TO THE PRESIDENT AND THE MEMBERS

OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-673/13 P

between

EUROPEAN COMMISSION

Appellant

and

STICHTING GREENPEACE NEDERLAND AND PAN EUROPE

Respondents

STATEMENT IN INTERVENTION

pursuant to Article 40, second paragraph of the Protocol on the Statute of the Court of Justice of the European Union and Articles 190(1) and 132 of the Rules of Procedure of the Court of Justice of the European Union

on behalf of

CROPLIFE AMERICA, INC. ('CROPLIFE AMERICA'),

THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA ('THE NAM'),

and

AMERICAN CHEMISTRY COUNCIL, INC. ('ACC'),

Interveners

represented by Ms Kristina Nordlander, advokat, member of the Swedish Bar, Mr Marc Abenhaïm, avocat, member of the Paris Bar and Mr Patrick Harrison, solicitor, member of the Bar of England and Wales, all of Sidley Austin LLP, NEO Building, rue Montoyer 51, 1000 Brussels, Belgium. Pursuant to Articles 190(1), 130(4) and 121(2), and 48(4) of the Rules of Procedure of the Court of Justice, Ms Kristina Nordlander, Mr Marc Abenhaïm and Mr Patrick Harrison agree that service is to be effected on them by e-Curia.

I. INTRODUCTION

1. This Statement in Intervention supports the forms of order sought by the Appellant.[1]

2. The Interveners fully support the Appellant's single plea in law, according to which the General Court misconstrued the concept of information which '*relates to emissions into the environment*' in the first sentence of Article 6(1) of the Aarhus Regulation.[2] In sum, the Interveners consider that this concept (i) '*…must be read narrowly…*';[3] (ii) '*…refers to information about emissions which…emanate from installations such as factories and power stations*';[4] and (iii) '*…concern[s] actual, not hypothetical emission[s]…*'.[5]

3. The Interveners will not address or repeat all the Appellant's arguments, but rather focus this Statement on certain key questions of principle that affect – on a global scale – the intellectual property ('IP') rights, trade secrets, and confidential business information (together 'CBI') of United States ('US') companies. As explained further below, this case has a dramatic impact on the ability of US companies to continue marketing their products in the European Union ('EU'); in particular, products that are IP-intensive and involve the transmission of CBI to public authorities in order to get marketing authorization. More specifically, this Statement addresses the third branch of the Appellant's plea in law.

---

1 The Court of Justice should '*(i) quash the judgment of the General Court; (ii) pursuant to Article 61 of the Statute of the Court, either give a final ruling on the first and third pleas itself or refer the case back to the General Court for a ruling on those pleas; and (iii) order the respondents to pay the costs*'. Appeal, para. 70.

2 Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/13 ('Aarhus Regulation').

3 Appeal, para. 36.

4 *Ibid*., para. 39.

5 *Ibid*.

II. PRELIMINARY REMARKS: IMPACT OF JUDGMENT UNDER APPEAL ON US INDUSTRY

4. CropLife America represents the interests of over 90% of the manufacturers operating in the plant protection products sector in the US.[6] The NAM represents a large part of US manufacturers from various sectors in which companies are required to submit CBI to public authorities in order to obtain product approvals.[7] Finally, ACC represents more than 85% of the chemical manufacturing capacity in the US.[8] The Interveners thus together represent a significant part of the 75 US IP-intensive industries that in 2010 contributed about $5.06 trillion (or 34.8%) of the US gross domestic product (GDP) and $775 billion (or 60.7%) of total US merchandise exports, and that accounted for about 27.1 million American jobs, or 18.8% of all employment in the US economy.[9]

5. The Interveners' members routinely have to register their products or substances with various authorities in the US, the EU, and elsewhere, in order to get market access. In doing so, they expect certain kinds of proprietary and commercially valuable information to be protected against disclosure: US law has long recognized CBI as legally protectable information.[10] The US Supreme Court has confirmed that the Takings Clause of the Fifth Amendment to the US Constitution could apply to CBI.[11] In the plant protection sector, the US Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[12] gives further effect to this constitutional protection: its Section 10 provides that applicants submitting data and information required for registration of a pesticide may clearly mark such data and information as CBI and submit such CBI separately to the US Environmental Protection Agency ('EPA'). The EPA is

---

6 Case C-673/13 P *Commission v Stichting Greenpeace Nederland and PAN Europe* (order of 3 March 2015), ECLI:EU:C:2015:181, para. 6.

7 *Ibid*., para. 7.

8 *Ibid*., para. 8.

9 *See* US Patent and Trademark Office, Intellectual Property and the U.S. Economy: Industries in Focus, report March 2012, pp. vi-vii. This document may be consulted on the Internet, at the following address: http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf (last consulted on April 15, 2015).

10 The first reported trade secret case in the US was *Vickery v. Welsh*, 36 Mass (19 Pick.) 523 (1837). *See generally*, J. Poole, *Trade Secrets*, Law Journal Seminars Press § 1.03.

11 *Ruckelshaus v. Monsanto*, 467 US at 1003-04.

12 7 USC. §§ 136 – 136y.

prohibited from publicly disclosing data and information that contains or relates to CBI. If the EPA proposes to publicly release information which the applicant regards as CBI, it must first notify that applicant, who can then seek judicial review of the proposed disclosure.

6. Prior to the judgment under appeal, US companies believed that their CBI enjoyed an equivalent level of protection in the EU. Unfortunately, the judgment under appeal dramatically increased the risk of disclosure of CBI, not only in the plant protection sector, but also in a wide range of other sectors which, like the chemicals, cosmetics or pharmaceutical sectors, all involve similar marketing authorization procedures and potential environmental considerations.[13]

7. The judgment under appeal dramatically increased disclosure risks by adopting an interpretation of Article 6(1) of the Aarhus Regulation[14] that is at the same time excessively rigid and excessively broad:

- The judgment under appeal interpreted Article 6(1) as requiring EU institutions to disclose upon request any document or information relating to emissions into the environment, '*even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property.*'[15] The General Court interpreted Article 6(1) as setting out an irrebuttable presumption of an overriding public interest.
- The judgment under appeal interpreted the concept of information that '*relates to emissions into the environment*' as covering any information that '*relate[s] in a sufficiently direct manner to emissions into the environment*'.[16] The judgment under appeal thus leads to a situation where every possible information –

---

13 *See*: H. Von Holleben, Judgment of the General Court of the EU on Access to Information under Substance Law, *European Journal of Risk Regulation*, 04|2013, pp. 565-578, spec. p. 568; G. Garçon, Aarhus and Agrochemicals: The Scope and Limitations of Access Rights in Europe, *EurUP*, 02|2012, pp. 72-85, spec. p. 72.

14 Which provides that '*an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment*'.

15 Judgment under appeal, para. 46.

16 *Ibid*., paras 53, 57, 69, 72 and 73. Note the redundancy between the concept itself (information which '*relates to emissions into the environment*') and its interpretation (information that '*relate[s] in a sufficiently direct manner to emissions into the environment*'): the judgment under appeal in fact does not define the concept that had to be interpreted.

including CBI – about every possible substance potentially '*relates to emissions into the environment*'.[17]

8. Such a far-reaching interpretation prevents EU institutions and EU courts from protecting many types of CBI or even weighing the relevant interests at stake on a case-by-case basis. This entails important immediate and long-term consequences for US industry:

- The General Court's interpretation, first, immediately and dramatically increased the risk of disclosure of a wide range of CBI *already submitted* to national and EU authorities in the framework of various marketing authorization procedures. Such information had never been subject to public disclosure so far. As a result of the judgment under appeal, CBI already submitted to national and EU authorities may soon be the subject of multiple access requests originating from competitors and other third parties.[18]

- The General Court's interpretation also affects, second, *future* marketing authorization procedures. When submitting new studies or registration dossiers in EU approval applications for new products/substances, US companies must now confront the very real possibility that their CBI might be disclosed to the public, '*even if such disclosure is liable to undermine the protection*' normally recognised to such CBI. For the future, it is likely that the Interveners' member companies will seriously consider delaying or abandoning altogether entry into European markets for IP/CBI sensitive products. This may have a real and serious negative impact on their future business.[19]

9. Importantly, even though the legal protection of CBI might be lost only in the EU, any CBI disclosed by EU authorities will immediately be accessible for use in world-wide markets, including in the US. This risk particularly affects IP-intensive

---

17 The Appellant and the General Court agree that '*every substance is inevitably released into the environment at some stage of its life cycle*': judgment under appeal, para. 64; Appeal, paras 36 and 42.

18 About this immediate risk: *see* Interveners' Application for Leave to Intervene of 18 April 2014, paras 45-48.

19 For example, the chemicals, agriculture and pharmaceutical sectors contributed to foreign sales and exports by, respectively, $147.8 billion, $68.9 billion and $51.6 billion in 2013. *See* S. Siwek, Copyright Industries in the U.S. Economy, The 2014 Report (prepared for the International Intellectual Property Alliance). This document may be consulted on the Internet, at the following address: http://www.iipa.com/pdf/2014CpyrtRptFull.PDF (last consulted on April 15, 2015).

industries, which account for about 74% of the total exports of the US.[20] The implications are thus not confined to the EU, but are rather global in nature.

10. For all these reasons, the Interveners have taken the unprecedented step to seek to appear in the Court of Justice in these proceedings.

III. OBSERVATIONS (THIRD LIMB OF APPELLANT'S PLEA)

11. According to settled case law, EU courts have a duty of consistent interpretation of EU secondary legislation: the primacy of international agreements concluded by the EU over provisions of secondary legislation means that such provisions must, in so far as possible, be interpreted in a manner that is consistent with those international agreements.[21]

12. The General Court's interpretation of the Aarhus Regulation is inconsistent with several key international instruments binding on the EU and its Member States, including the Aarhus Convention[22] and, most importantly, the European Convention on Human Rights ('ECHR') and the World Trade Organization ('WTO') Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS').

A. General Court's interpretation is inconsistent with ECHR

13. Since the Lisbon Treaty, fundamental rights occupy the highest rank in the EU legal order. Article 6(1) of the TEU grants the Charter of Fundamental Rights the same legal value as the Treaties themselves and Articles 6(1) and (3) TEU respectively oblige the EU to accede to the ECHR and recall that the fundamental rights guaranteed by that Convention '*shall constitute general principles of the Union's law*'. Article 53 of the Charter of Fundamental Rights also provides that '*[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [by] the European Convention for the Protection of Human Rights and Fundamental Freedoms […]*'.

---

20 *See* http://www.theglobalipcenter.com/ip-creates-jobs/#exports (last consulted on April 15, 2015).

21 Case C-61/94 *Commission v Germany*, ECLI:EU:C:1996:313, para. 52.

22 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005. On the Aarhus Convention, the Interveners refer to the first branch of the Appeal, in particular paras 37-38.

14. Under both the Charter of Fundamental Rights[23] and the ECHR,[24] any interference with the exercise of a fundamental right must: (i) be provided for by law, (ii) pursue an objective of general interest, and (iii) remain limited to what is necessary in a democratic society to pursue that objective. By definition, compliance with these conditions requires, at the very least, a case-by-case analysis and weighing of interests.

15. As will be shown below, the General Court's interpretation of Article 6(1) of the Aarhus Regulation interferes with the fundamental right to property of registrants and ignores the above-mentioned requirements.

16. First, the General Court's interpretation clearly interferes with the fundamental right to property of undertakings transmitting CBI in the framework of their product registration dossiers. The judgment under appeal makes it clear that disclosure applies '*even if such disclosure is liable to undermine the [registrants'] intellectual property*'.[25] The Interveners therefore share the Appellant's view that the General Court's interpretation is not consistent with Article 17 of the Charter of Fundamental Rights.[26] As a matter of fact, the judgment under appeal also '*interferes*' with Article 1 of Protocol No. 1 to the ECHR, which protects every person's fundamental right '*to the peaceful enjoyment of his possessions*', including '*intellectual property as such*'.[27]

17. Second, the combination of an excessively broad (i.e., the scope of the emissions rule) and excessively rigid (i.e., the alleged irrebuttable presumption) interpretation prevents any balancing of interests on a case-by-case basis. This lack of case-by-case analysis creates a systemic deficiency in the protection of registrants' fundamental right to property. Because the notion of information relating to emissions into the environment covers virtually every possible type of product composition

---

23 Charter of Fundamental Rights, Article 52(1).

24 *See* F. Sudre, *Droit européen et international des droits de l'homme*, 10th edition, *PUF* (2011), pp. 218-227 and pp. 651-652 (right to property); L. Helfer, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, *Harvard International Law Journal*, (2008) 49(1), pp. 1-52.

25 *See above*, para. 7.

26 Appeal, paras 34 and 61-65. Article 17(2) of the Charter of Fundamental Rights clarifies that '*[i]ntellectual property shall be protected*' (emphasis added).

27 European Court of European Rights ('ECtHR') *Anheuser-Busch v. Portugal* [2007], application no. 73049/01 [GC], para. 72. The ECtHR reached that conclusion on the ground that the '*concept of "possessions"[…] has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law*' (para. 63).

information,[28] EU institutions will inevitably be faced with requests for disclosure that potentially restrict the fundamental right to property. And because the General Court has characterized the disclosure rule as an irrebuttable presumption, EU institutions are prevented from applying the required proportionality test on a case-by-case basis. Such an interpretation of Article 6(1) of the Aarhus Regulation simply cannot be consistent with either the Charter of Fundamental Rights or the ECHR.[29]

18. Finally, the General Court's interpretation is liable to put Member States themselves at risk under the ECHR system. As illustrated by the judgment under appeal,[30] the CBI at issue is often submitted to national authorities in the framework of marketing authorization procedures. EU transparency rules and the Transparency Regulation (Regulation 1049/2001) apply to documents which such national authorities have forwarded to the EU institutions.[31] Although Article 4(5) of the Transparency Regulation allows a Member State to oppose disclosure by an EU institution of a document originating from that Member State, the Member State's objection can only apply '*on the basis of the substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position*'.[32] If the General Court's interpretation of Article 6(1) of the Aarhus Regulation were upheld, Member States might thus be found in breach of their international obligations pursuant to Article 1 of Protocol No. 1 to the ECHR as a consequence of performing their obligations (to transmit CBI to the EU institutions) pursuant to EU law.[33]

19. The General Court's excessively broad and excessively rigid interpretation of Article 6(1) of the Aarhus Regulation is thus not only inconsistent with Article 17 of the Charter of Fundamental Rights and Article 1 of Protocol No. 1 to the ECHR, it further risks exposing Member States to litigation in the European Court of Human Rights.

---

28 *See above*, para. 7.

29 *See also*: H. Von Holleben, cited above, n. 13, p. 574; G. Garçon, cited above, n. 13, p. 75.

30 Judgment under appeal, paras 2-9.

31 Transparency Regulation, Article 2(3).

32 C-135/11 P *IFAW Internationaler Tierschutz-Fonds v Commission* ECLI:EU:C:2012:376, para. 59.

33 *Comp.*: ECtHR *Bosphorus Airways v. Ireland* [2005], application no. 45036/98 [GC]; ECtHR *Povse v. Austria* (dec.) [2013], application no. 3890/11.

B. General Court's interpretation is inconsistent with Article 39(3) TRIPS

20. The way the judgment under appeal undermines CBI *as such* is also inconsistent with Article 39(3) TRIPS.[34]

21. Article 39(3) TRIPS obliges WTO members to protect trade secrets against disclosure or unfair commercial use in the following terms:

> '*Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.*'

22. Any disclosure of CBI will only be justified under the second sentence of Article 39(3) TRIPS if it is (i) deemed by the regulating body to be '*necessary to protect the public*', or (ii) '*ensure[d] that the data are protected against unfair commercial use*' (which requires a heightened level of protection relative to the level required by the first sentence[35]). As a member of the WTO, the EU is thus bound to interpret and apply Article 6(1) of the Aarhus Regulation in a manner that *prevents* EU institutions from disclosing CBI without a genuine necessity to protect the public or without at least taking steps to ensure that the data in question are protected against unfair commercial use.

23. The term '*necessary to protect the public*' is to be interpreted in light of the interpretation developed by the WTO Appellate Body for the term '*necessary*' under the exception clauses of Article XX of the General Agreement on Tariffs and Trade ('GATT 1994').[36] As Article 39(3) TRIPS, the exceptions under Article XX of the GATT 1994 strike '*a balance … between the* right *of a Member to invoke an exception and the* duty *of that same Member to respect the treaty rights of the other*

---

34 For an illustration in the case at hand, *see* Appeal, paras 23-24.

35 *See* G. Skillington and E. Solovy, The Protection of Test and Other Data Required by Article 39.3 of the TRIPS Agreement, *Northwestern Journal of International Law and Business*, Vol. 24, Issue 1 (2003), pp. 47-48.

36 Article XX(b) of GATT 1994 allows for the exceptional implementation of discriminatory measures deemed '*necessary to protect human, animal or plant life or health*'.

Members'.[37] The weighing and balancing between the competing rights must be undertaken on a case-by-case basis and requires that the allegedly '*necessary*' disclosure make a quantifiable contribution to the member's stated policy objective.[38]

24. However, the General Court's interpretation of Article 6(1) of the Aarhus Regulation fails to meet this test. The irrebuttable nature of the presumption which the General Court (unnecessarily) reads into this provision denies registrants the right to even claim that their interest in the protection of their CBI outweighs the interest of the public on the facts of a particular case. Further, the very broad scope of substances or products covered by the disclosure requirement implies that disclosure occurs regardless of any quantifiable contribution to the achievement of the public policy objectives pursued, and regardless of any balancing of the competing rights in light of the particular information and risks for the public at issue.

25. Again, the combination of the General Court's excessively broad and excessively rigid interpretation of Article 6(1) of the Aarhus Regulation can only be inconsistent with Article 39(3) TRIPS.[39]

IV. CONCLUSIONS

26. In conclusion, the judgment under appeal fails to ensure an interpretation of Article 6(1) of the Aarhus Regulation that would be consistent with higher ranking norms of EU law (such as the Charter of Fundamental Rights) and international instruments binding on the EU and its Member States, such as the ECHR and the TRIPS agreement.

27. The General Court's statement that the consistent interpretation sought by the Appellant would preclude the application of the first sentence of Article 6(1) of the Aarhus Regulation cannot be accepted. The Appellant has shown that Article 6(1) of the Aarhus Regulation can be interpreted in a way that respects the internal consistency among different EU regulations (sector-specific or otherwise) as well as

---

37 WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 156.

38 WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, para. 172.

39 *See also*: M. Bronckers, N. McNelis, Is the EU Obliged to Improve the Protection of Trade Secrets? [2012] *E.I.P.R.*, (10) pp. 673-688, spec., p. 681.

with general principles of EU law and international obligations. The interpretation suggested by the Appellant – and supported by the Interveners – is not inconsistent with the wording of Article 6(1) of the Aarhus Regulation and does not, therefore, amount to disapplying that provision.

28. Should the Court of Justice confirm the judgement under appeal, the EU would be an outlier in breach of international obligations and standards. This could have serious repercussions on the EU economy as investment in product registrations in Europe – including by US companies that are members of the Interveners – will most likely be chilled.

V. FORMS OF ORDER SOUGHT

29. For all the reasons stated above, the Interveners respectfully ask the Court to:

- grant the forms of order sought by the Appellant; and
- order Stichting Greenpeace Nederland and Pesticide Action Network Europe to pay the Interveners' costs incurred in these proceedings.

Kristina Nordlander

Patrick Harrison

Marc Abenhaïm

Brussels, 15 April 2015