fishing) (Scotland) Order 2024 – Final Business and Regulatory Impact Assessment*, January 2024, section 16 (**Exhibit C-66**).

<sup>1546</sup> Hearing, 29 January 2025, 95:19-22 (Juratowitch).

721. For these reasons, the Arbitration Tribunal considers that an “alternative measure” does not alter its analysis of whether the Scottish decision-maker had regard to applying the principle of proportionality.

*(iii) Conclusion on the Measure in Respect of Scottish Waters*

722. The Arbitration Tribunal agrees with the United Kingdom that the Scottish measure was adopted for the purpose of marine conservation, that the objective was to seek effective protection of sandeel as a contribution to the wider marine ecosystem, and that the closure of Scottish waters to sandeel fishing would have beneficial impacts on the resilience of the marine ecosystem.<sup>1547</sup> There is no dispute that the Scottish measure is apt or appropriate to contribute to the objective, or that there is a relationship of means and ends between the prohibition of sandeel fishing in Scottish waters and the objectives of the TCA.<sup>1548</sup>
723. The Arbitration Tribunal now turns to the issue of whether the Scottish decision-maker had regard to applying the principle of proportionality in deciding on the closure of Scottish waters to sandeel fishing. The Arbitration Tribunal recalls again that the standard it adopts is to review whether consideration of the various factors bearing on the proportionality of a measure were taken into account and whether these considerations were applied in the actual weighing and balancing such that what was done satisfies the requirement to “have regard to” the principle of applying a proportionate measure. In doing so, the Arbitration Tribunal does not seek to review the weighing and balancing to see if it would or would not have come out at a different place on the balancing.
724. The Arbitration Tribunal notes the various factors bearing on the proportionality of a measure that were taken into account and applied in the weighing and balancing. These included a review of the environmental benefits set out in the Scottish Scientific Review and the Scottish SEA, which presented a qualitative assessment of the potential environmental effects of a sandeel prohibition in Scottish waters, as well as a review of the monetised and non-monetised benefits and costs of the closure of Scottish waters to sandeel fishing which were set out in the Final Business and Regulatory Impact Assessment.
725. Regard was had not only to the benefits of the sandeel prohibition in Scottish waters, but also to the economic costs to the UK and EU fishing and processing industries and the impairment of the rights of the European Union during the adjustment period. Furthermore, these considerations

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<sup>1547</sup> UK’s Written Submission, paras 387-388.

<sup>1548</sup> EU’s Written Submission, paras 698-699.

were applied in the actual weighing and balancing that was undertaken by the Scottish decision-maker. Attention was paid to the TCA adjustment period, ending 30 June 2026, and the need to take measures to build the resilience of Scottish seabird populations due to recent significant declines. In this, the Scottish decision can be contrasted with that of the United Kingdom in respect of the sandeel fishing prohibition in English waters.

726. The Arbitration Tribunal, therefore, finds that the Scottish measure to close Scottish waters to sandeel fishing is not inconsistent with the requirement in Article 496(1), read together with Article 494(3)(f) of the TCA, to have regard to the principle of applying a proportionate measure. As explained above, the decision-maker had regard to the principle of applying a proportionate measure as it took into account the relevant considerations and applied these in a weighing and balancing exercise, thereby satisfying the requirement to “have regard to” the principle of applying a proportionate measure.

#### **4. Application of the Legal Standard to Applying a Non-Discriminatory Measure**

727. The Arbitration Tribunal notes as a preliminary matter that the non-discrimination claim that was ultimately pursued by the European Union is not based on *de jure* discrimination because the decisions apply equally to UK and EU vessels.<sup>1549</sup> Rather, it concerns *de facto* discrimination, which as noted above (paragraphs 631-632) occurs where there is differential treatment that is not based on a legitimate regulatory objective or where there is a lack of a clear nexus between the differential treatment and the regulatory objective.
728. The sandeel quota in the North Sea is divided between the United Kingdom, which according to Annex 35, had a 3.11% share of the North Sea sandeel TAC in 2024 and the European Union which had a 96.8% share.<sup>1550</sup> The Parties accept that differential treatment on its own is not enough to establish discrimination.<sup>1551</sup> The European Union considers that it is relevant to a consideration of *de facto* discrimination that the measure is confined to sandeel as a species which is overwhelmingly fished by EU vessels.<sup>1552</sup> This is for two reasons. First, according to the European Union, the United Kingdom relied on the differential impact to conclude that the impact on UK vessels is “low” or “minimal”.<sup>1553</sup> Second, sandeel is not the only forage fish and the

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<sup>1549</sup> EU’s Written Submission, para. 758; UK’s Written Submission, para. 418.

<sup>1550</sup> Annex 35 to the TCA.

<sup>1551</sup> EU’s Responses to Questions, para. 66; EU’s Replies to the UK’s Responses to Questions, para. 131; Hearing, 29 January 2025, 185:23-186:2 (Westaway).

<sup>1552</sup> EU’s Responses to Questions, para. 68.

<sup>1553</sup> EU’s Responses to Questions, para. 68; EU’s Written Submission, para. 737.



United Kingdom has not explained its policy choice of commencing with a legitimate objective of marine conservation and fisheries management with a fish stock in which the share of TAC is allocated to such a significant proportion to the European Union.<sup>1554</sup>

729. The United Kingdom argues that the source of the differential impact is not only the measures, but the terms of the TCA itself.<sup>1555</sup> The European Union does not disagree that the quota shares under Annex 35 may imply that a fisheries management measure would have a greater impact on the vessels of one Party than the other. However, the European Union's point is that in deciding which stocks should be subject to a fisheries management measure, the quota shares should be taken into account.<sup>1556</sup>
730. The Arbitration Tribunal recalls its interpretation above (paragraphs 631-632) that "having regard to the principle of applying non-discrimination" requires consideration of whether the design, content and application of the measure reflects the principle of non-discrimination. *De facto* discrimination may occur where differential treatment is not based on a legitimate regulatory objective or where there is a lack of a clear nexus between the differential treatment and the regulatory objective.
731. The regulatory objective of the closure of English and Scottish waters to sandeel fishing is to increase the biomass of sandeel stocks with the aim of bringing about wide environmental and ecosystem benefits, including GES for the North Sea, and improvements in the resilience of sandeel stocks and the wider marine ecosystem, including seabirds, marine mammals, and other fish species. The closure of UK waters to sandeel fishing applies to both UK and EU vessels. The differential impact on vessels of the United Kingdom and European Union is due to the quota shares set out in Annex 35 to the TCA.
732. The Arbitration Tribunal does not consider that a Party is required to take into account the TAC quota shares in deciding on a fisheries management measure. Rather, each measure should be decided on in light of its legitimate objectives and the requirement to have regard to applying the principle of non-discrimination. This is particularly the case where Article 494(2) specifically prohibits *de jure* discrimination, and there is no question that the measure applies to both UK and EU vessels. Furthermore, the United Kingdom has explained that its choice of a fisheries

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<sup>1554</sup> EU's Responses to Questions, para. 68.

<sup>1555</sup> UK's Responses to Questions, p. 12.

<sup>1556</sup> EU's Replies to the UK's Responses to Questions, para. 143.

management measure on sandeel, as compared with another forage fish, is due to the role of sandeel in the food web and North Sea ecosystem.<sup>1557</sup>

733. The Arbitration Tribunal considers that there is a clear nexus between the differential treatment and the legitimate objective, which is to close all UK waters to all UK and EU vessels in order to provide ecosystem benefits.
734. For the above reasons, the Arbitration Tribunal finds that the United Kingdom's decision to close UK waters to sandeel fishing was not inconsistent with the requirement in Article 496, read together with Article 494(3)(f) of the TCA, to have regard to the principle of applying non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources.
735. As a final point, the Arbitration Tribunal notes that the European Union claimed a breach of Article 496(2), read together with Article 494(3)(f), in its Written Submission.<sup>1558</sup> However, according to the United Kingdom, there is no basis for contending that the prohibition of sandeel fishing in English and Scottish waters is applied in a way that would contravene Article 496(2) of the TCA, as the measures deliberately apply to all vessels.<sup>1559</sup> Furthermore, the United Kingdom argues that any alleged breach of Article 496(2) with respect to this non-discrimination claim is not part of the Request for Arbitration.<sup>1560</sup> The European Union did not respond to these arguments of the United Kingdom. As the Arbitration Tribunal has found that the sandeel fishing prohibition is not inconsistent with the requirement in the TCA to have regard to the principle of applying a non-discriminatory measure, it considers that there is no need to address the issue of whether or not Article 496(2) falls outside the remit of the jurisdiction of the Arbitration Tribunal.

**E. THE UNITED KINGDOM'S ALLEGED BREACH OF THE OBLIGATION TO GRANT FULL ACCESS TO FISH SANDEEL PURSUANT TO ANNEX 38 TO THE TCA**

736. The sandeel fishing prohibition has arisen during the "adjustment period" established by Annex 38 to the TCA. The European Union claims that the United Kingdom breached its obligation to grant full access to the European Union to fish sandeel pursuant to Annex 38 to the

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<sup>1557</sup> Hearing, 29 January 2025, 82:4-23 (Juratowitch); UK's Responses to Questions, p. 5.

<sup>1558</sup> EU's Written Submission, paras 757-759.

<sup>1559</sup> UK's Written Submission, para. 365.2.

<sup>1560</sup> UK's Written Submission, para. 365.3.

TCA as the United Kingdom has adopted a fisheries management measure that is inconsistent with Article 496 of the TCA, read together with Article 494 of the TCA.

## 1. Applicable Legal Standard

### (a) *Positions of the Parties*

737. The European Union's claim under Annex 38 is consequential on the European Union's claims under Article 496 of the TCA, read together with Article 494 of the TCA. Article 2(1)(a) of Annex 38 provides for "full access to waters to fish" for certain stocks, and when considered in relation to sandeel specifically, should be understood to mean "full access to waters to fish" sandeel at a level that is reasonably commensurate with the guaranteed share of the agreed TAC as set out in Annex 35 to the TCA.<sup>1561</sup>
738. The European Union argues that the wording of Article 2(1)(a) of Annex 38, particularly the use of the term "shall grant", carries the necessary implication that "any impairment or reduction of this right must be justified."<sup>1562</sup> The European Union accepts that the right of "full access to fish" in Annex 38 may be derogated from,<sup>1563</sup> but argues that access to the other Party's waters should not systematically take precedence over the legitimate objectives of the other provisions contained in Heading Five of Part Two of the TCA.<sup>1564</sup> In the European Union's submission, the obligation to grant full access to waters to fish may only be restricted where "there is full respect of the requirements" of Article 496 of the TCA, read together with Article 494.<sup>1565</sup> Moreover, any restriction on the right of "full access to waters to fish" should be "extraordinary given the rationale for the adjustment period", and warrants "a particularly high degree of scrutiny".<sup>1566</sup>
739. The United Kingdom does not agree with the European Union's contention that "a particularly high degree of scrutiny" is warranted when considering any restriction on the right of "full access to waters to fish" under Annex 38 to the TCA, due to the rationale for the adjustment period.<sup>1567</sup> The United Kingdom explains that the justification for fisheries management measures is the right under Article 496 to take fisheries management measures in pursuit of the objectives and having

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<sup>1561</sup> EU's Written Submission, para. 378.

<sup>1562</sup> EU's Written Submission, para. 767. *See also* EU's Written Submission, paras 379-391.

<sup>1563</sup> EU's Written Submission, para. 767.

<sup>1564</sup> EU's Written Submission, para. 774; Hearing, 28 January 2025, 196:3-7 (Gauci).

<sup>1565</sup> EU's Written Submission, paras 773-775.

<sup>1566</sup> EU's Written Submission, para. 391.

<sup>1567</sup> UK's Written Submission, paras 427-428.1.

regard to the principles in Article 494.<sup>1568</sup> The United Kingdom considers that the proper interpretation of the TCA preserves the Parties' regulatory autonomy to decide on fisheries management measures that limit access to their waters so long as they are not in breach of Article 496, read together with Article 494.<sup>1569</sup> Moreover, "regulatory autonomy plays a role in understanding the process, although it's not per se the justification".<sup>1570</sup>

**(b) *The Arbitration Tribunal's Interpretation***

740. The Arbitration Tribunal considers that Annex 38 must be read together with Heading Five of Part Two of the TCA. There is no disagreement between the Parties on this.<sup>1571</sup> The Arbitration Tribunal does not understand there to be a different standard to be applied to the application of Annex 38 such that any restriction on the "full right of access to fish" for the stocks listed in Annex 35 during the adjustment period should be subject to stricter scrutiny. Rather Annex 38 and the rest of Heading Five should be read harmoniously in line with the ordinary meaning of the terms of the TCA in their context and in light of the object and purpose of the TCA. This has the corollary that neither the right of access to waters to fish during the adjustment period nor the right of a Party to take fisheries management measures enjoys precedence. Rather, it is the requirements of Article 496 of the TCA to take fisheries management measures in pursuit of the objectives in Articles 494(1) and (2), and having regard to the principles, in Article 494(3) that are determinative. This requires a balance to be struck between the rights of the Parties to enjoy regulatory autonomy and their rights of access to fish in the waters of the other Party during the adjustment period.
741. The Arbitration Tribunal has set out its views in Section V.B.2. on the role of regulatory autonomy in Heading Five of Part Two of the TCA. 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. Rather, the measures that derogate from the right of full access to waters to fish during the adjustment period must be decided on and applied in a manner that is consistent with the disciplines set out in the TCA.

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<sup>1568</sup> Hearing, 30 January 2025, 77:16-20 (Westaway).

<sup>1569</sup> UK's Written Submission, para. 428.2, *referring to* EU's Written Submission, para. 390.

<sup>1570</sup> Hearing, 30 January 2025, 77:20-23 (Westaway).

<sup>1571</sup> Hearing, 28 January 2025, 192:12-15 (Gauci); UK's Written Submission, paras 425.1-425.4.

## **2. Application of the Legal Standard**

742. The Parties agree that the claim of the European Union under Article 2(1)(a) of Annex 38 to the TCA is consequential on the European Union's claims under Article 496 of the TCA, read together with Article 494 of the TCA.<sup>1572</sup> However, the European Union supplemented this by adding that the United Kingdom has committed a consequential breach of Article 2(1)(a) of Annex 38 to the TCA, because "the impairment of rights guaranteed by that provision is not justified or justifiable."<sup>1573</sup> Following questioning, however, it was clarified that the claim for breach of Article 2(1)(a) of Annex 38 was purely a consequential claim. No claims have been put before the Arbitration Tribunal either that a fisheries management measure that does not contravene Article 496, read together with Article 494, can nevertheless breach Article 2(1)(a) of Annex 38, or that a fisheries management measure that contravenes Article 496, read together with Article 494, can be justified through recourse to regulatory autonomy without further consideration of Annex 38.
743. The Arbitration Tribunal is of the view that the European Union has structured its claim of a breach of Article 2(1)(a) of Annex 38 as a purely consequential claim. The claim for a breach of Article 2(1)(a) of Annex 38 therefore stands or falls on the basis of the findings in respect of the claims under Article 496, read together with Article 494 of the TCA. In this sense "the consequential element is symmetrical".<sup>1574</sup> Once a breach of Article 496(1), read together with Article 494, has been found, that is the end of the Arbitration Tribunal's remit.
744. The Arbitration Tribunal therefore finds, on the basis of its reasoning in Section V.D.3 that the United Kingdom's decision to close English waters to sandeel fishing was inconsistent with the requirements of Article 496(1), read together with Article 494(3)(f) of the TCA, to have regard to the principle of applying a proportionate measure for the conservation of marine living resources and the management of fisheries resources, and that in consequence, therefore, there has been a breach of Article 2(1)(a) of Annex 38 of the TCA.

## **VI. RULINGS**

745. The Arbitration Tribunal recalls that the European Union requests that the Arbitration Tribunal issue a ruling in accordance with Article 745 of the TCA, finding that:

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<sup>1572</sup> EU's Written Submission, paras 772, 781.

<sup>1573</sup> EU's Written Submission, para. 765; EU's Responses to Questions, paras 177-178.

<sup>1574</sup> Hearing, 28 January 2025, 203:6 (Gauci).

- i. the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(c) TCA;
- ii. the sandeel fishing prohibition is inconsistent with the UK's obligations under Articles 496(1) and (2) TCA, read together with Article 494(3)(f) TCA; and
- iii. the UK is in breach of its obligation to grant full access to its waters to fish in accordance with Article 2(1)(a) of Annex 38 TCA.<sup>1575</sup>

746. The United Kingdom requests that the Arbitration Tribunal dismiss each of the European Union's claims.<sup>1576</sup>

747. Therefore, in accordance with Article 745 of the Trade and Cooperation Agreement, and for the reasons set out in this Report, the Arbitration Tribunal rules as follows:

- i. DISMISSES the claim that the prohibition of fishing for sandeel in the waters of the United Kingdom is inconsistent with the United Kingdom's obligations under Articles 496(1) and (2) of the Trade and Cooperation Agreement, read together with Article 494(3)(c) of the Trade and Cooperation Agreement, with respect to the claim that it was not based on the best available scientific advice;
- ii. RULES that the prohibition of fishing for sandeel in English waters is inconsistent with the United Kingdom's obligations under Article 496(1) of the Trade and Cooperation Agreement, read together with Article 494(3)(f) of the Trade and Cooperation Agreement, on the grounds that there was a failure to have regard to the principle of applying a proportionate measure;
- iii. DISMISSES the claim that the prohibition of fishing for sandeel in Scottish waters is inconsistent with the United Kingdom's obligations under Article 496(1) of the Trade and Cooperation Agreement, read together with Article 494(3)(f) of the Trade and Cooperation Agreement, with respect to the claim that there was a failure to have regard to the principle of applying a proportionate measure;
- iv. DISMISSES the claim that the sandeel fishing prohibition is inconsistent with the United Kingdom's obligations under Article 496(1) of the Trade and Cooperation Agreement, read together with Article 494(3)(f) of the Trade and Cooperation Agreement, with respect to the claim that there was a failure to have regard to the principle of applying a non-discriminatory measure;

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<sup>1575</sup> EU's Written Submission, para. 782.

<sup>1576</sup> UK's Written Submission, para. 430.

- v. RULES, in consequence of the ruling in (ii) above, that the United Kingdom is in breach of its obligation to grant full access to its waters to fish sandeel in accordance with Article 2(1)(a) of Annex 38 to the Trade and Cooperation Agreement.

748. Pursuant to Article 746 of the Trade and Cooperation Agreement, the Arbitration Tribunal RULES that the United Kingdom is required to take the necessary measures to comply with the ruling of the Arbitration Tribunal set out in sub-paragraphs 747(ii) and (v) above, in order to bring itself in compliance with the covered provisions.

Done at the Peace Palace, The Hague, the Netherlands, this twenty-seventh day of March, two thousand and twenty-five:

For the Arbitration Tribunal:



Professor Hélène Ruiz Fabri  
Arbitrator

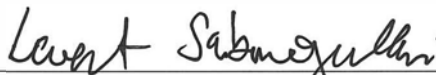


Hon. Justice Mr. David Unterhalter  
Arbitrator



Dr. Penelope Jane Ridings, MNZM  
Chairperson

For the Registry:



Dr. Levent Sabanogullari  
Senior Legal Counsel