

**CASE C-673/13 P COMMISSION V STICHTING GREENPEACE
NEDERLAND AND PAN EUROPE**

**ORAL STATEMENT
ON BEHALF OF CLA, NAM, ACC**

My Lords, My Ladies,

1. It is my pleasure to appear before you today to support the European Commission in this important case. I fully agree with the legal position as set out on behalf of the Commission, Cefic, ECPA, and CLI. I will not repeat their arguments.
2. My focus today will be on the EU's international law obligations and why the judgment under appeal has dramatic consequences not just in Europe, but globally.
3. My clients' presence here today is evidence in itself of the global importance of this case.
4. **Why are three major US trade associations representing the plant protection, chemical and manufacturing sectors speaking for over 10,000 member companies appearing before you for the first time today?** Well, essentially because the General Court's interpretation has a dramatic impact on the ability of global companies to continue marketing their products in the EU.
5. The General Court's ruling leaves two options for companies seeking authorizations in the EU. Either, they accept that their trade secrets will be made public, meaning that their data can be used and abused anywhere in the world by competitors, or ... they decide not to market their products in the EU altogether, with obvious adverse consequences for the EU as a whole.

6. In the judgment under appeal, the General Court held that the Transparency and Aarhus regulations require the automatic disclosure of *any* data relating, in a sufficiently direct manner, to emissions into the environment.
7. The General Court held that the Transparency and Aarhus regulations could not be *interpreted* in a manner consistent with fundamental rights or the TRIPS Agreement. But that is not correct.
8. It has already been established that another interpretation of the emissions rule is possible – namely the Commission’s interpretation – and I will now briefly explain why international law obligations mandate that the Commission’s interpretation be adopted by this Court.
9. I will start with fundamental rights.

I. GENERAL COURT’S INTERPRETATION CONFLICTS WITH FUNDAMENTAL RIGHTS

10. It is undisputed that the fundamental rights guaranteed by the ECHR constitute general principles of EU law and that the Charter has the status of primary EU law.
11. Both the Charter and the ECHR set out fundamental rights to property – which can include trade secrets and IP – and to conduct a business.¹ The General Court’s interpretation of the emissions rule interferes with these fundamental rights without an opportunity to balance the interests at stake.
12. I refer to our statement in intervention concerning the explanation of why the General Court’s excessively broad and rigid interpretation is inconsistent with Article 17 of the Charter and Article 1 of Protocol No. 1

¹ There is a fundamental right to transparency that applies to the activities of the EU institutions, but there is no fundamental right specific to access to environmental information.

to the ECHR. For now, I would just like to draw this Court's attention to the potential risks of litigation before the European Court of Human Rights to which the General Court's interpretation exposes Member States.

13. The General Court's interpretation of the emissions rule may put Member State authorities in a conundrum. The first authority responsible for processing the information request at issue was not an EU institution, but a national authority. That is to say a public authority *directly bound* by the obligations in the ECHR and the enforcement mechanism set out therein.
14. I will now turn to the TRIPS Agreement.

II. GENERAL COURT'S INTERPRETATION CONFLICTS WITH TRIPS

15. Article 216(2) of the TFEU provides that *international agreements concluded by the EU* are binding upon the institutions of the EU and its Member States. On that basis, this Court has consistently held that international agreements concluded by the EU have *primacy* over provisions of secondary EU law.²
16. But the General Court held that the Transparency and Aarhus regulations could not be *interpreted* in a manner consistent with the TRIPS Agreement. That is not correct.
17. The *principle of consistent interpretation* requires that provisions of EU secondary law be interpreted, *in so far as possible*, in a manner consistent with the EU's international obligations.³ It is common ground that the

² C-308/06 *Intertanko and Others* [2008] ECR I-4057, para. 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 307.

³ See Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52. Something which is not contested in the judgement under appeal, see para. 45: "Where there are European Union rules in a

Transparency and Aarhus regulations must be interpreted, *in so far as possible*, with the TRIPS Agreement, and in particular Article 39(3) of the TRIPS Agreement.

18. Article 39(3) of the TRIPS Agreement concerns data that must be submitted to obtain marketing approval of agricultural chemical products. It requires that the EU:
 - (1) Protect such data against unfair commercial use; and
 - (2) Protect such data against disclosure, except where (i) *necessary to protect the public*, or (ii) unless steps are taken to ensure that the data are protected against unfair commercial use.
19. Therefore, the EU's first and foremost obligation is to protect data against unfair commercial use. For instance, the EU must ensure that submitted data does not allow competing companies to copy confidential production methods.
20. The EU's second obligation is to protect data against disclosure. The EU may nonetheless disclose information where it is necessary to protect the public. Whether disclosure is *necessary* to protect the public requires a case by case assessment, showing that:
 - (1) The disclosure of the information makes a quantifiable contribution to the policy objective sought; and
 - (2) There is no reasonably available less trade restrictive alternative that would make the same contribution to the policy objective.
21. It follows that the Transparency and Aarhus regulations must be interpreted as requiring the disclosure of data relating to emissions into the environment only where:

sphere concerned by the TRIPS Agreement, European Union law will apply, which will mean that it is necessary, as far as possible, to adopt an interpretation in keeping with the TRIPS Agreement."

- (1) Disclosure of the data in question contributes to the enhanced transparency policy objective aimed at preserving, protecting and improving the quality of the environment, and
 - (2) There is no less onerous alternative for achieving that same objective.
22. Under that interpretation, the EU may thus disclose information only if it is *necessary* to preserving, protecting and improving the quality of the environment. Nothing more. Other data may not be disclosed unless the EU takes active and concrete steps to ensure that it is protected against unfair commercial use.
23. The General Court's interpretation is at odds with the EU's TRIPS obligations because it mandates disclosure without a case-by-case assessment of whether or not disclosure of the information contributes to protecting the environment and whether or not there is an alternative for achieving the same objective that would not entail a risk of unfair commercial use.
24. The Commission's interpretation on the other hand is in line with these TRIPS obligations because it limits disclosure to data about actual emissions that affect the environment, and whose disclosure thus contributes to the policy objective. As Advocate General Kokott noted in a previous Opinion (Case C-266/09), commercial confidentiality typically ends when the substance in question is actually released and interacts with the environment.
25. In conclusion, the Commission's interpretation of the emissions rule is consistent with the EU's TRIPS obligations; the General Court's interpretation is not. **The principle of consistent interpretation thus requires favouring the Commission's interpretation over that of the General Court.**
