

Fishing in Uncharted Waters: The First Ever Arbitral Award Under the EU-UK Trade and Cooperation Agreement

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In 2016, a fleet of fishing boats flying anti-European Union (EU) banners sailed up the River Thames. The Brexit campaign and its ‘take back control’ slogan both fed off and further fuelled the belief that the British fishing industry had been betrayed by allowing non-British boats to fish British waters.¹ Years later, after gruelling negotiations, the United Kingdom (UK) and the EU finally signed the 2020 Trade and Cooperation Agreement (TCA), which contained a chapter regulating fishing between the new trade partners. Despite that, fishing rights continued to be a source of political tension between the two blocs, particularly with France.²

Seen in this light, it is perhaps symbolic that the first-ever big dispute under the TCA concerned a small fish.

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1 Sebastian Whale, ‘Hook, Line and Sinkers: How Brexit Betrayed the UK Fishing Industry’ (*Politico*, 22 June 2023) www.politico.eu/article/brexit-fisheries-uk-industry-betrayal [accessed 12 October 2025].

2 Paul Seddon, ‘EU Chief “surprised” at Importance of Fish in Brexit Talks’ (BBC News, 11 April 2025) www.bbc.co.uk/news/articles/ce92v31mnn9o [accessed 12 October 2025].

The background to the dispute

Sandeel are small eel-like fish that are caught seasonally. They form a major part of the diet for marine mammals, seabirds, and predatory fish. Sandeel are also commercially fished by humans; once fished, they are processed by fishmeal factories to produce oil and fishmeal, which are used in animal feed and aquaculture.

Sandeel are classified under the TCA as a jointly managed shared fish stock. This means that their population spans both British and EU waters and that annual quotas (known as total allowable catches or TACs) have to be agreed. The EU and the UK consult annually to agree on TACs; when doing so, they rely on scientific advice from the International Council for the Exploration of the Sea (ICES). After these TACs are agreed, the UK and EU divide the agreed quotas between their fleets.

Since 2021, the UK has chosen not to allocate its share of sandeel TACs to any UK fishing vessel. This decision was based on the need to protect the UK's marine ecosystem, notably seabirds such as puffins for which sandeel are a vitally important food source. The EU, by contrast, continued to allocate its share of sandeel TACs to EU fishing vessels.

In March 2023, both the UK and Scottish Governments announced public consultations about possible further steps that might be taken to protect the UK's marine ecosystem. This was followed, in January 2024, by the announcement of separate bans on fishing for sandeel in both English and Scottish waters. The stated purpose of the bans was 'to ensure that local food availability is preserved' and 'improve the resilience of marine life for which sandeels are a crucial source of nutrients'.³

The UK duly notified the EU of the ban, in accordance with Article 496(3) of the TCA. On 26 March 2024, the ban on sandeel fishing in English and Scottish waters came into effect.

Perhaps influenced by pressure from the Danish fishing industry, which holds 96% of the EU's sandeel TACs, the EU formally requested amicable consultations under the TCA in April 2024.⁴ When those failed, the EU started arbitration proceedings under the TCA's dispute settlement mechanism in October 2024.

A three-member expert panel was constituted in November, with the Permanent Court of Arbitration appointed as registry. Following written

3 Department for Environment, Food & Rural Affairs, 'Government Response' (2024) www.gov.uk/government/consultations/consultation-on-spatial-management-measures-for-industrial-sandeel-fishing/outcome/government-response [accessed 12 October 2025].

4 Rachael Harper, "What a Mess!": North Sea Sandeel Ban Escalates into Row with EU' (Fishing News, 25 April 2024).

submissions, a three-day public hearing was held in The Hague in January 2025. Under Article 745(2) of the TCA, the arbitral tribunal issued an interim report on 27 March 2025, on which the parties submitted their comments. On 28 April 2025, the Tribunal rendered its final award.⁵

The outcome was mixed. Although the EU prevailed on the merits in that part of the ban was found to be disproportionate, the Tribunal rejected the other claims that the ban was not based on the best available scientific advice and constituted discrimination under the TCA. Furthermore, the Tribunal's basis for finding the ban to be disproportionate was based not on the effect of the ban per se, but on the decision-making process followed by the UK Government in imposing the English ban. The Tribunal accordingly left the door open to the ban remaining in place if the UK Government were to adopt a different decision-making process.

Analysis

Substantive issues addressed in the award

The TCA provisions on fishing rights represent a balance of competing objectives. On the one hand, the UK and the EU are granted significant regulatory freedom to design measures for managing and exploiting living marine resources within their waters. On the other, this regulatory freedom is not unlimited: it is tempered both by international law – notably the United Nations Convention on the Law of the Sea (UNCLOS) – and by certain restrictions imposed by the fishery management provisions of the TCA itself. The TCA-based restrictions have particular force in the context of shared stocks, such as the sandeel.

The consequence of the balance being struck in this way is that the concept of sovereignty over resources cannot be invoked to override obligations freely undertaken under the TCA or international law. This echoes recent investment arbitration awards – such as *Red Eagle v Colombia*⁶ and *Eco Oro v Colombia*⁷ – where international tribunals have upheld a state's right to regulate for environmental purposes while emphasising that such measures must not contradict the state's international obligations.

In this context, the EU advanced its challenge against the UK under three main grounds. First, that the ban on sandeel fishing was not based on the best available scientific advice; secondly, that the ban was

5 *The European Union v The United Kingdom of Great Britain and Northern Ireland* ('Sandeel Award') [2025] PCA 2024-45.

6 [2024] ICSD ARB/18/12.

7 [2024] ICSD ARB/16/41.

discriminatory because it had a disproportionately adverse impact on EU fishers compared to their UK counterparts; and thirdly, that the measure was a disproportionate means of achieving the desired aim. Each of these arguments is examined in turn below. Before addressing these grounds, however, it is necessary to consider the preliminary issue of how to assess the respective bans imposed by England and Scotland.

Separation between England and Scotland

A salient feature of the regulation of fishing rights in this case lies in the dual involvement of the UK Government and the devolved Scottish Government. The EU sought to frame the two bans, formally enacted by the UK and Scottish Governments and covering different zones of the Greater North Sea, as a single, all-encompassing measure. Specifically, it emphasised that the UK's unique constitutional structure – namely the devolution of powers to the Scottish Government – is irrelevant on the international plane.

It was common ground that only the UK – and not the devolved Scottish Government – was a party to the TCA. Accordingly, the UK alone bears international responsibility for any breach caused by the two bans. Notwithstanding this fact, the Tribunal nevertheless refused to accede to the EU's argument that the two bans ought to be interpreted as a single measure. The Tribunal stressed that the claims at hand required factual determinations that cannot be carried out in the abstract. These included whether the bans were based on sufficient scientific evidence and whether they were a proportionate means of fulfilling the stated aim. In answering these questions, it was necessary to consider the two bans separately. The Scottish Government's action in respect of Scottish waters could not be assessed based on scientific advice that the Scottish Government did not in fact rely upon, but on which the UK Government did rely in deciding to impose the English ban. Similarly, the proportionality of the Scottish ban could only be assessed based on the cost-benefit analysis conducted with respect to that ban, and not with regard to a separate analysis that was conducted by the UK Government with respect to the English ban. Each measure ought to be assessed on its own merits.

Were the bans 'based on the best available scientific advice'?

Article 494(3)(c) of the TCA requires that fisheries management decisions, including bans, be based 'on the best available scientific advice'. This requirement was at the heart of the dispute, with the EU challenging the UK's justification for the fishing ban, arguing that that it relied on flawed or insufficiently vetted scientific studies.

The UK's decision to implement a total ban on sandeel fishing was based on the English Scientific Report and the Scottish Scientific Report, each concluding that sandeel are highly vulnerable to environmental changes and fishing pressures. The Scottish report highlighted that previous partial closures of sandeel fisheries had led to some improvements in seabird breeding success, but overall, sandeel abundance continued to decline. Both reports concluded that a full closure was deemed necessary to provide the best chance for recovery and resilience of sandeel populations and their predators.

The proposal to ban sandeel fishing was reinforced by the outcomes of public consultation. Most respondents supported a full ban to protect seabirds and marine wildlife. Following the public consultation, an internal memorandum concluded that '[t]here are currently no known alternative management interventions that could produce the same potential beneficial effect as closing the sandeel fishery'.⁸

The EU was therefore required to show that the twin decisions to impose the English ban and the Scottish ban were not based on the best available scientific advice. This gives rise to two questions: what constitutes the 'best available scientific advice', and what does it mean for a fisheries management decision to be 'based on' such advice.

Turning to the first of these questions, the TCA offers little conceptual clarity on what constitutes the best available scientific advice. The closest that it comes is to provide that fisheries management decisions shall be based 'principally' on that provided by ICES.

The inability to specify what exactly constitutes 'the best available scientific advice' is not a new problem. Although widely used in environmental treaties, the precise and concrete meaning of this term remains elusive.⁹ Interpreting qualifiers, such as best and scientific, can cause difficulties. In the WTO context, for instance, the Appellate Body opined that best science under the SPS Agreement means reputable, objective and coherent, and methodologically sound scientific evidence, which can be a minority scientific opinion.¹⁰

In clarifying the elusive meaning of Article 494(3)(c) of the TCA, the *Sandeels* tribunal adopted similar criteria to those applied by the WTO Appellate Body: the advice should be 'scientifically objective, transparent,

8 Internal email (Exhibit R-0077), Defendant's Memorial, (2025) Sandeel Award.

9 Kate Cook, 'Judging "Best Available Science": Emerging Issues and the Role of Experts' (2018) 9 *Journal of International Dispute Settlement* 388, 392.

10 *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* [2008] WTO WT/DS321/AB/R para.591.

evidence-based, and have a methodological rigour within a scientific discipline'.¹¹ The Tribunal further held:

- (i) that some uncertainty or error does not invalidate the advice, provided it was credible at the time the decision was taken;¹² and
- (ii) that scientific advice is not confined 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.

When it came to undermining the quality of the scientific advice relied on by the UK, the Tribunal held that there were two options open to the EU. These were:

- (i) proving that better, more compelling evidence (such as an alternative ecosystem model) would have led to better advice;¹³ or
- (ii) demonstrating that the advice was very clearly faulty and as a result, could not qualify as the 'best available scientific advice'. In this case, the EU chose the second option.

On the second question of what it means for a measure to be 'based on' the best available scientific advice, the Tribunal clarified that the obligation to rely on scientific advice is substantive, not merely aspirational or procedural. Decision-makers must engage meaningfully with scientific evidence and establish a rational link between the advice and the measure. According to the tribunal, a measure can only be said to be 'based on' scientific advice where that advice is both relevant and sufficiently tailored to support the policy outcome.

Importantly, however, when assessing whether a particular measure is 'based on' the best available scientific advice, the Tribunal is not entitled to step into the shoes of the original decision-maker. The Tribunal found that its role was instead to conduct an 'objective assessment' in order to determine whether or not the decision-maker had justified its measure with sufficient science. Provided that the decision-maker can show that the

11 *Ibid* para 559. This similarity is, arguably, no coincidence. The TCA's drafters drew inspiration from the WTO framework, referring to it directly at times. Indeed, the disputing parties agreed that the WTO jurisprudence bears consideration, though to varying degrees. Interestingly, the UK's Competition Appeal Tribunal recently cited the *Sandeels* award to underscore the relevance of WTO case law under the TCA (*Mr Aubrey Weis v Greater Manchester Combined Authority* [2025] CAT 41, paras 118–119).

12 For example, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* [2011] ITLOS 17, para 131, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal)* [2015] ITLOS 21, para 208(II) and *EC – Biotech* [2006] WTO WT/DS291/R, para 7.1525.

13 A key distinction exists between 'evidence' and 'advice'. Evidence refers to raw data or scientific outputs, while advice implies a process of expert interpretation of that data. This conceptual separation allowed the UK to holistically rely on different pieces of evidence to shape the advice, which it did.

decision was based on sufficient science, the only option that was open to a claimant – such as the EU in this case – would be to identify material errors in the scientific advice that would discredit the conclusions reached.

Applying this standard, the Tribunal held that:

(i) both the English and the Scottish bans were ‘*based on*’ scientific advice; and

(ii) the EU had failed to demonstrate a ‘*material*’ error in the UK’s approach.¹⁴ The Tribunal noted that there were certain weaknesses in the evidentiary base relied upon by the UK, but that these did not rise to the level of having a material bearing on the scientific advice rendered. Indeed, many of the EU’s criticisms related more to certain methodological flaws rather than their actual impact on the advice.¹⁵

The Tribunal also made certain further findings – albeit *obiter* – regarding the so-called ‘precautionary principle’. The effect of the precautionary principle is to allow a regulating state to adopt measures that cannot be shown to be supported by science, in circumstances where the scientific evidence is unclear.

The UK invoked the precautionary principle to justify the measures taken amid scientific uncertainty. The EU argued, in contrast, that the precautionary principle could not be relied upon to cure flawed evidence. The Tribunal held that it was unnecessary to rule on this issue, as the ban was found to rest on the best available scientific advice. It therefore refused to decide the broader point of whether the precautionary principle could serve as a fallback that would allow a defendant to cure a measure in circumstances where the supporting scientific evidence *falls short of constituting the best scientific advice available*.

The Tribunal did opine, however, that the precautionary principle can apply in situations where scientific advice is *inconclusive or where sufficient adequate scientific information is lacking*. It cautioned that precautionary measures are not a substitute for scientific advice but rather serve as a legitimate and necessary response in conditions of uncertainty. Accordingly, the Tribunal affirmed that States remain under a duty to act – even in the absence of definitive data – where there is a plausible risk to conservation objectives.¹⁶

14 Sandeel Award (n 5 above), para 532.

15 For instance, the EU did not show how the omission of Norwegian catches in the UK’s model would have made a difference, have a ‘material bearing’ to its outcomes and its confidence intervals (*ibid*). Nor did it establish that an overestimation of the biomass response to the ban undermined the integrity of the UK’s ecosystem model. Moreover, in the eyes of the Tribunal, some issues cited by the EU, such as the spatial distribution of predators, were not reasonably obtainable by the UK at the time.

16 See also Philippe Sands et al. *Principles of International Environmental Law* (Cambridge University Press, 2018), p 234.

This interpretation of the precautionary approach is consistent with the broader normative framework of sustainability. This includes treaties such as the Convention on Biological Diversity, UNFCCC, and the Paris Agreement, which emphasise the ethical foundations of sustainability science, incorporating precaution, responsibility, and intergenerational equity into decision-making processes.

Did the two bans discriminate against the EU?

Article 496(1) of the TCA requires parties to have ‘*regard to*’ the principles of proportionality and non-discrimination. The EU asserted that the two bans violated Article 496(1), in that they were both discriminatory and disproportionate. The Tribunal’s ruling with regard to discrimination is considered in this section; its ruling on proportionality is considered immediately below.

Discrimination can, in theory, take one of two forms. *De jure* discrimination could potentially occur where the measure in question, on its face, treats one group more favourably than another group. *De facto* discrimination could occur where the measure is neutral on its face, but when applied has the effect of unjustifiably treating one group less favourably than another.

It was common ground that the bans did not constitute *de jure* discrimination. The bans did not prohibit fishing by EU vessels but allow fishing by UK vessels. All vessels were prohibited from fishing sandeel.

Instead, the dispute centred around whether the bans amounted to *de facto* discrimination against EU vessels. The EU asserted that they did. It argued that the law had disproportionately impacted EU vessels, as UK vessels were considerably less reliant on the banned fishing areas in terms of sandeel TACs. In contrast, the UK rejected the claim, contending that measures that pursue a legitimate regulatory objective are not discriminatory even if they produce differential impacts.

The tribunal endorsed the UK’s position. In reaching this decision, it reasoned that *de facto* discrimination may occur when differential treatment is not grounded in a legitimate regulatory objective or lacks a clear link to that objective. In this instance, however, the tribunal found that the bans exhibited a ‘clear nexus between the differential treatment and the legitimate objective’,¹⁷ which is to close all UK waters to all UK and EU vessels in order to ‘provide ecosystem benefits’.¹⁸ Given this overarching objective, and the fact that the ban applied to all vessels, the UK was not required to take into account the TAC quota shares.

¹⁷ Sandeel Award (n 5 above), para 733.

¹⁸ *Ibid.*

Were the two bans disproportionate?

The EU asserted that the two bans were disproportionate, in violation of Article 496(1) of the TCA. In assessing proportionality, the Tribunal formulated a three-pronged test. First, the measure must be capable of contributing to its underlying environmental objective. Secondly, there must be a relationship of ‘means and ends’ between the ban and its objectives. Thirdly, the likely contribution of the measure to the objective pursued must be weighed against the likely economic, social and other consequences (costs and benefits) of adopting the measure and its likely implementation. According to the Tribunal, the greater the margin by which the commensurable harm exceeds the benefit, the more the proportionality of the measure may be called into question.

The Tribunal found that neither the first nor the second limb of the test was in dispute. It was common ground that the two bans could contribute to the environmental objective of protecting the marine environment, and that there was a relationship of means and ends between the bans and the objective of protecting the marine environment. The dispute centred on the third issue: the relationship between the contribution of the measure to the objective pursued and the likely consequences of adopting the measure.

Applying this standard to the measures taken, the Tribunal found that the English ban was disproportionate and therefore unlawful, but that the Scottish ban was proportionate and therefore lawful. As regards the English ban, the Tribunal took issue with the UK Government’s failure to seriously consider the economic impact of the ban on the EU. This failure was particularly concerning given the importance of the ‘adjustment period’ provided for in Annex 38 of the TCA. Annex 38 allows fishing vessels from both the UK and the EU to have full access – for a limited period of time – to the fishing grounds of the other party. The purpose of Annex 38 was to smooth the impact of Brexit, particularly for fishing vessels from the EU. Therefore, by failing to take into account this negotiated adjustment period during its weighting exercise, the UK was held to have breached the proportionality principle.¹⁹

By contrast, the Scottish ban was deemed lawful. The Scottish Government had engaged in a thorough examination of the benefits of the ban on sandeel fishing and compared that with an assessment of the economic impact of the ban on the fishing and processing industries in the EU (and the UK). Importantly, and unlike the UK Government, the Scottish Government had also taken into account the existence of the adjustment period when conducting its assessment.

¹⁹ This led the Tribunal to consequently consider that Annex 38 itself was breached.

Importantly, the Tribunal did not find that the UK was precluded from banning sandeel fishing. Instead, it only identified a due process issue, so that a new assessment curing this procedural defect would render the ban lawful. As a consequence, soon after the issuance of the award, the UK Government confirmed that a new decision-making process would take place,²⁰ and in June 2025 the UK informed the EU that it had completed said process based on updated evidence, which considered the EU's rights during the adjustment period. As a result, the UK concluded that the ban will 'remain in place'.²¹

Noteworthy procedural features of the Sandeels arbitration

Three procedural features of the *Sandeels* arbitration should be briefly mentioned.

The first is the speed of the proceedings. In a complex dispute involving many lengthy submissions and an oral hearing, it took the Tribunal only 160 days to issue its 263-page award after its establishment. This is impressive, notwithstanding the fact that the 160-day timeframe is the maximum permitted under the TCA.

The second is the transparency of the proceedings and the possibility of third-party involvement. Consistent with the current trend towards transparency in investment arbitration (illustrated most notably by the Mauritius Convention), all *inter partes* submissions were rapidly made public.²² *Amicus curiae* briefs were also permitted, which led to no fewer than 12 *amici curiae* briefs being submitted by environmental NGOs and fishing trade associations.

The third is the overall approach to this dispute taken by the EU. Despite lobbying efforts from the Danish fishing industry, the EU did not resort to retaliatory 'remedial measures' under Article 506(5) of the TCA.²³ It opted instead for consultation and then arbitration. Although the precise motivation behind this strategic choice remains unknown, the choice is one to be welcomed: it is undoubtedly preferable for all parties to resolve their disputes by means of reasoned legal processes rather than tit-for-tat trade restrictions.

20 UK Government, 'Response to Arbitration Tribunal Final Report: UK-Sandeel (The European Union v the United Kingdom of Great Britain and Northern Ireland)' (2025) www.gov.uk/government/news/response-to-arbitration-tribunal-final-report-uk-sandeel-the-european-union-v-the-united-kingdom-of-great-britain-and-northern-ireland [accessed 13 October 2025].

21 *Ibid.*

22 United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration [2015].

23 Harper (n 4 above).

Conclusion

Although the headline is that the EU succeeded in establishing that the UK had breached its obligations under the TCA, the overall outcome could be seen as a regulatory win for the UK.

As to the meaning of best available scientific advice, the Tribunal favoured a material error standard, noting, among other things, that ecosystem models are ‘always’, to a certain extent, ontologically flawed.²⁴ Rather than accepting the mere identification of errors as sufficient, the Tribunal emphasised that such errors must have a material and proven impact on the outcome – something the EU repeatedly failed to establish.

More generally, the Tribunal interpreted the TCA as primarily imposing on the UK due process obligations, rather than more substantively intrusive constraints. Mindful of its adjudicatory mandate, the three-arbitrator bench endeavoured to steer clear of interfering with politically-driven decisions, which are rarely an exact science. In the present case, such a spirit of restraint was perhaps fitting when dealing with hardly commensurable things, such as environmental protection and biodiversity, and when competing economic objectives need to be balanced.

Accordingly, apart from issues involving clear violations of procedural obligations to consider something, such as the ban’s impact on the EU, most legal issues were arguably subject to a more lenient standard of judicial review. And so, the threshold core question was not so much whether the ban was the right or optimal outcome, but rather whether it was reasonable. Underscoring this reluctance to intrude into the merits of policy choices, the award employs flexible concepts such as ‘a rational or objective relationship subsists between that advice and the measure’,²⁵ ‘reasonable conclusion in line with’,²⁶ ‘serious error of estimation which altered the balance of considerations relevant to proportionality’²⁷ and makes plain that the ‘[t]ribunal should not seek to replace the decision-maker’s judgements [...] with its own judgements’.²⁸

Looking beyond the immediate horizon, given the central emphasis on party autonomy within the TCA, as anchored in Article 1, the deferential approach adopted by the *Sandeels* tribunal may well extend beyond its fishing chapter. This first precedent could shape future interpretations of the state’s regulatory autonomy under the agreement, and as a result future policy decisions.

²⁴ Sandeel Award (n 5 above), para 558.

²⁵ *Ibid*, para 504.

²⁶ *Ibid*, para 571.

²⁷ *Ibid*, para 675.

²⁸ *Ibid*, para 642.