

18 April 2014

**APPLICATION FOR LEAVE TO INTERVENE
IN THE COURT OF JUSTICE OF THE EUROPEAN UNION**

on the basis of

Article 40 of the Statute of the Court of Justice of the European Union

CASE C-673/13 P

European Commission v Stichting Greenpeace Nederland and PAN Europe

ON BEHALF OF

CropLife America, Inc. (“CropLife America”),

The National Association of Manufacturers of the United States of America (“the NAM”),

and

The American Chemistry Council, Inc. (“ACC”),

hereafter the “Applicants”

IN SUPPORT OF

The European Commission (“Commission”)

The Applicants are:

- a) CropLife America, Inc. ("CropLife America"), a U.S. non-profit trade association registered under the laws of the State of Delaware, having its principal office at 1156 15th St. NW, Suite 400, Washington, DC 20005, U.S.A.;
- b) The National Association of Manufacturers of the United States of America ("the NAM"), a U.S. non-profit association registered under the laws of the State of New York, having its principal office at 733 10th Street NW, Suite 700 Washington, DC 20001, U.S.A.;
- c) The American Chemistry Council, Inc. ("ACC"), a U.S. non-profit association registered under the laws of the State of New York, having its principal office at 700 2nd Street, NE, Washington, District of Columbia, U.S.A.

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I. INTRODUCTION

1. EU institutions, bodies and agencies should conduct their work as openly as possible. Indeed, this is required by the Treaty on the Functioning of the European Union, which identifies transparency as an overarching principle governing the activities of the Union, as well as a fundamental tool to promote good governance and ensure the participation of public society.
2. However, when making information or documents publicly available, EU institutions and bodies must also protect the confidentiality of commercially sensitive information provided by individuals or legal entities (for example, confidential business information provided to regulatory authorities in the context of seeking product approvals). This is required not only by EU law, but also by international trade rules.
3. The importance of finding the right balance between transparency and confidentiality is particularly striking for regulatory procedures concerning plant protection products and chemical substances. In these procedures, the law requires applicants to submit proprietary information to EU regulatory authorities to initiate the scientific or technical assessment needed for marketing authorization or approval. As they must provide this information, companies reasonably expect the information to remain confidential.
4. On 8 October 2013, transparency trumped confidentiality in Case T-545/11 *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission*. In this case, the General Court ordered the Commission to grant public access to proprietary information on glyphosate on the grounds that the information in question constituted information relating to “emissions into the environment” – information to which the public could presume access under Article 6(1) of Regulation (EC) No. 1367/2006¹ (“Aarhus Regulation”).
5. The General Court rejected the Commission’s position on the concept of information relating to “emissions into the environment”; the Commission had maintained that the concept must be interpreted in a consistent and harmonious manner in light of the other legal provisions at issue in the case. Accordingly, on 17 December 2013, the Commission lodged an appeal with the Court of Justice of the European Union, seeking reversal of the judgment in Case T-545/11 (the judgment under appeal).
6. The appeal consists of one plea, namely, that the General Court misconstrued the concept of information which “relates to emissions into the environment” under the Aarhus Regulation.
7. Article 6(1) of the Aarhus Regulation provides that “*an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.*” In the judgment under appeal, the General Court

¹ 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.

interpreted this provision surprisingly broadly, requiring EU institutions to disclose any document or information upon request, “*where the information requested relates 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, within the meaning of Article 4(2), first indent, of Regulation No 1049/2001.*”²

8. This far-reaching interpretation will create an obligation for all EU institutions to disclose, upon request, any information relating “in sufficiently direct manner” to emissions into the environment. It will further prevent EU institutions from protecting confidential information, business secrets, or even intellectual property, as well as from weighing the specific interests at stake in a given case. In short, the interpretation will radically expand the right of public access at the expense of reasonable case-by-case protection of confidential business information and IP.
9. The Court’s reasoning dramatically increases the risk of publication of information on plant protection products, and sets a precedent that could apply – by extension – to confidential data on chemicals.³ Confidential documents in these two sectors that have never been subject to public disclosure may soon be the subject of multiple access requests originating from competitors and other third parties. In all likelihood, the outcome of the present case will determine the extent to which plant protection products and chemical companies will be able and willing to continue marketing their products in the EU.
10. Finally, if the General Court’s ruling is upheld, its impact will be felt not only in the EU, but also globally. It will create a risk that data disclosed in the EU will be accessible to the world market and used in other jurisdictions. This risk, in particular, will affect U.S. entities due to their significant exports to the EU. When submitting new studies in EU approval applications for new substances, U.S. companies must now confront the very real possibility, created by the judgment under appeal, that these studies might be disclosed to the public based on the Aarhus Regulation. In such circumstances, these companies may prefer to delay (or cancel) the market entry of new substances in the EU to avoid undermining global data confidentiality. This inability to freely market their products in the EU will have a real and serious negative impact on their business.
11. It is for these reasons that CropLife America, the NAM, and ACC (all of them being U.S. trade associations) are hereby seeking to intervene in the present case to protect the vital interests of their members.
12. The Commission’s appeal was published in the Official Journal on 8 March 2014. This application for leave to intervene has therefore been made within the time limit

² Judgment under appeal, paragraph 46.

³ The judgment under appeal, if upheld, is also likely to affect the functioning of the other similarly placed industries obliged to submit confidential business information to EU institutions and bodies to secure market access.

set forth in Article 190(2) of the Rules of Procedure of the Court of Justice of the European Union.

II. STATEMENT OF INTEREST OF THE APPLICANTS

A. Four conditions for intervention by a trade association

13. Article 40 of the Statute of the Court of Justice provides that an application for leave to intervene must establish that the applicant has an interest in the outcome of the case in question. The EU Courts have also stated that an application for leave to intervene may be admitted if it is submitted by a representative association whose objectives include the protection of its members' interests in cases raising questions of principle liable to affect those members.
14. It follows from the case law of the EU Courts that an association may intervene in a given case if:⁴
 - a) the association represents a significant number of undertakings active in the sector concerned;
 - b) the association's objects include the protection of the interests of its members;
 - c) the case may raise questions of principle affecting the functioning of the sector concerned; and
 - d) the interests of the association's members may be affected significantly by the forthcoming judgment.

15. All these conditions are met here, as outlined below.

B. First condition – CropLife America, the NAM and ACC each represent a significant number of undertakings active in the sector concerned

1) Sector concerned by the judgment

16. The Applicants consider that the judgment under appeal concerns more than one sector.
17. First, the outcome of the present case will affect the plant protection industry. Because the General Court, in the judgment under appeal, broadened the concept of information related to "emissions into the environment" beyond the direct emissions of chemical substances into the environment, the category of information will now include information that plant protection manufacturers are required to submit to EU institutions and bodies to obtain marketing authorizations for their products.

⁴ See for example: Order of the President of the Court of 17 October 2011 in Case C-2/11P(I) *Gesamtverband der deutschen Textil- und Modeindustrie and Others v Council and Others* [2011] ECR I-00152, paragraph 25 and references cited; see also: Order of the General Court in Case T-253/03 *Akzo Nobel Chemicals and Akros Chemicals v Commission* [2004] ECR II-1603, paragraph 18 and references cited.

Regulation No 1107/2009⁵ (the “Plant Protection Products Regulation”) requires such manufacturers to provide substantial amounts of information, including proprietary or otherwise confidential information. As a direct result of the judgment under appeal, these manufacturers are now at risk of having this information publicly disclosed.

18. Second, in addition to the plant protection industry, the outcome of the dispute will potentially affect many other economic sectors. If the judgment under appeal stands, the definition of information concerning “emissions into the environment” will have become so broad that it will apply in a very large number of situations in which confidential information is provided to EU institutions and bodies. Therefore, as a result of the judgment under appeal, any undertaking obliged to submit such confidential information to EU institutions and bodies is at risk of having that information publicly disclosed.
19. Without being exhaustive, one can identify at least one other sector clearly affected by the judgment under appeal: the broader chemicals industry. Within the framework of REACH, manufacturers of chemicals are routinely required to provide proprietary or otherwise confidential information to EU authorities. Such information will very often relate to “emissions into the environment” under the very broad understanding of this term derived from the judgment under appeal. The broader the interpretation given to Article 6(1) of the Aarhus Regulation, the greater the risk of public disclosure of proprietary (or otherwise confidential) information provided within the framework of REACH. Indeed, as a result of the interpretation of Article 6(1) of the Aarhus Regulation given by the General Court in the judgment under appeal, EU institutions will automatically have to disclose such information upon request, despite its confidentiality. Litigants have already brought cases before the General Court that are likely to rely on the judgment under appeal.⁶

2) *CropLife America is sufficiently representative*

20. CropLife America represents over 90% of the manufacturers operating in the plant protection products sector in the United States, which, as noted above, will be directly affected by the judgment under appeal.
21. CropLife America is the United States’ largest trade organization for agriculture and pest management. It currently represents more than 60 developers, manufacturers, formulators, and distributors providing plant protection products and services to the U.S. market.⁷ Its member companies, many of which are global leaders in plant protection, produce, sell and distribute virtually all the crop protection and

⁵ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC; OJ L 309, 24.11.2009, p. 1.

⁶ See for example: Case T-245/11 *ClientEarth and International Chemical Secretariat v ECHA* (pending), third plea in law.

⁷ See list of CropLife America Members attached as Annex 1.

biotechnology products used by American farmers. Indeed, CropLife America represents three of the four owners of the glyphosate data at issue in this case.

22. Therefore, CropLife America is adequately positioned to represent the interests of U.S. manufacturers of plant protection products in these proceedings.

3) The NAM is sufficiently representative

23. As the largest industrial trade association in the United States, the NAM represents small and large manufacturers from a variety of sectors, many of which operate in regulated industries where companies are required to submit confidential business information to public authorities in order to obtain product approvals. These sectors include the chemical industry, the plant protection industry, and the pharmaceutical industry.

24. The NAM is composed of over 12,000 members. Out of these 12,000 companies, approximately 20 are specifically involved in the plant protection sector and 1090 companies in the broader chemicals sector. The NAM therefore represents approximately 1090 companies that could be directly affected by the judgment under appeal.

25. Therefore, the NAM represents a substantial number of companies operating in the sectors concerned and is thus adequately positioned to represent the interests of these companies in the present proceedings.

4) ACC is sufficiently representative

26. ACC represents more than 85 percent of the chemical manufacturing capacity in the United States, including the leading companies engaged in the business of chemistry. ACC membership includes companies with significant plant protection product business and interest in the United States. Notably, ACC represents Bayer Corporation, DuPont, FMC, BASF and Dow – companies which market glyphosate in the United States.

27. ACC is composed of 185 members the vast majority of which are involved in the broader chemicals sector.⁸ Out of these 185 companies, at least 62 are specifically involved in the plant protection sector. Therefore, almost the entire ACC membership could be directly affected by the judgment under appeal.

28. Therefore, ACC represents a substantial number of companies operating in the sectors concerned and is thus adequately positioned to represent the interests of these companies in the present proceedings.

C. Second condition – Objects of CropLife America, the NAM and ACC include the protection of their members' interests

1) CropLife America

⁸ The list of ACC members attached as Annex 2.

29. CropLife America is a nation-wide, non-profit trade association representing developers, manufactures, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CropLife America's primary objective is the protection of its members' interests:

*"The purposes for which the corporation is organized are to promote the interest of those who are engaged in the production and marketing of crop and livestock protection or enhancement chemicals, to promote the efficient and safe use of such products, and the public understanding of such products and their use."*⁹

30. In addition, CropLife America is explicitly authorized to represent its members in judicial proceedings concerning matters of common interest to members:

*"In promoting these purposes, the corporation is authorized to represent some or all of its members by participating in legislative, regulatory or judicial proceedings which involve issues which are of common interest to such members (emphasis added)."*¹⁰

31. Therefore, CropLife America meets the second condition for being granted leave to intervene in the present case.

2) The NAM

32. The NAM is the largest industrial trade association in the United States, representing small and large U.S. manufacturers in every industrial sector and in all 50 states. Its membership includes both large multinational corporations and small and medium-sized manufacturers. The NAM is the voice of the U.S. manufacturing community and the leading advocate for a policy agenda that helps U.S. manufacturers compete in the global economy and create jobs across the United States. As stated in the NAM's Certificate of Incorporation, one of the NAM's primary objectives is the protection of its members' interests:

*"The particular objects and purposes of said corporation are to establish and maintain a mutual and co-operative organization of American manufacturers in the United States for the fostering of their trade, business and financial interests, [...] to procure uniformity and certainty in the customs and usages pertaining to the trade, business and financial interests of the members of said corporation, [...] and to do all things necessary to carry out the aforesaid purposes for the mutual benefit and protection of its members."*¹¹

33. The NAM focuses on advancing policies that help manufacturers in the United States create economic strength and jobs. The purposes and objectives of the association

⁹ See Restated Certificate of Incorporation, p. 1, excerpt attached as Annex 3.

¹⁰ Ibid., p. 1.

¹¹ The NAM's Articles of Incorporation, p. 3, attached as Annex 4.

give the NAM the implicit authority to represent the interests of its members before United States administrative and judicial authorities, and the NAM has exercised this authority many times.¹² (The authority exists even though the NAM's Articles of Incorporation do not contain an explicit clause to that effect.) In addition, many NAM members are multinational corporations and strong supporters of the global system of trade and investment. As a consequence, the NAM also has the implicit authority to represent its members before foreign authorities as necessary to protect their interests.

34. Therefore, the NAM meets the second condition for being granted leave to intervene in the present case.

3) ACC

35. ACC is a nation-wide, non-profit trade association representing U.S. companies engaged at various levels in the chemicals manufacturing sector, including manufacturing, transportation and distribution, storage and disposal, sales and marketing, consulting, logistics, and equipment manufacturing. These companies may be of any size and may be based either in the United States or in Europe. ACC's primary objective is the protection of its members' interests:

*"The purpose of the consolidated corporation shall be the promotion of the interests of the chemical manufacturing industry of the United States of America."*¹³

36. By way of example, ACC regularly contributes on matters relating to protection of confidential business information in the chemicals sector.¹⁴ Also, ACC is actively involved in fostering and expanding chemicals trade across the Atlantic by promoting regulatory cooperation, addressing regulatory barriers that may impede trade, and supporting possible future trade agreements.¹⁵
37. Therefore, ACC meets the second condition for being granted leave to intervene in the present case.

D. Third condition – Case C-673/13 P may raise questions of principle affecting the functioning of the sectors

¹² See, e.g., the NAM's amicus brief in *Copper Tire v Neal* (Arkansas Supreme Court), attached as Annex 5.

¹³ ACC's Certificate of Incorporation, attached as Annex 6, p.3. See also statement on the ACC website attached as Annex 7: *"The American Chemistry Council's (ACC's) mission is to deliver business value through exceptional advocacy using best-in-class member performance, political engagement, communications and scientific research. [...] ACC is America's oldest trade association of its kind, representing companies engaged in the business of chemistry."*

¹⁴ See Testimony of Craig O. Morrison on behalf of ACC before the Subcommittee on Environment and the Economy, United States House of Representatives, 11 July 2013, attached as Annex 8.

¹⁵ See CEFIC-ACC response to EU and U.S. call of 7 September 2012 for input on regulatory issues for possible future trade agreements, attached as Annex 9.

38. Case C-673/13 P raises a number of important questions of principle that affect the functioning of the plant protection sector, the chemical sector, and many other similarly-placed industries. Three main questions (among others) are:

- a) Does Article 6(1) of the Aarhus Regulation establish an irrebuttable presumption that an overriding public interest in disclosure exists when the information to which access is requested relates to emissions into the environment?
- b) What is the relationship between the Aarhus Regulation and the rules on access to documents contained in the Plant Protection Products Regulation and other EU transparency rules?
- c) What is the relationship between the Aarhus Regulation and Article 39(3) of the TRIPS Agreement?

39. The case also raises questions about the validity of the Aarhus Regulation vis-à-vis rules on confidentiality and fundamental rights enshrined in the EU Treaties and under general principles of EU law.

40. The three questions above are addressed in turn below.

1) Does Article 6(1) of the Aarhus Regulation establish an irrebuttable presumption?

41. In the judgment under appeal, the General Court ordered the Commission to grant access to proprietary confidential information of a type that is typically protected from disclosure. This protection is necessary because such disclosure undermines the protection of the commercial interests of a natural or legal person, as provided for under Article 4(2) of Regulation 1049/2001¹⁶ (“Transparency Regulation”) and under the Plant Protection Products Regulation. The General Court ordered access on the grounds that the information was “information on emissions” to which the public can presume access. Under the Aarhus Regulation, the public is presumed to have an interest in disclosure of information on emissions, even if it would impair the commercial interest (or IP rights) of a natural or legal person.

42. Prior to the judgment under appeal, the term “information on emissions” was understood to denote information on the specific act of releasing a chemical substance into the environment, along with information about the circumstances of such a release (the name of the substance, where and when it was released, and the amount of the release). This commonsense understanding was supported by the Implementation Guide for the Aarhus Convention,¹⁷ a document which narrowly defines the concept of “emissions” as releases directly from installations.

¹⁶ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145, 31.5.2001, p. 43. Under Article 4(2), public access to confidential information is refused unless there is an overriding public interest in disclosure.

¹⁷ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is an international treaty signed by the Member States and the Community on 25 June

43. However, in Case T-545/11, the General Court stretched the notion of “information on emissions” to include any information about any substance that relates “in a sufficiently direct manner to emissions into the environment.” The General Court’s reading of this term is surprisingly broad and clearly goes beyond what was initially intended by the Aarhus Regulation. As a result, information about glyphosate’s composition, substance identity, and the level of impurities qualified as information on emissions.
44. By the same token, any information about plant protection products relating “in a sufficiently direct manner” to their impact on the environment could be considered as information on emissions, thereby triggering the presumption of access in the Aarhus Regulation. The potential implications are wide-ranging. Confidential documents from plant protection manufacturers may soon be the subject of multiple access requests originating from industry competitors and other third parties. As stated above, the Court of Justice will now have to decide whether Article 6(1) of the Aarhus Regulation does in fact establish an irrebuttable presumption that an overriding public interest in disclosure exists when the information to which access is requested relates to emissions into the environment. In other words, the Court of Justice will have to decide whether such dramatic loss of confidentiality is legal under the Aarhus Regulation and EU law more generally.
45. The question of principle at issue in the present case will likely affect not only the plant protection industry but, in fact, a whole array of regulated sectors. In particular, it will affect all companies obliged to submit proprietary or otherwise confidential information to EU institutions and bodies under market authorization procedures. These companies will now automatically face disclosure risks whenever the information so submitted can be deemed as “relating to emissions into the environment.”
46. Not only does the ruling in Case T-545/11 threaten to strip proprietary data of its confidentiality in the EU, it also presents a real and immediate threat to confidentiality in other jurisdictions that maintain higher standards for protection of confidential information. This concerns the United States in particular.
47. In the plant protection sector, U.S. law clearly favors confidentiality for proprietary data and information.¹⁸ The General Court’s judgment in Case T-545/11 is

1998 in Aarhus, Denmark. The Aarhus Convention was approved for the Community in 2005, and its provisions were made applicable to Community institutions and bodies by Regulation (EC) No. 1367/2006.

¹⁸ Section 10 of the US Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides that applicants submitting data and information required for registration of a pesticide may clearly mark data and information as trade secret, commercial, or financial information and separately submit the marked data and information to the US Environmental Protection Agency (EPA). The EPA is prohibited from publicly releasing data and information that, in its judgment, contains or relates to trade secret, commercial, or financial information. If the EPA proposes to publicly release qualifying data and information that the submitter believes to be protected from disclosure, it must first notify the registrant or applicant of its intent to release such information, which enables the submitter to seek judicial review of the proposed release.

inconsistent with the approach under U.S. law and endangers the protection of commercially sensitive data and information that U.S. companies have submitted over many years, not only to EU regulators but also to U.S. regulators. Such data and information was submitted to satisfy mandatory requirements under EU or U.S. law for the granting or maintenance of market approvals for products. Now, such confidential data and information will potentially be disclosed to competitors for use in both the relevant EU and U.S. markets.

48. Thus, Case C-673/13 P raises a vital question of principle endangering confidentiality worldwide. The General Court's answer to this question will affect the functioning of the plant protection industry and other similarly-placed industries obliged to submit confidential business information to EU institutions and bodies. Among others, the answer will affect U.S. entities (including members of CropLife America, the NAM and ACC) conducting business in the EU.

2) Relationship between Aarhus Regulation and Plant Protection Products Regulation

49. The Plant Protection Products Regulation directly addresses the scope of public access to information in this sector. Article 63(2) contains a catalogue of information, which, if disclosed, is deemed to undermine the protection of commercial interests. This includes specification of impurities and information on the complete composition of a plant protection product, *i.e.*, the very same information that the General Court said must be publicly available in the judgment under appeal.

50. The extremely broad reading of the notion of "*information on emissions*," which the General Court applied in the present case, arguably deprives Article 63(2) of its practical meaning.

3) Relationship between Aarhus Regulation and Article 39(3) of TRIPS Agreement

51. Finally, the present case will shed light on the interaction between EU rules and the provision set out in article 39.3 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

52. TRIPS article 39.3 mandates that WTO Members, including the EU, must protect undisclosed test and other data when its origination involves a considerable effort and when its submission is required by governments as a condition for approving the marketing of pharmaceutical or agricultural chemical products that use new chemical entities. Protection against "unfair commercial use" is one type of protection mandated by that article.¹⁹

¹⁹ TRIPS Article 39.3 provides that: "*Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilise 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.*"

53. CropLife America, the NAM and ACC are obliged to intervene in this case to ensure that the EU adheres to its obligations arising from TRIPS article 39.3 and protects the confidentiality of business information provided by companies in the context of seeking product approvals.

E. Fourth condition – Interests of the Applicants’ members may therefore be affected significantly by the forthcoming judgment

54. If the judgment under appeal is upheld, the interests of CropLife America, NAM and ACC members will be directly and fundamentally affected, not just in the United States and the EU, but throughout the world market. Thus, the importance and effect of the present case is not restricted to business in the EU.

55. The case law of the EU Courts supports the conclusion that CropLife America, the NAM and ACC should be granted leave to intervene in the present case.

56. In *Atlantic Container Line AB and Others v Commission*,²⁰ the Japanese Shipowners’ Association was granted leave to intervene due to the very fact that the immediate application of the Commission’s decision was likely to affect maritime transport to or from European ports. The present case is similar in this respect. The judgment under appeal is likely to create a significant non-tariff barrier to EU market access for U.S. manufacturers of plant protection products and chemicals, and CropLife America, the NAM and ACC have a direct interest in participating in these proceedings to prevent this outcome.

57. Also, as held in *Microsoft v Commission*,²¹ when the forthcoming judgment may affect the activities of companies in the sector concerned, such an element of the case establishes an interest of the representative association in the result of the case.²² The same line of reasoning can be applied to this case. Because the judgment under appeal will have an impact on competition in plant protection products and chemicals in the United States, it is evident that CropLife America, NAM and ACC members can be affected by its outcome and, therefore, should be allowed to intervene to protect their members’ interests.

58. Also, this case will determine whether CropLife America, NAM and ACC members can expect the EU to comply with its WTO commitments. Global trade and investment rules are a key priority for CropLife America, NAM and ACC members, given that they are critical to boosting the competitiveness of the U.S. plant protection products and chemical industry. If the contested judgment is upheld, CropLife

²⁰ Order of the President of the General Court in Case T-395/94 *Atlantic Container Line AB and Others v Commission of the European Communities* [2002] ECR II-0875, paragraph 28.

²¹ Order of the President of the General Court in Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II—3601.

²² *Ibid.*, paragraphs 35-36.

America, NAM and ACC members will no longer be able to rely on the protection of confidential business information offered under article 39.3 TRIPS.

1) Impact of the case on members of CropLife America

59. If the Court of Justice's judgment in Case C-673/13 P comes down on the side of a radically expanded right of public access, EU institutions and bodies will no longer be able to adequately protect the confidentiality of commercially sensitive information provided by companies in the context of seeking product approvals. This major change in the EU regulatory framework will create a world-wide threat to confidentiality for the plant protection industry and will affect directly and significantly the interests of CropLife America members in the United States.
60. First, CropLife America members will be at risk of losing the immediate market value of their products sold in the United States to free-riding competitors. The confidential business information and documents that members of CropLife America have already submitted to EU institutions and bodies through their EU subsidiaries may be made subject to public disclosure and can be copied by competitors, who may then use it to potentially register copycat products. CropLife America members will thus potentially face additional competition in the United States with respect to their own product formulations and will likely suffer at least partial losses of the significant investments incurred to develop them.²³
61. Second, if the judgment under appeal is upheld, it may discourage U.S. plant protection companies from conducting business in the EU.²⁴ Specifically, it will likely force the innovator, the generator of the original data, to assume much greater risk (of loss of time and money) associated with market approvals. For example, due to disclosure of confidential information, a chemical company could see third parties gain access to its pre-marketing studies and/or data for a given chemical. That third party, relying on the innovator's studies, could then apply to enter the market with the same or substantially the same plant protection product without sharing any part of the cost or risk.
62. The lack of adequate protection for the confidentiality of proprietary data in the EU will likely thus become a significant non-tariff barrier to market access for U.S. manufacturers of many products. It will also likely discourage research-based companies from marketing a new generation of more effective and environmentally-friendly agricultural chemicals in the EU due to the EU's now weaker intellectual

²³ CropLife America members spend hundreds of millions of dollars every year on research and development of new crop protection products and on development of health and environmental safety data in support of the registration and marketing of these products in the United States and around the world. In 2012 alone, U.S. chemical companies invested \$57 billion in research and development to support new innovation (source: www.americanchemistry.com/Innovation/Technology). See also CropLife America's letter of 7 February 2014 to Susan Wilson, Director for Intellectual Property and Innovation at the Office of the United States Trade Representative, attached as Annex 10.

²⁴ According to ACC, US chemical manufacturing companies generated \$188 billion in exports in 2012 (source: www.americanchemistry.com/Membership/Associate-Member).

property protections. As a result, the newest and presumably the most technologically advanced products may become unavailable to EU farmers. Such an outcome would clearly contradict the main objective of the EU regime on plant protection products, which is “to ensure a high level of protection of both human and animal health and the environment.”²⁵

63. Third, if the Court of Justice removes adequate protections for confidential proprietary information in the EU, U.S. manufacturers of many products will become reluctant to submit any data beyond the minimum required to obtain or maintain a marketing authorization. This, in turn, will reduce the amount of data available to the EU authorities that draw up safety and environmental impact assessments.

64. In this context, it is worth mentioning that CropLife America has already been alerting U.S. authorities to the regulatory risks related to the judgment in Case T-545/11. In a letter of 7 February 2014, CropLife America warned Susan Wilson, the Director for Intellectual Property and Innovation at the Office of the United States Trade Representative, that the General Court’s judgment in Case T-545/11 presents “a real and immediate threat” to the American plant protection industry.²⁶

2) *Impact of the case on members of the NAM*

65. NAM members are strong supporters of global trade and investment rules that promote trade on a level playing field. These rules provide a system in which all countries abide by core principles, including the protection of intellectual property. In one of its policy statements, published on its website, the NAM has expressed its members’ joint position regarding the appropriate balance between public access and the protection of business secrets and other confidential information:

“The NAM recognizes and supports the public’s right of access to certain types of information maintained by government. The submitters of confidential information provided to government have a corresponding right to expect that the confidentiality of such information shall be preserved. The NAM is especially concerned about the resultant harm to industry when disclosure is indiscriminate and fails to take into account the sensitive and confidential nature of business information. The NAM further believes that any statute providing access to government-held information must reflect a clear balance between the right of access and the right to confidentiality. A mechanism to safeguard confidential business information is essential if this balance is to be achieved.”²⁷

66. If the judgment under appeal is upheld, the balance between the public’s right of access and the interests of submitters of confidential information, for which the NAM

²⁵ See Article 1(3) of the Plant Protection Products Regulation.

²⁶ See CropLife America’s letter of 7 February 2014 to Susan Wilson, Director for Intellectual Property and Innovation at the Office of the United States Trade Representative, attached as Annex 10.

²⁷ See Policy ILRP-03 Regulation, Section 3.05. Freedom of Information, attached as Annex 11.

is advocating on behalf of its members, will no longer be preserved in the EU. All NAM members who have submitted documents or information to EU institutions and bodies will face serious disclosure risks. Their confidential business information will potentially be accessible worldwide and their products will potentially be deprived of their unique commercial value. This serious threat to their interests will also arise in the United States, despite the fact that U.S. law adequately protects intellectual property and trade secrets and – most importantly – despite the fact that the United States has not even signed the Aarhus Convention.

67. In addition, NAM members are likely to see this change in EU policy as a significant non-tariff barrier to market access for U.S. manufacturers. It will also discourage them from marketing new products in the EU due to the EU's weaker intellectual property protection.
68. Therefore, the interests of NAM members will be affected to an appreciable extent by the outcome of this case.

3) Impact of the case on members of ACC

69. ACC represents the U.S. chemical industry which, as explained in paragraph 19 above, is undoubtedly affected by the judgment under appeal. Under REACH, European subsidiaries of members of ACC are routinely required to provide business confidential information to EU authorities to market their products in the EU; in many instances, such information relates to “emissions into the environment” (as that concept has been construed by the General Court in the judgment under appeal). This demonstrates that their interests may be severely affected by the outcome of the case, which creates a serious threat of global disclosure of their proprietary information.
70. In addition, if the General Court's ruling is upheld, ACC members may need to change their business models as a result of the sudden loss of the expectation that confidential business information will not be disclosed to third parties in the EU. In particular, they may prefer to delay or even refrain from introducing new substances in the EU to avoid the risk of undermining global data confidentiality. Such changes in the business models of ACC members are likely to have a serious negative impact on their business.
71. Also, given that the judgment under appeal is likely to create a significant non-tariff barrier to EU market access for U.S. manufacturers of chemicals, ACC members have a direct interest in preventing this outcome. The chemical manufacturing sector is one of America's top exporting industries, accounting for 12 percent of all U.S. exports. The United States and the EU already have the world's largest commercial relationship; total two-way trade in the chemical sector exceeded \$139 billion in 2011.²⁸ If the contested judgment is upheld, barriers to information sharing across the Atlantic will create additional hurdles and costs for U.S. companies exporting to the EU.


²⁸ See Report by ACC “Keys to export growth for the chemical sector”, p. 3, attached as Annex 12.

III. APPLICANTS' REQUEST TO THE COURT

72. For all the reasons mentioned above, and pursuant to Article 40 of the Statute of the Court of Justice, the Applicants request the Court of Justice to:

- a) grant them leave to intervene in support of the Commission;
- b) provide the Applicants with copies of any and all documents served on all parties to the proceedings;
- c) allow the Applicants, within a prescribed period upon receiving those documents, to submit their statement in intervention; and
- d) rule that the costs of the Applicants' intervention be paid by Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe).

For the Applicants



Kristina Nordlander

Patrick Harrison

SCHEDULE OF ATTACHMENTS

No.	Attachment description	Page Reference
<u>I.</u>	Certificate of Admission from the Swedish Bar for Kristina Nordlander; no. of pages: 2	2
<u>II.</u>	Certificate of Admission from the UK Solicitors Regulation Authority for Patrick Harrison; no. of pages: 2	2
<u>III.</u>	Power of attorney from CropLife America in favour of Kristina Nordlander and Patrick Harrison; no. of pages: 2	2
<u>IV.</u>	Proof from CropLife America that the power of attorney has been properly granted by someone authorised for the purpose; no. of pages: 4	2
<u>V.</u>	Certificate of Incorporation of CropLife America as a proof of its existence in law; no. of pages: 9	2
<u>VI.</u>	Power of attorney from the NAM in favour of Kristina Nordlander and Patrick Harrison; no. of pages: 2	2
<u>VII.</u>	Proof from the NAM that the power of attorney has been properly granted by someone authorised for the purpose; no. of pages: 4	2
<u>VIII.</u>	Certificate of Incorporation of the NAM as a proof of its existence in law; no. of pages: 16	2
<u>IX.</u>	Power of attorney from ACC in favour of Kristina Nordlander and Patrick Harrison; no. of pages: 2	2
<u>X.</u>	Proof from ACC that the power of attorney has been properly granted by someone authorised for the purpose; no. of pages: 4	2
<u>XI.</u>	Certificate of Incorporation of ACC as a proof of its existence in law; no. of pages: 50	2

SCHEDULE OF ANNEXES

No.	Annex description	Page Reference	Paragraph(s) where annex is cited
A.1	List of CropLife America Members; no. of pages: 3	7	21
A.2	List of ACC members; no. of pages: 4	8	27
A.3	Restated Certificate of Incorporation of CropLife America (excerpt); no. of pages: 4	9	29, 30
A.4	Articles of Incorporation of the NAM (excerpt); no. of pages: 6	10	32
A.5	The NAM's amicus brief in <i>Copper Tire v. Neal</i> (Arkansas Supreme Court); no. of pages: 32	10	33
A.6	ACC's Certificate of Incorporation (excerpt); no. of pages: 7	10	35
A.7	Excerpt from the ACC website regarding ACC's primary objective as the protection of its members' interests; no. of pages: 2	10	35
A.8	Testimony of Craig O. Morrison on behalf of ACC before the Subcommittee on Environment and the Economy, United States House of Representatives, 11 July 2013; no. of pages: 17	10	36
A.9	CEFIC-ACC response to EU and U.S. call of 7 September 2012 for input on regulatory issues for possible future trade agreements; no. of pages: 15	10	36
A.10	CropLife America's letter of 7 February 2014 to Susan Wilson, Director for Intellectual Property and Innovation at the Office of the United States Trade Representative; no. of pages: 9	15, 16	60, 64
A.11	Policy ILRP-03 Regulation, Section 3.05. Freedom of Information; no. of pages: 3	16	65
A.12	Report by ACC "Keys to export growth for the chemical sector"; no. of pages: 18	17	71