Appeal no.: UKSC/2025/0119

In the Supreme Court of the United Kingdom

ON APPEAL FROM

HIS MAJESTY'S COURT OF APPEAL (CIVIL DIVISION) (ENGLAND AND WALES)

COULSON, STUART-SMITH & HOLGATE LJJ

[2025] EWCA Civ 624; [2025] 4 All ER 187

BETWEEN:—

THE KING

(on the application of FOODRISE LIMITED)

Claimant/Respondent below/Appellant

-and-

(1) HIS MAJESTY'S TREASURY

(2) THE SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendants/Appellants below/Respondents

WRITTEN CASE OF THE RESPONDENTS

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*References to the Statement of Facts and Issues are in the format "**SFI, §**". References to the Appellant's Written Case are in the format "**AWC, §#**". References to the judgment of the Court of Appeal are in the format "**CA Judgment, §#**". References to the judgment of the Administrative Court are in the format "**AC Judgment, §#**".*

A. INTRODUCTION

1. The issue raised by this appeal is whether the Appellant's claim for judicial review of the Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (Australia) (Amendment) Regulations 2023 SI 2023/195 ("**the 2023 Regulations**") falls within the scope of art.9(3) of the Aarhus Convention,[1] which applies to "*challenge[s] to acts and omissions by private persons and public authorities which contravene provisions of … national law relating to the environment*". The 2023 Regulations were made by the

[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus on 25 June 1998, Treaty Series No.24 (2005), Cm6586.

Respondents under the powers conferred on them by Part 1 of the Taxation (Cross-border Trade) Act 2018 ("**the 2018 Act**"). They reduce import duties payable on goods originating in Australia for the purpose of giving effect to the UK's obligations under a free-trade agreement ("**FTA**") between the UK and Australia ("**the UK-Australia FTA**").

2. If the Appellant's claim for judicial review falls within the scope of art.9(3) as it contends, it will be subject to costs capping pursuant to Section IX of CPR Part 46, under which the UK has given effect to its obligation in art.9(4) of the Aarhus Convention that proceedings falling within art.9(3) shall not be "*prohibitively expensive*". If its claim does not fall within art.9(3), the Appellant is, in any event, entitled to seek (and has sought in the alternative) the benefit of costs protection under ss.88-89 of the Criminal Justice and Courts Act 2015 ("**the 2015 Act**"). The courts below have not considered whether the criteria in ss.88-89 of the 2015 Act are satisfied. Accordingly, this appeal will not necessarily determine whether the Appellant should have the benefit of costs protection in the underlying proceedings.

3. The Court of Appeal held that the Appellant's claim was not within the scope of art.9(3), such that ss.88-89 of the 2015 Act were the appropriate means of seeking costs protection: CA Judgment, §148. The Court below was right for the reasons it gave. On its proper interpretation, art.9(3) requires the claimant to allege a contravention of a legal provision which concerns, or is to do with the environment, its protection or regulation. It does not apply merely because the claim's subject matter is "*the environment*", or the impugned decision, or an alleged public law error vitiating it, concerns, or may have some effect on, the environment. While the subject matter of the Appellant's claim concerns "*the environment*" in that very broad sense, it does not allege a contravention of any provision of national law relating to "*the environment*", but of principles of public law in the context of a general taxing statute, *viz.* Part 1 of the 2018 Act.

B. <u>THE KEY CONTEXT</u>

(i) The statutory scheme under which the 2023 Regulations were made

4. The purpose of Part 1 of the 2018 Act, as set out in the long title, is "*to impose and regulate a duty of customs by reference to the importation of goods into the United Kingdom*". Section 1(1) provides for a duty of customs, known as import duty, to be charged "*by reference to the*

importation of chargeable goods" into the UK.[2] All goods are chargeable goods other than "*domestic goods*": s.2(1). Domestic goods are those that are "*wholly obtained*" in the UK, or those that have already been subject to a chargeable customs procedure: s.33(1).

5. The amount of import duty is determined under the customs tariff established by regulations made under s.8 of the 2018 Act, as amended or adjusted by provision made under ss.9-15: s.7(1). The customs tariff is a system for classifying goods according to their nature, origin or any other factor, and for determining the amount of duty: see ss.8(1)-(2). Section 8(5) provides:

> "*In considering the rate of import duty that ought to apply to any goods in a standard case,*[3] *the Treasury must have regard to—*
>
> *(a) the interests of consumers in the United Kingdom,*
>
> *(b) the interests of producers in the United Kingdom of the goods concerned,*
>
> *(c) the desirability of maintaining and promoting the external trade of the United Kingdom,*
>
> *(d) the desirability of maintaining and promoting productivity in the United Kingdom, and*
>
> *(e) the extent to which the goods concerned are subject to competition.*"

6. The customs tariff is contained in the Customs Tariff (Establishment) (EU Exit) Regulations 2020 SI 2020/1430. It is subject to amendment and adjustment by way of regulations made under Part 1 of the 2018 Act:

   (1) Section 9 enables the Treasury, on the Secretary of State's recommendation, to make regulations giving effect to arrangements between HMG and the government of a country or territory outside the UK providing for a lower rate of import duty than that under the customs tariff. Section 9 is one power enabling tariff preferences for foreign goods imported under an FTA to be implemented in domestic law. The 2023 Regulations were, in part, made under it.

   (2) Section 10 enables the Secretary of State, by regulations, to establish a trade preference scheme providing for a lower rate of import duty for goods originating from eligible developing countries. This has been done by the Trade Preference Scheme (Developing

[2] Special provision is made in relation to Northern Ireland: see ss.1(2), 2(2), & 30A-30C of the 2018 Act. This is not material to this case.
[3] That is (see s.8(8)) a case other than one in which ss.9-15 or 19(4) apply.

Countries Trading Scheme) Regulations 2023 SI 2023/561. The scheme's purpose is to assist the external trade, and economic growth, of developing countries.

(3) Section 11 provides for regulations to determine the amount of import duty applicable to goods subject to a quota: see s.11(1). Goods may be subject to a quota either as a result of (i) arrangements made between HMG and a foreign government; or (ii) a decision made by the Treasury: s.11(2). Regulations under s.11 are made by the Treasury, save those providing for a quota to be subject to a licensing or allocation system, which are made by the Secretary of State: see ss.11(6)-(7). Section 11 has been used to implement quotas contained in international arrangements, such as tariff rate quotas for imports of cattle meat under the UK-Australia FTA, and to establish autonomous tariff quotas. The 2023 Regulations were, in part, made under s.11 of the 2018 Act.

(4) Section 12 permits the Treasury, by regulations, to provide for a lower rate of duty for specified goods for a specified period, known as tariff suspensions. Provision to this effect is contained in the Customs Tariff (Suspension of Import Duty Rates) (EU Exit) Regulations 2020 SI 2020/1435. Tariff suspensions exist "*in order to encourage trade and support domestic production by ensuring that UK businesses have access to the supplies they need*": see the Explanatory Notes to the Bill that became the 2018 Act, §82.

(5) Section 13 of, and Schedules 4-5A to the 2018 Act contain provision for the rate of import duty to be raised in response to the dumping of foreign goods, foreign subsidies and certain increases in imports, including under FTAs, which cause serious injury to UK producers. Functions are conferred on the Trade Remedies Authority, a statutory corporation established by Part 2 of the Trade Act 2021, for this purpose.

(6) Section 14 permits the Treasury to increase the rate of import duty for specified agricultural goods if the volume of imports exceeds, or the price of imports falls below, specified trigger levels. This allows the UK to give effect to safeguard measures to protect domestic agriculture: see §§87-90 of the Explanatory Notes.

(7) Section 15 provides that where a dispute or other issue has arisen between HMG and a foreign government, and HMG considers that it is appropriate, having regard to the matters set out in s.28 and any other relevant matters, to deal with the issue by varying the amount of import duty, the Secretary of State may, by regulations, make provision to that effect: s.15(1). For example, the Customs (Additional Duty) (Russia and Belarus)

Regulations 2022 SI 2022/376 imposed additional duties on imports of certain goods from Russia and Belarus following the invasion of Ukraine.

7. Section 17 of the 2018 Act makes provision for determining the place of origin of chargeable goods for the purposes of Part 1.[4] Section 19 enables the Treasury, by regulations, to make full or partial relief from liability to import duty.

8. Section 28(1) of the 2018 Act provides that:—

> "*In exercising any function under any provision made by or under this Part—*
>
> *(a) the Treasury,*
>
> *(b) the Secretary of State,*
>
> *(c) HMRC,*
>
> *(d) the TRA, and*
>
> *(e) any other public body,*
>
> *must have regard to international arrangements to which His Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function.*"[5]

9. Lang J held (AC Judgment, §12) that Part 1's purpose "*is to regulate customs duty and the importation of goods, not the environment*". This part of her reasoning has never been challenged. The statute does not purport to regulate the economic processes by which chargeable goods are produced outside the UK. It is concerned solely with imposing a customs duty on imports and fixing the amount of that duty. That will depend on a number of complex multi-factorial judgments and high policy considerations. While there is no prohibition on environmental considerations being taken into account, no part of the statutory purpose is environmental protection or regulation.

(ii) The issues in the Appellant's underlying claim for judicial review

10. The Appellant does not challenge the Government's decisions to sign or ratify the UK-Australia FTA in the exercise of its prerogative powers. Its claim concerns the Respondents' separate decisions to make the 2023 Regulations, which implement one part of the UK's obligations under the UK-Australia FTA in domestic law, *viz.* affording preferential tariff treatment to goods originating in Australia. Those decisions were taken (i) on behalf of the

[4] The 2023 Regulations were made, in part, in the exercise of the power conferred by ss.17(6)-(7).
[5] As noted in CA Judgment, §29, while there is no overall definition of "*international arrangements*", s.37(1) provides that "*arrangements*" include "*an understanding of any kind*".

Secretary of State by the then Minister of State for International Trade, Mr Nigel Huddleston MP, on 13 February 2023; and (ii) on behalf of the Treasury by the then Economic Secretary to the Treasury and City Minister, Mr Andrew Griffith MP, on 15 February 2023.

11. Grounds 1-2 of the Appellant's claim concern a 1-page section dealing with "*Carbon leakage risk*" in Chapter 6 (addressing environmental matters) of a 90-page impact assessment ("**the Impact Assessment**") published by the Department for International Trade ("**DIT**") on 16 December 2021 on signature of the UK-Australia FTA. Much of the claim is directed to a single footnote (fn91) in this section: AWC, §67. The Appellant contends alleged errors of law in the Impact Assessment vitiated the later decision to make the 2023 Regulations.

12. Ground 1 consists of four allegations:

    (1) Under Ground 1(a), the Appellant contends the Respondents irrationally declined to assess the nature and extent of the carbon leakage impact of the 2023 Regulations in respect of cattle meat production. It alleges that the reasoning in support of the DIT's conclusion in the Impact Assessment was infected by logical and scientific error in that it relied in fn91 to the Impact Assessment on a comparison of two materially different assessments of relative emissions intensities of UK- and Australian-produced cattle meat.

    (2) Under Ground 1(b), it alleges that the Respondents' alleged decision not to conduct an assessment of carbon leakage associated with cattle meat production breached the *Tameside* duty. It alleges the DIT failed to consider which sources of UK-produced beef would be displaced by Australian-produced beef under the UK-Australia FTA.

    (3) Under Ground 1(c), the Appellant contends that the alleged decision not to assess carbon leakage derived from cattle meat production was unlawful because it was taken without personal knowledge, on the part of the Ministers who decided to make the 2023 Regulations, of allegedly material facts arising under Grounds 1(a)-(b).

    (4) Under Ground 1(d), it alleges that the supposed decision not to conduct an assessment of carbon leakage derived from cattle meat production was unlawfully predetermined.

13. Under Ground 2, the Appellant alleges that the DIT irrationally concluded that it was not possible to conduct an assessment of carbon leakage derived from cattle meat production using data from the Global Livestock Environmental Assessment Model ("**GLEAM**") alone.

14. Ground 3 ostensibly concerns the Minister of State for International Trade's consideration of the Paris Agreement. The Appellant alleges that he misdirected himself as to Article 4(1)(f) of the United Nations Framework Convention on Climate Change ("**UNFCCC**"), by concluding that it did not require the UK to account for increased greenhouse gas ("**GHG**") emissions from greater production of goods in Australia destined for consumers in the UK. The Appellant alleges that, having recognised the relevance of the Paris Agreement (and thus, it says, of the UNFCCC), the Respondents were required correctly to construe the UNFCCC.

15. The Appellant's case is that s.28(1) of the 2018 Act required the Respondents to take into account Article 4(1)(f) of the UNFCCC when making the 2023 Regulations. It further contends that they were under an obligation to conduct an impact assessment before making the 2023 Regulations because of (i) certain public statements made by the DIT (as to which, see SFI, §9; AWC, §75(b)); and/or (ii) s.28(1), read with art.4(1)(f) of the UNFCCC.

16. The Respondents join issue with the Appellant's claim.[6] They contend in summary that:

    (1) The DIT in the Impact Assessment did undertake a rational qualitative impact assessment of "*carbon leakage*" (including as concerns cattle meat production). It was under no obligation to undertake any quantitative assessment, but, on the Appellant's definition of "*carbon leakage*" (with which the Respondents join issue), the DIT did in fact conduct a quantitative assessment, which is not challenged. If (which is denied) the DIT made public law errors in the section on "*carbon leakage*" and impugned footnote, these were in any event immaterial to Ministers' later decision to make the 2023 Regulations.

    (2) As to Ground 1(a), the DIT in the Impact Assessment was entitled to conclude, without committing any public law error, that data on emissions intensities from different sources (including the sources referred to in fn91) were not readily comparable. The claim the DIT compared "*apples and pears*" (AWC, §68(a)) is, therefore, based on a false premise.

    (3) As to Ground 1(b), the intensity of inquiry in the Impact Assessment as to the sources of UK beef that might be displaced as a result of the UK-Australia FTA was rational: officials verified the information in question with the Committee on Climate Change. In any event, the alleged error was immaterial to the later decisions under challenge.

[6] The following is a summary of the Respondents' submissions made at the oral permission hearing. As the Appellant amended its claim, the Summary Grounds of Resistance no longer set out a full response to its case.

(4) As to Ground 1(c), the criticisms relied on by the Appellant concerning fn91 did not need to be personally considered by Ministers when making the 2023 Regulations.

(5) As to Ground 1(d), there is no basis for an allegation of predetermination on the part of officials or Ministers, and any predetermination on the part of officials who prepared the Impact Assessment would not in any event have vitiated the Ministers' later independent decision to make the 2023 Regulations.

(6) As to Ground 2, there was no arguable obligation to quantify carbon leakage, still less to do so using GLEAM. The DIT lawfully considered a range of sources qualitatively.

(7) As to Ground 3, the alleged error was immaterial because the Respondents considered projected increased production emissions in Australia as a result of the UK-Australia FTA, irrespective of their view as to the UK's obligations under the Paris Agreement (the UNFCCC was not separately considered). Ground 3, on analysis, thus involves the same rationality challenge made under Grounds 1(a)-(c) & 2. In any event, s.28(1) did not require the Respondents to consider the Paris Agreement let alone the UNFCCC, and even it if had, the approach the Minister adopted in relation to the Paris Agreement would be a tenable approach in relation to the UNFCCC, alternatively the correct approach.

(8) The Respondents further join issue with the Appellant's contention that they committed, when making the 2023 Regulations, to undertake an impact assessment. On their true construction, the statements relied on (see, *e.g.*, SFI, §9; AWC, §75(b)) amounted only to commitments to publish an impact assessment once negotiations on the UK-Australia FTA had concluded, which the DIT did on 16 December 2021, in the context of the separate and unchallenged decisions to sign and ratify the treaty under the prerogative.

C. THE PROPER INTEPRETATION OF ART.9(3) OF THE AARHUS CONVENTION

17. The Court below was correct to hold that art.9(3) "*only applies to a contravention of a legal provision which concerns, or is to do with, the environment, its protection or regulation*": CA Judgment, §96; see also §151.

(i) The proper approach to the interpretation of the Aarhus Convention

18. As the Court of Appeal correctly held (CA Judgment, §§51-52), the Aarhus Convention is to be interpreted in accordance with the principles of public international law codified in Section

3 of Part III of the Vienna Convention on the Law of Treaties ("**VCLT**"):[7] *Infrastructure Services Luxembourg v Kingdom of Spain* [2026] 2 WLR 581 *per* Lord Lloyd-Jones and Lady Simler at §73. In doing so, the Court should "*follow the structured approach*" which the provisions of Section 3 of Part III of the VCLT establish: *JTI Polska v Jakubowski* [2024] AC 621 *per* Lord Hamblen at §25.

19. The general rule in art.31(1) mandates that the Aarhus Convention be "*interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms … in their context and in the light of its object and purpose*". The context, for this purpose, includes (inter alia) the text, preamble and annexes: art.31(2). Article 31(3)(a) provides that "*There shall be taken into account, together with the context… any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*". Article 31(3)(b) provides for any subsequent practice in application of the treaty that establishes the parties' agreement as to the treaty's interpretation to be taken into account. Article 31 thus requires a "*holistic approach*", and its clear focus is "*on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to context, object and purpose of the treaty as a 'single combined operation'*": *Infrastructure Services Luxembourg v Spain* at §75.

20. Article 32 allows for recourse to supplementary material (including *travaux préparatoires*) for limited purposes only, as "*the court's task is to interpret the treaty rather than the supplementary material*": *Infrastructure Services Luxembourg v Spain* at §76. Recourse to supplementary means is permitted to confirm (rather than to change or contradict) the meaning ascertained under art.31, and confirmation, for this purpose, "*may consist of finding support for a given meaning*", such as material which helps to identify the object and purpose of the treaty, or particular provisions: *JTI Polska v Jakubowski per* Lord Hamblen at §32.

21. Where, however, the application of the rule in art.31 produces a meaning that is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the rule in art.32 permits supplementary means to be used to determine the meaning of a treaty's provisions. Such

[7] Done at Vienna, 23 May-30 November 1969 & New York, 1 December 1969-30 April 1970, Treaty Series No.58 (1980), Cmnd 7964. Before the UK's exit from the EU, EU law did not impose an obligation on the UK to implement art.9(3) of the Aarhus Convention in cases such as the present: *Austin v Miller Argent (South Wales)* [2015] 1 WLR 62 *per* Elias LJ at §§25-34; *Royal Society for the Protection of Birds v Secretary of State for Justice* [2018] Env. LR 13 *per* Dove J at §24. Accordingly, this appeal does not raise any question as to the effect of assimilated law under the European Union (Withdrawal) Act 2018, and nor is the Court bound by any decisions of the Court of Justice of the EU ("**CJEU**") interpreting the Aarhus Convention. This does not appear to be in dispute.

cases will be rare. They will apply where the material in question clearly and indisputably discloses a definite legislative intention: *Infrastructure Services Luxembourg v Spain* at §77.

22. The Aarhus Convention is authenticated in English, French and Russian: see art.22. As a result, "*the text is equally authoritative in each language*" (VCLT, art.33(1))[8] and "*[t]he terms of the treaty are presumed to have the same meaning in each authentic text*" (VCLT, art.33(3)). Where, however, a comparison of the authentic texts discloses a difference in meaning that cannot be removed by applying arts 31-32, "*the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*" (art.33(4)).

23. The Aarhus Convention should be given a uniform meaning by all parties. So far as possible, the text should be interpreted in light of that end, having regard to how it has been interpreted by the courts of different countries: *Infrastructure Services Luxembourg v Spain* at §79. Domestic courts must also be careful not to amend a treaty under the guise of interpreting it. Nothing in the VCLT permits "*a court, when it is performing its function, to expand the limits which the language of the treaty itself has set for it*": *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 *per* Lord Hope of Craighead at §9; see also CA Judgment, §89.

(ii) Matters that do not appear to be in issue

24. A number of matters concerning the interpretation of art.9(3) appear to be common ground:

    (1) The reference to "*acts and omissions by … public authorities*" can include administrative decisions adopted by them: *Venn v Secretary of State for Communities and Local Government* ("***Venn***") [2015] 1 WLR 2328 *per* Sullivan LJ at §13; CA Judgment, §44.

    (2) The use of the word "*contravene*" does not have the effect that art.9(3) "*applies only where the claim succeeds in establishing a contravention; it includes a challenge founded on the contention that there has been such a contravention*": *R (McMorn) v Natural England* ("***McMorn***") [2016] Env LR 14 per Ouseley J at §239.[9]

    (3) Whether a claim falls within the scope of art.9(3) does not depend on its prospects of success. Unarguable claims for judicial review that are refused permission are often

[8] The Aarhus Convention does not provide for any particular text to prevail in the case of divergence.
[9] See also see also CA Judgment, §105, §137; Case C-470/16 *North East Pylon Pressure Campaign v An Bord Pleanála* [2018] Env LR 28 at §64.

within its scope: *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin) ("***Lewis***"); *R (ClientEarth) v Financial Conduct Authority* ("***ClientEarth***") [2024] Env. LR 20.[10]

(4) The interpretation of the term "*environment*" in art.9(3) is informed by the broad definition of "*environmental information*" in art.2(3) of the Aarhus Convention, and therefore has a broad meaning: *Venn per* Sullivan LJ at §§11-12; AWC, §16, §22.

(iii) The language of art.9(3) of the Convention, its context and purpose

25. The Court of Appeal's interpretation was correct for the reasons they gave. Eight points are emphasised.

26. **First**, as the Court of Appeal correctly identified (CA Judgment, §75), the critical issue is the meaning of the words "*relating to*" in art.9(3). These words take their meaning from the context in which they appear. The nature and degree of strength of the connecting link between "*provisions of its national law*" and "*the environment*" thus depends upon the surrounding language, the wider context of the Convention, and its purpose (CA Judgment, §77).

27. **Second**, by its very wording, art.9(3) requires consideration of whether there is an allegation of a contravention of specific "*provisions of … national law*" (emphasis added) relating to "*the environment*". The word "*provisions*" is used frequently throughout the Aarhus Convention to refer to identifiable provisions of the Convention or other legal instruments.[11] Accordingly, the "*focus*" of the inquiry under art.9(3) "*is on the nature of the provision which is said to have been contravened and not on the nature of the act or omission which is said to have constituted the contravention*": *Lewis per* Eyre J at §31. It is not on the reasons for the conduct under challenge, or on the potential environmental effects of that conduct.

28. The Appellant concedes the test under art.9(3) is "*not whether the decision has an impact on the environment*": AWC, §34. It also observes that "*national law*" in art.9(3) can have a broader scope than "*legislation*" (AWC, §22, §30), which is not in dispute.[12] It contends, however, that "*national law*" means "*requirements which need to be satisfied in order for the*

[10] See also *North East Pylon Pressure Campaign v An Bord Pleanála* (fn9 above) at §65. The prospects of success may, however, be taken into account in determining whether the proceeding would be prohibitively expensive.
[11] See, in particular, the penultimate recital, art.1, art.3(5) & (8)-(9), art.6(1)(a)-(b), art.9(2) & (5), art.15.
[12] If, however, the Appellant intends to suggest that "*national law*" necessarily embraces "*policies, plans, [and] programmes*" (AWC, §30(c)), it is wrong to do so. These may not be law in the sense of legal requirements. As to AWC, fn13, there is no dispute that, to the extent national law incorporates provisions of international law (including EU law), the incorporated international law can fall within the scope of art.9(3).

relevant acts or omissions to be lawful" (AWC, §30). This gloss effectively deletes the words "*provisions of*" from art.9(3) in cases where there is a legislative scheme. However, those words must have been intended by the parties to have meaning, and that is made clear beyond doubt by the fact that the words "*provisions of*" qualify only one of the two uses of "*national law*" in art.9(3). Thus, where a defendant is alleged to have acted unlawfully in administering legislation, the inquiry's primary focus must be the specific provision of the legislation concerned.

29. **Third**, interpreting art.9(3) so that its application turns on a simple analysis of the provision of national law which is said to have been contravened, and whether that provision is concerned with the environment, is consistent with the structure of art.9. This requires the applicability of art.9(3) to be determined at the outset of proceedings, by considering the nature of the legal provision which is said to have been contravened in the abstract.

    (1) If a claim is within the scope of art.9(3), the parties are under an international obligation to ensure that the procedure in question is "*not prohibitively expensive*": art.9(4). The evident purpose is to ensure that members of the public are not deterred from using the procedure in art.9(3) by exposure to a financial liability which is prohibitively expensive.

    (2) Given that purpose, whether costs are prohibitively expensive will typically require an assessment by the court "*at the outset of the proceedings*": *R (Edwards) v Environment Agency* [2011] 1 WLR 79 *per* Lord Hope of Craighead at §23. While Section IX of CPR Part 46 is not the only means by which the UK could have implemented its relevant obligations under art.9(4),[13] the requirement under CPR, r.46.28(2) for the Court to determine whether a claim is within the scope of art.9(3) (where in issue) "*at the earliest opportunity*" reflects this. What is required is "*a definitive assessment by the court of whether [the] claim is an Aarhus Convention claim*", it being insufficient that it is merely arguable that the claim falls within the scope of arts.9(1)-(3): CA Judgment, §72.

    (3) It is sufficient for a claimant to allege a contravention of a national law which can, at the outset of proceedings, be definitely characterised as a national law relating to the environment. However, art.9(3) is not applicable to alleged "*contraventions of*" (i) "*alleged provisions of national law relating the environment*" or (ii) "*provisions of*

[13] The CPR apply only in England and Wales. For the position in Scotland, see Chapter 58A of the Rules of the Court of Session 1994. As for Northern Ireland, see the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, SR 2013/81.

national law allegedly relating to the environment". This would give it an absurdly broad scope which has no basis in the Convention's text.

(4) It follows that the parties intended an assessment of whether a claim fell within the scope of art.9(3) to be capable of being made at the start of proceedings, before the court is able to make extensive findings on contested issues of law and fact, or value judgments as to whether a claim would advance or harm environmental interests: *McMorn per* Ouseley J at §242, §§244-245; *White v Plymouth City Council* [2025] PTSR 596 *per* Sheldon J at §79. The parties thus "*clearly sought to apply the protection against prohibitive expense to challenges aimed at enforcing environmental law in the abstract*".[14]

30. The nature of the assessment which must be made under art.9(3) indicates that the test should be straightforward to apply, focused on the nature of the legal provision said to have been contravened in the abstract, not on the facts of the particular case. The Appellant is, therefore, wrong to suggest there is no need for the relevant provision of national law to have a clear *ex ante* connection to the environment: AWC, §80. That is a central feature of art.9 of the Convention, and is reflected in art.9(1)-(2), as well as art.9(3). Had the parties intended for art.9(3) to apply to alleged "*contraventions relating to the environment of provisions of national law*", they would have used language to that effect, but did not do so.

31. **Fourth**, art.9(3) applies to challenges to the conduct of "*private persons*" as well as of "*public authorities*", in contrast to the provisions of arts.9(1)-(2). This indicates that the words "*relating to*" require a genuine and material connection between the relevant "*provisions of national law*" said to have been contravened and "*the environment*". As the Court of Appeal observed, there is no reason to think that the parties intended to entitle members of the public to a procedure for challenging another citizen's conduct because of their contravention of any national law that might have an impact on the environment, or because a private individual's conduct might have some effect on the environment: CA Judgment, §91.

32. The Appellant has no convincing answer to this point: AWC, §32. The fact that art.9(3) can extend to claims under private law (which is common ground) in no way undermines the facts that (i) the words "*relating to the environment*" have the same scope whether the claim arises under public or private law; and (ii) the application of art.9(3) to private law claims indicates the provision does not have the expansive scope the Appellant suggests. Nor is it

[14] *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* (above) at §64.

correct that the "*Convention plainly extends to private operators*" in any general sense: AWC, §32. It creates obligations on States, the preponderance of which concern public authorities.[15]

33. **Fifth**, the French version of the Convention, which is equally authentic, refers to "*les actes ou omissions de particuliers ou d'autorités publiques allant à l'encontre des dispositions du droit national de l'environnement*", *i.e.* challenges to contraventions of provisions of national environmental law. The natural meaning of "*environmental*" includes "*of or relating to the environment*" and "*concerned with or relating to the protection of the environment*". Under art.33(3) of the VCLT, the English and Russian versions, which refer to "*national law relating to the environment*", are presumed to have the same meaning as the French version. That provides a further indication that national law relating to the environment means national law which is concerned with the environment, its protection or regulation.

34. **Sixth,** in interpreting the Aarhus Convention, it is "*reasonable to assume that the meaning of an expression … in one provision also applies to the others*".[16] There are a number of provisions of the Convention using the term "*relating to the environment*". In particular:

    (1) Art.5(3)(b)-(c) provides for information to be made available to the public to include "*[t]exts of legislation on or relating to the environment*" and (as appropriate) "*policies, plans and programmes on or relating to the environment*". Article 5(5) requires the parties to take measures within the framework of their legislation for the purpose of disseminating "*[l]egislation and policy documents … relating to the environment, and progress reports on their implementation, prepared at various levels of government*".

    (2) Art.5(7) requires the parties to provide in appropriate form information "*on the performance of public functions or the provision of public services relating to the environment by government at all levels*".

    (3) Art.7 provides for public participation during "*the preparation of plans and programmes relating to the environment*" and, to the extent appropriate, "*in the preparation of policies relating to the environment*".

35. The Appellant (rightly) observes that legislation "*on*" the environment has a narrower meaning under the Convention than legislation "*relating to the environment*". Legislation

[15] Two of the three provisions the Appellant refers to (arts 5(6) & 6(5)) impose duties of encouragement on public authorities.
[16] *Responsibilities and obligations of States with respect to activities in the Area* [2011] ITLOS Rep. 10, at §93.

"*on*" the environment plainly is intended to refer to environmental legislation in a sense, *i.e.* with the environment as its direct subject matter, such as the Environmental Protection Act 1990: AWC, §31. As the Court of Appeal observed (CA Judgment, §94), however, there is no reason to believe that "*relating to*" in these provisions means, for example, that performance information must be provided on all public functions or services which have effects on the environment, as opposed to only those functions or services which concern, or are to do with, the environment. Still less can it have been intended that the parties must disseminate progress reports on the implementation at different levels of government of any legislation which may impact on the environment. That would be an absurdly broad obligation.

36. **Seventh**, where the parties to the Aarhus Convention wished to set out a test based on environmental effects, they did so in terms: CA Judgment, §93; see also AWC, §31. This confirms that they did not intend to do so in art.9(3). In particular:

    (1) Art.2(3)(b) defines "*environmental information*" to include "*administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment*".

    (2) Art.5(6) makes provision to encourage operators "*whose activities have a significant impact on the environment*" to inform the public of the "*environmental impact*" of their activities and products.

    (3) The public participation requirement in art.6 applies to activities not listed in Annex I "*which may have a significant effect on the environment*": see art.6(1)(b); see also §21 of Annex 1. Article 6(6) requires information provided under that provision to include "*a description of the significant effects of the proposed activity on the environment*".

    (4) Art.8 makes provision in connection with public participation during the preparation of "*executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment*".

37. As such, the test under art.9(3) is plainly not (i) whether an alleged contravention of the provision of national law under consideration may have a significant environmental impact, or (ii) whether the national law itself is liable to have such an impact.

38. **Eighth**, the Respondents' interpretation accords with the object and purpose of the Aarhus Convention as a whole, and art.9 specifically. The Convention's objective is set out in art.1,

namely to ensure (inter alia) "*access to justice in environmental matters in accordance with the provisions of this Convention*". It does not, therefore, create an unlimited right of access to justice. The right it creates is carefully "*delineated by the Convention*", in this case, by the words of art.9(3) (CA Judgment, §35), with arts 9(1)-(2) each "*providing access limited to specific types of environmental justice*" (CA Judgment, §95). As art.3(5) (with which the Appellant does not engage) confirms, the parties may provide for "*wider access to justice in environmental matters than required by this Convention*".

39. It follows that many proceedings concerning "*environmental matters*" in the broad sense of the term are not within the scope of arts.9(1)-(3), and the Convention leaves it to each party's national law to determine whether to provide costs protection in such cases, and if so, to what extent. In the UK, Parliament has decided that costs protection under ss.88-89 of the 2015 Act is potentially available in judicial review proceedings related to the environment when a claim is not an Aarhus Convention claim, and prescribed the criteria by which applications for such protection fall to be determined.[17] The clear limits to the scope of art.9(3) cannot be overridden by vague appeals to the need to take a broad purposive approach: CA Judgment, §90; citing *Department for Business, Energy & Industrial Strategy v Information Commissioner* [2018] Env LR 3 *per* Beatson LJ at §§16-17. Still less did the Court of Appeal err (as the Appellant suggests) in reaching the orthodox conclusion that the language used by the parties "*set[s] the purpose*": of the Convention: AWC, §52(c).

40. It follows that it is not accurate to suggest that purpose of art.9(3) is, as the Appellant suggests, "*to ensure effective environmental protection*" (AWC, §28). That is one of its purposes <u>where</u> the provision applies. As set out further at §§89-103 below, the Respondents' case does not lead to a particularly narrow interpretation of art.9(3) in practice, let alone one which would undermine effective environmental protection. On the contrary, under their case, art.9(3) has very broad application in a number of classes of case, and where it does not apply, costs protection remains potentially available. The fact that art.9(3) would have still broader application on the Appellant's case tells one nothing about the principles by reference to which this Court should identify the limits to the scope of art.9(3).

[17] CA Judgment, §3, §148; see further SFI, §33.

(iv) The travaux préparatoires to the Aarhus Convention

41. The Court of Appeal was right to hold that the interpretation of the Aarhus Convention it favoured was confirmed, for the purpose of art.32 of the VLCT, by the *travaux préparatoires* to the Convention: CA Judgment, §§82-88.

42. The *travaux préparatoires* which are relevant to the appeal are as follows:

(1) A Working Group of the Committee on Environmental Policy ("**the Working Group**") was charged with drafting the Convention. Draft elements of the Convention were produced by the Secretariat for the Working Group's First Session on 11 April 1996. The provision on access to justice in these initial draft elements applied to "*judicial ... proceedings relating to ... matters related to the protection of the environment*".[18]

(2) At its Second Session on 11 November 1996, the Working Group observed that it was "*in principle, of the opinion that [the] convention should include a third substantial part on access to justice. However, it was recognized that this issue would require careful wording*". One of the particular matters which was considered "*needed further clarification*" was the term "*matters related to the protection of the environment*".[19]

(3) At its Fourth Session on 21 March 1997, the Working Group decided to convene an informal meeting. The report of that meeting was made to the Fifth Session on 7 July 1997.[20] In that report, it was agreed three issues had to be addressed, namely (i) a review mechanism for administrative decisions relating to access to information (*i.e.* the provision that became art.9(1)); (ii) a review mechanism for environmental decisions which would be subject to public participation requirements under the Convention (*i.e.* the provision that became art.9(2)); and (iii) "*[a]ccess to justice in environmental matters generally (i.e. access to justice for purposes other than those of the specific review mechanisms referred to above)*" (*i.e.* the provision that became art.9(3)).[21] As to the latter, some delegations considered the Convention should contain nothing beyond what became art.9(1)-(2), but others disagreed. It "*was suggested by some delegations that such provisions could include a right for NGOs and/or individuals meeting particular*

[18] CEP/AC.3/R.1, p.10.
[19] CEP/AC.3/4, p.7 (Annex 1).
[20] CEP/AC.3/10, p.1 (§§8-9).
[21] CEP/AC.3/10, p.10 (Annex I, §1).

criteria to challenge unlawful acts or omissions by private persons or public authorities which contravened specific provisions of national environmental law".[22]

(4) The informal meeting prepared a consolidated version of the provision, including two options for what became art.9(3).[23] The first applied to challenges to "*acts or omissions by private persons or public authorities which contravene provisions of its national environmental law*". The French version of this option was "*pour contester les actes ou omissions de personnes privées ou autorités publiques allant à l'encontre des dispositions du droit national de l'environnement*".[24] The second applied to challenges to "*acts or omissions by public authorities which contravene the provisions of this Convention*".[25]

(5) At the Sixth Session on 22 July 1997, it was decided that a consolidated draft of the Convention would be prepared for consideration at the Seventh Session.[26] The consolidated draft retained the two options for art.9(3), with the former covering challenges to "*acts or omissions by private persons or public authorities which contravene provisions of its national environmental law*".[27]

(6) One of the items specifically considered at the Seventh and Eight Session was the provision on access to justice.[28] Specific comments were made on the draft of art.9 by members of the Working Group at its Eighth Session on 17 December 1997.[29] No specific comments were made by any members of the Working Group on the words of art.9(3) at issue in this appeal. Amendments were, however, made to redraft art.9 as a whole.[30] The revised English draft, following these amendments, referred to challenges to "*acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*".[31] As the Court below observed, "*[t]he report does not give any explanation for that alteration*": CA Judgment, §86. The Appellant seeks to rely on fresh evidence purporting to explain the change: AWC, §50(h), §51(a).

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[22] CEP/AC.3/10, p.10 (Annex I, §5). The French version refers to "*à l'encontre de telle ou telle disposition du droit national de l'environnement*".
[23] CEP/AC.3/10, p.11 (Annex I, §7).
[24] CEP/AC.3/10, p.16 (Annexe V).
[25] CEP/AC.3/10, p.16 (Annex V).
[26] CEP/AC.3/12, p.12 (§13).
[27] CEP/AC.3/R.5, p.15.
[28] CEP/AC.3/13, p.2; CEP/AC.3/15, p.2.
[29] CEP/AC.3/16, p.2 (§10), pp.4-5 (§§21-25).
[30] CEP/AC.3/16, p.2 (§10).
[31] CEP/AC.3/16, p.9 (Annex I); see also the consolidated draft prepared before the tenth session, CEP/AC.3/R.5/Rev.1, pp.13-14.

For the reasons given in opposition to that application, the fresh evidence is inadmissible and cannot fairly be admitted. The Respondents do not, therefore, address it further here.

43. Three material points can be drawn from the relevant and admissible *travaux préparatoires*.

44. **First**, the provision that became art.9(3) was the subject of careful consideration and deliberation by the Working Group: CA Judgment, §84. It was a controversial proposal which some delegations did not wish to include in the Convention at all: CA Judgment, §85. The Group restricted the provision's broad scope in the original draft elements ("*matters related to the protection of the environment*"), which was "*a plainly wider concept than proceedings to challenge acts or omissions contravening national legal provisions relating to that protection*": CA Judgment, §83. This appears to be common ground: AWC, §51(a).

45. **Second**, the only specific discussion in the admissible *travaux* of the policy intention behind the provision that became art.9(3) occurred at the Fifth Session, where it was proposed that it should cover "*unlawful acts or omissions by private persons or public authorities which contravened specific provisions of national environmental law*". This confirms the intended purpose of art.9(3) and supports the Respondents' case.

46. **Third**, the Appellant contends that the change in the English and Russian drafts of art.9(3) between the Sixth and Eighth Sessions shows the parties intended substantially to broaden the material scope of that provision: AWC, §50(g). That is not correct:

    (1) Nothing in the extensive admissible *travaux* indicates the parties had such an intention. Many particular aspects of art.9 were discussed at the Seventh and Eighth Sessions, but there is no admissible record of any decision to expand the substantive scope of art.9(3) beyond allegations of contraventions of specific provisions of national environmental law. The Appellant's case rests on the improbable premise that a major change of legislative policy to what was demonstrably a closely and carefully negotiated instrument was made without having been recorded officially.

    (2) The change to the English and Russian versions of art.9 between the Sixth and Eighth Sessions was made as part of a redrafting of the entire article, rather than any particular amendment to the material words of art.9(3), whereas detailed textual amendments were made to the provisions of other draft articles.[32] This indicates that the change to the

[32] CEP/AC.3/16, pp.6-8 (Annex I).

English and Russian versions of art.9(3) relied on by the Appellant were in the nature of the drafting, not substantial amendments. The Appellant's suggestion (AWC, §51(b)) that drafting changes could not in principle have been made before the Tenth Session is contradicted by the way in which the Working Group functioned in practice.[33]

(3) That is, as the Court of Appeal held, confirmed by the fact that the authentic French text of art.9(3) adopted by the parties to the Convention remained the same as that used in the Fifth and Sixth Sessions. This demonstrates that "*the Working Group did not see any significant difference between the earlier English equivalent of the French text 'which contravene provisions of national environmental law' and the final English version 'which contravene provisions of its national law relating to the environment'*": CA Judgment, §87. The Working Group was on any view alive to the need to preserve a uniform meaning among the three language versions of the Convention.[34]

47. The Court of Appeal was thus right to hold that the *travaux* "*confirm that 'relating to' is used as a strong, not a loose or broad, connector*", such that the relevant legal provision of national law should be to do with, or be concerned with, the environment: CA Judgment, §88.

48. In any event, even if the admissible *travaux* indicated that "*national law relating to the environment*" was somehow intended to be wider than "*national environmental law*", that does not indicate that the Appellant's case is correct. The parties could have considered that "*national environmental law*" in the English and Russian versions might be interpreted restrictively as "*national law on the environment*" (*c.f.* article 5(3)(b), discussed at §§34-35 above). The *travaux* provide no support at all for the Appellant's case under which there effectively are no limits at all on the scope of art.9(3). On no view do they "*clearly and indisputably point to [a] definitive legislative intention*" supporting its construction (as asserted in AWC, §49), such that they could be admitted pursuant to art.32(a) of the VCLT.

(v) Domestic authority

49. The Court of Appeal's interpretation of art.9(3) is consistent with domestic authority (recognising that that authority is below the level of this Court).

[33] See, e.g., CEP/AC.3/12, p.6 (Annex I), where the Working Group at the Sixth Session requested the small drafting group to consider certain changes, such as "*new wording for 'advice' or 'training'*".
[34] See, e.g., CEP/AC.3/12, p.6 (Annex I), where the Working Group requested the small drafting group "*to identify the correct translation in Russian*" for a particular term.

50. In *Venn*, that Court held that that the duty under s.70(2) of the Town and Country Planning Act 1990 to have regard to material considerations, in conjunction with policies for the protection of the environment, could constitute a national law relating to the environment. As Sullivan LJ observed at §13, "*[n]ational legislation may address the issue of environmental protection in different ways*" and Parliament "*has chosen to implement much of the UK's environmental protection through that system*". The consequence was that it was "*characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies*": §14. In that context, "*the combination of statute and policy*", with the former requiring that the latter be prepared, taken into account and in some instances followed, could properly be characterised as a national law relating to the environment: §17 (emphasis added).

51. The Appellant contends the decision in *Venn* supports its case that a national law relating to the environment need not be a law which is concerned with environmental protection or regulation: AWC, §§14-21. However, as the Court below rightly observed, an essential part of that Court's reasoning in *Venn* depended upon an inference that "*Parliament had chosen to implement much of the UK's environmental protection*" through the Planning Acts: CA Judgment, §139. If *Venn* were to be interpreted as the Appellant contends, much of the reasoning of Sullivan LJ would be otiose, and he would instead have simply and directly held that a public law error in a decision which has an effect upon the environment, or a public law error which relates to the environment in some way, was sufficient to engage art.9(3), irrespective of whether the underlying legal regime served the purpose of protecting or regulating the environment: CA Judgment, §142. It is telling he did not do so.

52. A similar approach to that in *Venn* was adopted by Lang J in *ClientEarth*, which the Appellant concedes is "*perhaps*" inconsistent with its case (AWC, §23), but does not suggest was wrongly decided, and did not invite the Court of Appeal to overrule. In that case, the claimant argued that the Financial Conduct Authority had erred in law by approving a prospectus for shares which failed properly to assess the materiality of risks associated with climate change. The Judge rejected the contention that the claim fell within art.9(3) on the basis that the financial services legislation in question was intended to ensure investors were informed about material risks. It was "*not to protect or regulate the environment in any way. Any connection with the environment and the purpose of the Aarhus Convention is incidental and remote*": §43. The Appellant attempts to rationalise Lang J's decision on the basis that the environmental nature of the information which had to be provided "*was simply irrelevant*":

AWC, §26. That attempt fails. The Judge in terms noted that risks which the legislation required to be disclosed "*may arise from environmental circumstances*": §43. The critical point, however, was that environmental matters had to be disclosed for the purpose of informing investors, rather than to protect or regulate the environment.[35]

53. There are two domestic cases which require further consideration by this Court.

54. The first is *Austin v Miller Argent (South Wales)* ("***Austin***") [2015] 1 WLR 62. In *Austin*, the Court of Appeal held that the law of private nuisance could in principle fall within the scope of art.9(3). The Appellant is wrong to contend that *Austin* is in any way inconsistent with the need for the purpose of the rule of national law being to protect or regulate the environment: AWC, §22. Indeed, as the Aarhus Convention Compliance Committee ("**the Compliance Committee**") has stated, the law of private nuisance is capable of falling within art.9(3) because it "*regularly concerns various components of the environment and aims to protect them*": see further §78 below. As the Court of Appeal held in this case (CA Judgment, §110), the basis of the decision in *Austin* is that "*the law of nuisance may serve the additional purpose of protecting the environment, as well as protecting the enjoyment of property*".

55. *Austin* is thus not authority, as the Appellant suggests, for the bald proposition that the test under art.9(3) is whether "*the facts of the actual complaint hav[e] a link with environmental matters*", and that it is not necessary to consider the purpose of the law in the abstract: AWC, §21. The proposed claim in *Austin* was that the emission of dust and noise from an opencast mine and reclamation site near to the claimant's home constituted an unreasonable interference with the claimant's enjoyment of her property, that would not have occurred but for the defendant's breach of conditions of a planning permission intended to mitigate the adverse environmental effects of its activities: see p.64E-F; *per* Elias LJ at §§1-2. The Court held that the proceedings did not fall within the scope of art.9(3), notwithstanding that the proposed claim would, indirectly, "*raise issues concerning compliance with the planning conditions imposed to mitigate environmental harm*": *per* Elias LJ at §46.

56. The Respondents accept that there are potential difficulties with the Court of Appeal's reasoning in *Austin*, in particular in the conditions it identified for whether a claim in private nuisance falls within the scope of art.9(3). The correctness of that reasoning does not arise for decision in this case. That said, it is on one view liable to draw the Court into making

[35] For the avoidance of doubt, Lang J was wrong in this case (AC Judgment, §§11-13) in attempting to distinguish her decision in *ClientEarth*: AWC, §27.

value judgments about a claim at the start of litigation, which it is ill-equipped to perform, rather than focusing on the nature of the legal provision said to have been contravened in the abstract, as the parties to the Aarhus Convention intended. Whether or not that reasoning was correct in the special context of claims for private nuisance, Ouseley J was right in *McMorn* (see §§244-245) to reject an attempt to import conditions of this kind into the assessment of whether public law claims fall within the scope of art.9(3), where it is (on any view) possible to consider the nature of the legal provision said to have been contravened in the abstract: see further §80 below. The Appellant does not suggest he was wrong to do so.

57. The second is the *ex tempore* judgment of Thornton J in *R (Friends of the Earth) v Secretary of State for International Trade* ("***Friends of the Earth***") [2021] EWHC 2369 (Admin), which the Appellant contends the Court of Appeal was wrong to overrule: AWC, §§58-61. The Respondents address why *Friends of the Earth* was wrongly decided at §101 below, but they observe that the Judge (understandably) did not undertake any detailed analysis of the purpose and scope of art.9(3). To the extent she considered that the test was whether the proceedings involved a "*quintessential environmental claim*" (§13), she was wrong, as the Court below rightly held: CA Judgment, §150. The parties to the Aarhus Convention deliberately did not create a general right of access to justice in environmental matters.

(vi) International authority

58. The Court of Appeal's interpretation is also consistent with the bulk of international authority, by which this Court is not bound, but to which it should have regard given the desirability of achieving a uniform interpretation of the Aarhus Convention: see §23 above.[36]

    (1) In C-873/19 *Deutsche Umwelthilfe v Germany* [2023] Env LR 17, the Grand Chamber of the CJEU considered whether allegations that authorisations had been given contrary to a prohibition on using defeat devices which reduced the effectiveness of emission control systems in cars fell within art.9(3) of the Aarhus Convention.[37] The CJEU found that both the legislative scheme as a whole, and the particular prohibition in question had "*an environmental objective and therefore forms part of the 'law relating to the environment', within the meaning of Article 9(3) of the Aarhus Convention*": §52. It was immaterial, for this purpose, that the legislation had been adopted under a legal basis providing for the approximation of laws concerning the establishment and functioning of the EU's internal

[36] As to the status of decisions of the CJEU in particular, see fn7 above.
[37] See Parliament and Council Regulation 2007/751/EC, art.5(2), quoted at §16 of the Court's judgment.

market: §53. The CJEU further used the term "*provisions of national environmental law*" interchangeably with "*provisions of its national law relating to the environmen*t": §64.

(2) The Appellant contends that *Deutsche Umwelthilfe* does not set out any threshold condition for the application of art.9(3): AWC, §20. That is incorrect. The CJEU's approach in that case reflects how the EU has itself given effect to art.9(3) of the Aarhus Convention in Title IV of Parliament and Council Regulation 2006/1367/EU ("**the Aarhus Regulation**"). The Aarhus Regulation provides for administrative reviews of acts and omissions by EU institutions and bodies "*on the grounds that such an act or omission contravenes environmental law*" (art.10(1)), following which proceedings may, in certain circumstances, be taken before the EU courts (art.12). For this purpose, "*environmental law*" (or, in the French version, "*droit de l'environnement*") is defined in art.2(1)(f) of the Aarhus Regulation as EU "*legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives*" of EU environmental policy as set out in the Treaty on the Functioning of the EU: *Deutsche Umwelthilfe* at §54.

(3) The Irish courts (to whose jurisprudence the Appellant does not refer) have adopted a similar approach. In *Conway v Ireland* [2017] 1 IR 53, the Supreme Court observed that whether a national law fell within art.9(3) had to be determined as a matter of substance not form. Accordingly, it was irrelevant that the legislation dealt with other questions, or had a title implying its principal focus was not the environment, provided that "*the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment*": *per* Clarke J at §63. Thus laws concerning the grant of permission to construct roadways "*clearly form part of environmental law*": §64. However, "*many measures concerning either road traffic or health and safety do not have any material environmental component at all*": §65. It followed that "*the mere fact that roadways can have an environmental impact and that the purpose of environment legislation can frequently be directed towards protecting health and safety does not mean that all road traffic legislation or all health and safety legislation can be regarded as coming within the ambit of environmental law for the purposes of article 9.3*": §66. The Court held that allegations of breach of an entirely general statutory duty to maintain a safe and efficient network of roads did not fall within the scope of art.9(3): §67.

(4) *Conway v Ireland* was followed by the Supreme Court in *Heather Hill Management Co v An Bord Pleanála* [2024] 2 IR 222, where Murray J affirmed the critical distinction

between laws which "*may, in a remote sense, impact upon the environment*" and those which "*'relate to the environment' in the sense of regulating conduct for environmental purposes*": §179. As the High Court of Ireland has subsequently observed, in holding that legislation allowing for the compulsory acquisition of land does not fall within the scope of art.9(3), the analysis does not change merely because a submission is made relying (relevantly or otherwise) on environmental points. On that logic, "*any part of domestic law could become law relating to the environment, which is unlikely to be what the Aarhus convention was intended to mean*": *Clancy v An Bord Pleanála* [2023] IEHC 233 *per* Humphreys J at §27(vii).

59. The Appellant relies upon the CJEU's ruling in Case C-240/09 *Lesoochranárske zoskupenie v Ministerstvo životného prostredia Slovenskej republiky* ("***the Brown Bear case***") [2012] QB 606: AWC, §§12-13. This concerned allegations of breach of Slovakian law implementing the Habitats Directive (1992/43/EEC). As the Court below noted, that legislation "*plainly was for the protection of the environment*" (CA Judgment, §78), or as the CJEU put it, constituted "*a system of strict protection*": §37. The CJEU was not asked to determine if the Slovakian legislation was a national law relating to the environment, and its ruling does not address that question, or any issue of material relevance to this appeal.

60. The actual issue before the CJEU was whether individuals, including NGOs, could, by virtue of EU law, acquire standing to "*challenge a decision to derogate from a system of environmental protection*" by virtue of art.9(3): §28. Having held art.9(3) did not have direct effect (§45), the CJEU observed that "*although drafted in broad terms*", it was "*intended to ensure effective environmental protection*": §46. This remark was made in the context of its holding that national courts were obliged, so far as possible, to interpret procedural rules on standing to enable NGOs to challenge acts or omissions "*liable to be contrary to European Union environmental law*": §51. There is, therefore, nothing in the *Brown Bear case* which assists the Appellant, and its attempt to take what was said in §46 out of its context as a generally applicable statement of art.9(3)'s purpose should be rejected: see §§38-40 above.

61. The Appellant also relies upon the decision of the General Court of the EU in Case T-9/19 *ClientEarth v European Investment Bank* ("***the EIB case***") [2021] 2 CMLR 17: AWC, §§62-63. The Court of Justice on appeal (Case C-212/21 P; [2024] Env LR 13) considered, insofar as relevant to the present case, only the interpretation of the Aarhus Regulation, and not the Convention itself: see §§76-91. Limited weight can be placed upon the CJEU's decision in

this context. To the extent, however, that it contains some kind of indirect interpretation of art.9(3) of the Convention, the Respondents respectfully submit that the CJEU's reasoning should not be followed in this jurisdiction. This is addressed further at §99(5) below.

(vii) Decisions of the Aarhus Convention Compliance Committee

(a) The relevant provisions of the Convention

62. The Appellant relies on two reports of the Compliance Committee. It was established under art.15 of the Convention. This provides for the Meeting of the Parties to establish "*on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention.*"

63. The Meeting of the Parties established the Compliance Committee in 2002 for the purpose of "*the review of compliance by the Parties with their obligations under the Convention*": see §1 of Decision I/7: *Review of Compliance*.[38] Part III of the Annex to that Decision sets out the Compliance Committee's functions: see §13. These include considering submissions by the parties (§§15-16); referrals by the Secretariat (§17); and communications from the public (§§18-24), concerning parties' compliance with the Convention.

64. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Compliance Committee, "*decide upon appropriate measures to bring about full compliance with the Convention*": §37 of Decision I/7. The measures it may take are set out in §37(a)-(h), which, as sub-paragraph (h) illustrates, are examples of "*non-confrontational, non-judicial and consultative measures*". Decision I/7 operates "*without prejudice to article 16 of the Convention on the settlement of disputes*": §38.

65. Article 16 of the Aarhus Convention applies where there is a dispute between two or more parties as to the interpretation or application of the Convention. Under art.16(1), they must "*seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute*". Under art.16(2), provision is made for judicial determination of disputes not resolved under art.16(1), either by submission to the International Court of

[38] The decision was adopted at the first meeting of the Parties, held in Lucca, Italy, on 21-23 October 2002: see ECE/MP.PP/2/Add.8; (2 April 2004).

Justice ("**ICJ**") or by arbitration in accordance with Annex II. The UK (among other parties) has not declared that it consents to compulsory dispute settlement under art.16(2).[39]

(b) The status of reports and recommendations of the Compliance Committee

66. The Appellant accepts that reports and recommendations of the Committee are not in themselves binding on the parties, but argues that they are "*binding*" when endorsed by the Meeting of the Parties: Grounds of Appeal, §6(b). The primary basis of this argument is that such endorsement amounts to a "*subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*" under art.31(3)(a) of the VCLT. The Appellant did not make this submission below (AWC, fn19). This Court may not need to determine whether the Appellant's new argument is correct, as the contention that the Meeting of the Parties has actually approved any interpretation of the Aarhus Convention which is inconsistent with the approach of the Court of Appeal is wrong: see §§70-79 below. If it is necessary to determine the Appellant's new argument, it should be rejected.

67. Article 31(3)(a) of the VCLT applies "*to a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*". This imposes a high bar. It is intended to apply only to "*an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation*": *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep. 1045 at §49. While it is not impossible that the endorsement by consensus of a report and recommendations by the Compliance Committee could satisfy this high bar, it is highly unlikely in practice:

(1) Where parties to the Convention wish to adopt an interpretative agreement for the purpose of art.31(3)(a) of the VCLT, they do so in terms. For example, at the 3rd Meeting of the Parties on 11-13 June 2008, the parties adopted *Decision III/1: Interpretation of Article 14 of the Convention*, which in terms refers to art.31(3)(a) of the VLCT, and contains an express agreement "*to interpret*" the Convention in a particular way. The Court should thus be very slow, in this context, to hold that anything less than an express interpretative agreement of that kind represents an agreement falling within art.31(3)(a) of the VCLT.

(2) The Appellant relies on decisions which have been adopted by the Meeting of the Parties "*by consensus*". As the International Law Commission ("**ILC**") has noted, however,

[39] The Republic of Austria has consented to both arbitration and the jurisdiction of the ICJ. The Kingdom of Norway has accepted the jurisdiction of the ICJ.

"*adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (a) or (b) to be established*", because it cannot "*necessarily be equated with agreement in substance*": "*consensus*" is "*not a concept that necessarily indicates any particular degree of agreement on substance*".[40] This will be particularly the case "*when there exists an objection by one or more States parties to that consensus*".[41]

(3) In any event, the Meeting of the Parties will typically endorse particular findings and recommendations of the Committee, rather than all aspects of the legal reasoning underpinning them, let alone parts of its reasoning which were not necessary for the Committee's finding. Accordingly, it cannot be assumed that the parties have adopted by consensus all aspects of the Committee's legal reasoning in any particular case, even if (which is denied) adoption by consensus was sufficient to constitute an agreement under art.31(3)(a) of the VCLT.

(4) As set out at §§62-65 above, the parties drew a distinction between binding dispute settlement under art.16 and "*arrangements of a non-confrontational, non-judicial and consultative nature*" under art.15. As Georg Nolte, the UN Special Rapporteur for subsequent agreements and subsequent practice in relation to the interpretation of treaties has observed, "*pronouncements of… the Compliance Committee under the Aarhus Convention… are primarily designed to facilitate the agreement of the parties regarding the application of the treaty rather than playing a role in the interpretation of the treaty*".[42] This makes it inherently improbable (absent some concrete and specific indication) that any particular pronouncement is intended to provide an authoritative interpretation of the Convention, contrary to what the Appellant suggests (AWC, §46). As the Appellant accepts (AWC, §45), the ILC has stated that decisions of Meetings of the Parties should "*be approached with caution before reaching any conclusion as to whether they imply a subsequent agreement or subsequent practice of the parties*".[43]

(5) The Court of Appeal was thus correct to hold that reports of the Compliance Committee are not "*analogous to the decisions of an international court or tribunal*" and "*may not contain legal analysis which would be found in a judicial adjudication on the*

[40] "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", *Yearbook of the International Law Commission*, II:2, 2018, p.72.
[41] "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", p.73.
[42] *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, 6th session of the International Law Commission, A/CN.4/694, (7 March 2016), §93.
[43] "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", p.85.

interpretation and application of an international treaty": CA Judgment, §49, citing *R (AB) v Secretary of State for Justice* [2022] AC 487 at §§64–67.

68. Nor, for materially similar reasons, do all statements of the Compliance Committee as to how the Aarhus Convention should be interpreted which are contained in reports endorsed by the Meeting of the Parties constitute "*subsequent practice in the application of the treaty which establishes the agreement*" of the parties for the purpose of art.31(3)(b) of the VCLT. As the Appellate Body of the World Trade Organization ("**WTO**") has held, the essence of a practice for this purpose is *"a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient*": AB-1996-2 *Japan: Taxes on Alcoholic Beverages*, p.13. In that case, the Appellate Body rejected the contention that the adoption by the parties to the WTO of reports of the WTO Panel (which unlike the Compliance Committee is a judicial body) involved a subsequent practice for the purpose of art.31(3)(b) of the VCLT; see also *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 *per* Lord Dyson at §130 (cited at AWC, §44).

69. In short, the Court of Appeal committed no material error in its analysis of the effect of decisions of the Compliance Committee. Its approach was consistent with that of this Court in *Walton v Scottish Ministers* 2013 SC (UKSC) 67, viz. that "*decisions of the committee deserve respect*" but are not binding: *per* Lord Carnwath at §100. They are a persuasive supplementary means of interpretation under art.32 of the VCLT: AWC, §54. The Appellant further has not established any practice, on the part of States (whether by governments or national courts), of treating all interpretations of the Aarhus Convention by the Committee in reports endorsed by the Meeting of the Parties as binding on every party. Indeed, the practice of States is to the contrary.[44] That is a further indication that the Appellant's case on this point is wrong.

(c) <u>The particular reports of the Compliance Committee relied on by the Appellant</u>

[44] In addition to the position of the Government and courts in this jurisdiction, see *Conway v Ireland* [2017] 1 IR 53 *per* Clarke J at §61, observing that it was appropriate to have regard to reasoning of the Compliance Committee, but that it did not "*provid[e] a definitive legal interpretation of the scope of the Aarhus Convention*". For the position in Germany, see the Decision of 24 March 2021: *BVerwG 4 VR 2.20* ECLI:DE:BVerwG:2021:240321B4VR2.20.0 at §70, observing that "*the practice of the Aarhus Convention Compliance Committee… may be used as an aid to orientation when interpreting the Aarhus Convention*". The General Court of the EU has said that while the Committee's pronouncements "*have no normative value, those communications are one of the elements that may guide the interpretation of that convention*": Case T-534/23 *Föreningen Svenskt Landskapsskydd v Council* ECLI:EU:T:2025:1020 at §57.

70. The Appellant relies on two reports of the Compliance Committee.

71. The **first** is *ACCC/C/2011/63: Austria* (27 September 2013): AWC, §§36-37. The communication concerned restrictive standing rules for criminal enforcement of animal welfare legislation. Austria's principal arguments were that (i) access to justice under the Convention did not extend to criminal proceedings; and (ii) animal protection under the Convention extended only to protection of animals in their natural habitats: §§43-46. In rejecting Austria's arguments, the Committee stated that at §52:

> "*the text of the Convention does not refer to 'environmental laws', but to 'laws relating to the environment'. Article 9, paragraph 3, is not limited to 'environmental laws', e.g., laws that explicitly include the term 'environment' in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.*"

72. The Committee further observed that the animal protection laws in issue related to the environment "*because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment*": §55.

73. The finding of the Committee was that Austria had failed to comply with art.9(3), in conjunction with art.9(4), because members of the public in certain cases had no means of access to administrative or judicial procedures to challenge conduct which contravened provisions of national laws relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection: §65. The Meeting of the Parties subsequently endorsed this finding by consensus: Decision, V/9b, §2. Notably, Austria indicated that it objected to the findings before they were made.[45] That, of itself, is sufficient to negative an agreement under art.31(3)(a) of the VCLT.

74. What the Meeting of the Parties cannot sensibly be taken to have endorsed was every aspect of the Committee's reasons for making that finding, most particularly the remarks of the Committee in §52 and §55 that a national law can relate to the environment under art.9(3) merely because of its potential impact on the environment, as the Appellant suggests: AWC,

[45] See Austria's comments on the Committee's draft findings dated 23 August 2013; see also Austria's Statement on the Committee's findings and recommendations dated February 2014, which was made at the Fifth Session of the Meeting of the Parties.

§46. Those remarks were unnecessary for the Committee's finding, because the legislation at issue had as its object the protection or regulation of a component of the environment (if the Committee's broad construction of that term is correct, which does not arise for decision in this case). There is nothing to indicate that any argument was addressed to the Committee specifically on the question of whether a law which merely impacted upon the environment fell within art.9(3).

75. Nor does there appear to have been any proper consideration of the profound consequences of the suggestion that a national law can relate to the environment within the meaning of art.9(3) merely because of its potential impact. Levying, amending or repealing any direct and indirect tax of general application chargeable by reference to economic activity is liable to have an indirect effect on economic activity, for example, by conferring an advantage on particular producers at the expense of others. As matters stand, therefore, varying almost any tax, for any number of policy reasons, is liable to have an incidental and indirect effect on GHG emissions, and thus on the environment. That cannot, however, be sufficient to convert all tax legislation into "*provisions of ... national law relating to the environment*" for the purpose of art.9(3). It would give that provision an almost unlimited scope that cannot have been intended, under which almost all fiscal legislation, and any other legislation affecting the scale or intensity of economic activity, on subjects as diverse as financial services (as in *ClientEarth*), pensions, insurance or competition law, would fall within the ambit of art.9(3). The Appellant disclaimed this argument below.[46]

76. In the premises, it is wrong to suggest the remarks §52 and §55 of the Commmittee's report represent an agreed interpretation on the scope of art.9(3) for the purpose of art.31(3)(a) of the VCLT. Nor do the remarks of the Committee in that case amount to a subsequent practice under art.31(3)(b). In any event, they are clearly inconsistent with the natural and ordinary meaning of art.9(3) in its context, the relevant *travaux* and a number of decisions of national courts, and this Court should decline to follow them. Even in the case of a judicial body such as the European Court of Human Rights whose rulings are binding on the UK in a case to which it is a party, domestic courts are not bound to follow its jurisprudence "*slavishly or unquestioningly: on the contrary, they can and do decline to follow Strasbourg judgments where there is a good reason to do so*": *R (Elan-Cane) v Secretary of State for the Home Department* [2023] AC 559 *per* Lord Reed at §101.

[46] §46 of its skeleton argument for the hearing of 7 March 2025. The argument was run by WWF which intervened.

77. There are principled reasons for taking a cautious approach when confronted with pronouncements of the Compliance Committee that appear to give the Aarhus Convention an interpretation which goes far beyond what the parties agreed. If the domestic courts take a cautious approach and explain why they disagree with the Committee, the claimant may make a communication to the Committee, which will allow further consideration of the issue, including potentially by the Meeting of the Parties, with the assistance of the domestic courts' reasoning. By contrast, if the domestic courts endorse an unduly expansive interpretation, the UK cannot complain to the Committee about the rulings of its own courts, with the result that "*the error made by the domestic courts will remain uncorrected*": see, by analogy, *R (AB) v Secretary of State for Justice* [2022] AC 487 *per* Lord Reed at §57.

78. The **second** report relied on is ACCC/C/2013/85 & ACCC/C/2013/86: *United Kingdom* (17 June 2015). This concerned the UK's compliance with art.9(3)-(4) in private nuisance cases. The Committee considered that while the law of private nuisance was primarily intended to protect property rights, this "*does not exclude that it at the same time regularly concerns various components of the environment and aims to protect them*": §72. For that reason, it considered private nuisance claims in principle fell within art.9(3): §73. The Committee's approach of considering the subject matter and purpose of the law of private nuisance is thus consistent with the Court of Appeal's analysis and the Respondents' case: see §54 above. The Appellant accepts that this part of the Committee's reasoning is "*perhaps unusual*" given the content of its case: AWC, §38.

79. The Appellant also seeks to rely on a statement by the Committee at §71 that "*a broad interpretation of the term 'national law relating to the environment' should … be applied*" as inconsistent with the Court of Appeal's holding that "*relating to*" is a strong, rather than a loose connector: AWC, §38. On analysis, however, there is no inconsistency. The Committee's approach gives the word "*environment*" a broad and generous construction (which is common ground), while also requiring that a national law relating to the environment must concern a component of the environment and aim to protect or regulate it.

80. The Appellant also relies on the test identified by the Compliance Committee as to whether particular proceedings in private nuisance fall within the scope of art.9(3), which it suggests supports "*an approach of populating the legal obligation (and its characterisation) by reference to the facts of the claim*": AWC, §40. The test proposed by the Compliance Committee was whether the alleged "*nuisance complained of affects the 'environment*'": §73.

Yet the Appellant elsewhere "*of course agrees*" that the issue under art.9(3) is not whether the challenged conduct "*has an impact or effect on the environment*": AWC, §34. The test formulated by the Compliance Committee is therefore inconsistent with the Appellant's own case as to what art.9(3) means. Resolving the considerable difficulties of determining whether particular proceedings in private nuisance fall within the scope of art.9(3) (which have been discussed at §56 above) should be left to a case in which that issue actually arises. The UK has further at no stage indicated its agreement in substance to the interpretation of the Compliance Committee.[47]

81. Taken together, the Committee's findings (to the extent endorsed by the Meeting of the Parties) do not establish either an agreement or practice for the purpose of art.31(3) of the VCLT which is inconsistent with the decision of the Court of Appeal.[48] That Court concluded that "*none of the decisions of the [Compliance] Committee cited to us support the analysis by [the Appellant] or WWF of the ambit of Art 9(3) where that differs from that of the [Respondents], nor do they run counter to the analysis in this judgment*": CA Judgment, §49. It was correct so to hold. For the reasons given above, (i) the finding in *ACCC/C/2011/63: Austria* is consistent with the Court of Appeal's analysis, albeit part of the reasoning, that was unnecessary for that finding, was wrong and should not be followed; and (ii) the Court of Appeal's approach is, in large part, consistent with both the reasoning and findings of the Committee in ACCC/C/2013/85-86 *UK*.

(viii) The Implementation Guide

82. The Appellant relies on guidance on the meaning of art.9(3) contained in the 2nd edition of *The Aarhus Convention: An Implementation Guide* (UNECE, June 2014) ("**the Implementation Guide**"): AWC, §§53-54.

83. The Implementation Guide is not an aid which falls to be taken into account by virtue of art.31 of the VCLT. The 1st edition was published in 2000 after the Convention was signed. The Meeting of the Parties requested an updated edition to be prepared, which was written

[47] The UK informed the Committee on 5 May 2015 that it was "*still unable to agree to the draft findings in their present form*". The UK has further not taken action to give effect to the Committee's interpretation. On 29 May 2025, the Government explained to the Committee that, as concerns England and Wales, it would invite the Civil Procedure Rules Committee to codify the decision of the Court of Appeal in *Austin* in order to address the Committee's concerns: see the letter of the Minister for Courts and Legal Services to the Compliance Committee of that date.
[48] The Appellant also relies on *ACCC/C/2010/50: Czech Republic* (AWC, fn27), but this concerned Czech legislation concerning environmental permits and land-use plans, and is in no way inconsistent with the Respondents' case.

by "*independent experts*".[49] It has not been approved by the parties, and the views expressed in it "*do not necessarily represent the official opinion of any of the Parties*".[50] It has not been prepared by any body established by the Convention (as suggested at AWC, fn46). While the commentary in the Implementation Guide may be taken into account as a persuasive authority,[51] the Court of Appeal rightly directed itself that it "*has no binding force and does not have the normative effect of the provisions of the Convention*": CA Judgment, §50; see further *Venn per* Sullivan LJ at §13; Case C-279/12 *Fish Legal v Information Commissioner* [2014] QB 521 at §38.[52] It should not be treated as "*authoritative*" (AWC, §53).

84. Contrary to the Appellant's case, the Implementation Guide is consistent with the interpretation adopted by the Court of Appeal. The 2nd edition (p.173) states that "*article 9, paragraph 3… provides for the right of citizens to bring actions in cases of violations of environmental law*"; see also p.181. It sets out that art.9(3) is intended to ensure that "*members of the public have access to legal review procedures to enforce … the provisions of domestic environmental law*" (p.187).[53] As the Court below noted, the Guide permissibly uses the term "*environmental law*" as a "*shorthand*" for laws within the scope of art.9(3), contrary to the Appellant's arguments that art.9(3) is not restricted to such laws: CA Judgment, §107; *c.f.* AWC, §36(a), §51(a). The 1st edition was to similar effect.[54]

85. The passage in the 2nd edition on which the Appellant relies (AWC, §54) is as follows:

> "*national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws.*" (p.197)

86. The Respondents agree that the decisive question is whether the provision of national law "*relates to the environment*": but this simply restates the test under art.9(3). It is also common

[49] Implementation Guide, p.4.
[50] Implementation Guide, p.7.
[51] See, *e.g.*, *Austin per* Elias LJ at §18; *Venn per* Sullivan LJ at §13.
[52] As to the status of the CJEU's decisions, see fn7 above; on foreign authority generally, see §23 above.
[53] See, to like effect, pp.198-199 ("*Members of the public should also be able to challenge acts or omissions of public authorities that transgress national environmental law*").
[54] (UNECE, 2000), p.131 ("*members of the public may challenge acts or omissions of public authorities that transgress national environmental law. 'Omissions' in this case includes the failure to implement or enforce environmental law with respect to other public authorities or private entities*").

ground that a national law may relate to the environment even if the environment is not used in the title or heading. For example, legislation establishing taxes or duties with an environmental purpose, such as the aggregates levy[55] or air passenger duty,[56] may well be provisions of national law relating to the environment, notwithstanding that the environment is not mentioned in the title or text of the statute. Likewise, as the Court of Appeal noted (CA Judgment, §108), a relevant legal provision relating to the environment may form "*only part of an enactment otherwise dealing with non-environmental issues*", such as a provision dealing with pollution from ships in an enactment on general maritime law. All this is common ground. The Appellant's contention that the approach of the Court of Appeal requires that, absent exceptional circumstances, there must be "*an express reference to the environment in the relevant law*" (AWC, §37(b)) is therefore wholly unfounded.

87. On analysis, the passage in the Implementation Guide relied on by the Appellant supports the Respondents' case. "*Environmental taxes*" are recognised as an example of law that may fall within art.9(3), rather than all forms of general direct and indirect taxation, notwithstanding that most taxies and levies are liable to have effects on economic activity, and consequently on the environment. Read fairly and as a whole, the Implementation Guide supports the proposition that for a provision to relate to the environment, it must be concerned with the environment, its protection or regulation, as all of the examples given do, and that the analysis of what falls within the scope of art.9(3) is conducted at a high-level in the abstract.

(ix) Conclusion

88. The Court of Appeal did not err in construing art.9(3).

D. THE APPLICATION OF ARTICLE 9(3) TO CLAIMS UNDER DOMESTIC LAW

(i) The relevant principles

89. It is not necessary for this Court to undertake any kind of exhaustive analysis of the circumstances in which art.9(3) may apply to different types of proceedings under domestic law, and it may be unhelpful to consider more than is necessary to decide the appeal. However, consideration of the effect of the judgment of the Court below is helpful in showing that it would not "*critically undermine[e] the proper scope*" of art.9(3), as the Appellant

[55] Finance Act 2001, Part 2.
[56] Finance Act 1994, Part 1, Chapter IV.

suggests (AWC, §4). The Respondents suggest that the potential application of art.9(3) may arise in at least the following seven classes of case.

90. **First**, "*[s]ome situations are straightforward and require little discussion*" (CA Judgment, §133). For example, a claimant may allege a breach of a statutory scheme whose purpose is the protection or regulation of the environment, and can properly be characterised, as a whole, as a national law relating to the environment. Examples of such schemes include Part I of the Wildlife and Countryside Act 1981 (considered in *McMorn*), the Environmental Protection Act 1990, or the Climate Change Act 2008.

91. **Second**, there is, of course, no requirement that the entire statutory scheme constitutes national law relating to the environment: a relevant legal provision relating to the environment may form part of an enactment dealing with non-environmental issues: see §86 above. For example, non-environmental legislation may contain a provision which requires expressly or by necessary implication a particular factor to be taken into account, and the language and context shows that its object is to protect or regulate the environment. In that case, art.9(3) will most likely be engaged, as the Court of Appeal held: CA Judgment, §138.[57]

92. **Third**, it may be alleged that there has been a contravention of a freestanding statutory requirement for the protection of the environment, which regulates the performance of other statutory functions. The Court of Appeal gave, as an example, the appropriate assessment regime under Part 6 of the Conservation of Habitats and Species Regulations 2017 SI 2017/1012: CA Judgment, §133. There are, however, many examples of similar provisions of national law relating to the environment. Thus in *Lewis*, Eyre J was right to hold that that ss.6-7 of the Environment (Wales) Act 2016 were "*manifestly provisions of national law relating to the environment*": §33.

93. **Fourth**, a claim against a public authority may raise an allegation of a contravention of public law principles. The mere fact that this does not in terms allege a breach of a provision of legislation does not necessarily exclude it from the scope of art.9(3). It is common ground that art.9(3) applies to contraventions of national law relating to the environment, whether

[57] See, for example, the *obiter* discussion by Karen Ridge, sitting as a Deputy High Court Judge, in *Green Lane Association v Central Bedfordshire Council* [2025] EWHC 2251 (Admin) at §§37-38, §41 (applying the Court of Appeal's judgment). Another example raised in argument in the Court of Appeal concerned s.3(5)(a) of the Infrastructure Act 2015, which requires the Secretary of State, in setting or varying a Road Investment Strategy, to have regard to the effect of the strategy on (among other things) "*the environment*". However, it does not necessarily follow that the purpose of such a provision is to protect or regulate the environment: *c.f. R (Transport Action Network) v Secretary of State for Transport* [2022] PTSR 31 *per* Holgate J at §37, §§121-124.

statutory or not (AWC, §30). Moreover, an allegation of breach of a public law principle will typically, on analysis, involve an allegation that the authority acted outside its powers under statute insofar as the enactment does not, on its proper construction, confer a power to act in breach of public law principles: *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682 *per* Lord Browne-Wilkinson at p.701C-E.

94. As the Court of Appeal rightly observed, however, public law principles regulate the legality of administrative actions of public authorities exercising a wide range of functions in many areas beyond environmental protection and regulation. They cannot by themselves be characterised as "*form[ing] part of our law relating to the environment. Their purpose is not to protect or regulate the environment*". Accordingly, a breach of a public law principle does not "*in itself amount… to a breach of environmental law*": CA Judgment, §132. The correct approach is rather that art.9(3) will only apply where a law for the protection or regulation of the environment is contravened through a breach of a public law principle, such as an irrational exercise of discretion: CA Judgment, §133.

95. The Court of Appeal's approach to this issue, of holding that alleged public law errors take their character from the statutory scheme in which they arise, was consistent with that of the Supreme Court of Ireland in *Heather Hill Management Co v An Bord Pleanála* (above), which held that:

> "*while the law governing judicial review of administrative action comprises a distinct body of principle, it is ultimately parasitic upon specific decisions usually made pursuant to identified statutory regimes. The 'classic grounds of judicial review' — the taking into account of irrelevant considerations; the failure to take into account relevant considerations; acting unreasonably; fettering discretion; failing to afford fair procedures; and so forth — all operate on the basis that to obtain legal validity a decision reached pursuant to a power granted by statute must comply with these requirements. They are intended to enable the proper functioning of the statutory scheme to which they are applied and are not an end in themselves. In each instance the grounds on which judicial review may be granted are thus adjectival, being dependent upon and an inherent part of each statutory regime to which they are applied. When the statutory scheme to which they are attached is itself part of the State's environmental law, it follows that these 'judicial review grounds' arise from that same body of law*": *per* Murray J at §180.

96. For this reason, the Appellant is wrong to claim (repeatedly) that the Court of Appeal's approach draws a distinction "*between express statutory language relating to the environment*" and other legal requirements relating to the environment: AWC, §3. The Court of Appeal rightly accepted (and it has always been common ground) that a claim alleging that a national law relating to the environment has been contravened through a breach of a public

law principle falls within the scope of art.9(3). It is also incorrect to assert that the Court of Appeal's approach "*reduces the part of the national legal framework which is made up of… public law obligations to nothing*": AWC, §81. On the contrary, it establishes a principled approach to when an alleged contravention of a public law principle falls within the scope of art.9(3), reflecting the need for a simple test that can coherently be applied at the outset of proceedings.

97. **Fifth**, the corollary of that approach, as the Court of Appeal held, is that a mere allegation of public law error (such as a failure to take account of material considerations) in the administration of a national law which does not relate to the environment does not somehow transmute into an allegation of a contravention of national law relating to the environment simply because the alleged error is in some way connected to the environment: CA Judgment, §§134-143. As it concluded, art.9(3) is not engaged merely by "*a factual matrix which involves environmental impact or effect*" and such a factual matrix does not "*alter the non-environmental nature of the legal provision under which the defendant acts*": CA Judgment, §142. The contrary approach would have the effect that, depending on the facts, any provision of national law could constitute a provision relating to the environment, which is plainly not what the parties to the Convention intended: see *Clancy v An Bord Pleanala* at §27(vii).

98. For example, a statute whose purpose is not to protect or regulate the environment may give rise to a general duty (whether as a result of a provision of the statute or public law principles) to have regard to relevant considerations. That may mean environmental considerations either have to, or may permissibly, be taken into account in a particular case,[58] but it does not mean that the general duty is a provision of national law relating to the environment:

    (1) The purpose of the relevant provision of legislation, or public law principle, is not to protect or regulate the environment, with the result that it is not a national law relating to the environment within the meaning of art.9(3), even where, on the facts, the environment must be considered.

    (2) The Appellant suggests that this distinction is unprincipled, because the effect of a specific duty to have regard to environmental matters is "*functionally identical*" to a general duty (whether under statute or public law) to take into account relevant matters, where on the facts, the environment must be considered: AWC, §72(b). However, the

[58] *c.f. R (Friends of the Earth) v Secretary of State for Transport* [2021] 2 ER 967 *per* Lord Hodge and Lord Sales at §§116-121.

distinction is principled because it rests on whether the national law's purpose is to protect or regulate the environment, a matter which the Court must be able definitely to ascertain at the outset of proceedings, without any detailed investigation of the merits of the claim. Moreover, while the issue of whether a consideration is so obviously material that it has to be taken into account must be assessed in the context of a particular statutory scheme, properly construed (AWC, §73), that question is determined according to a rationality standard on the facts of the particular case at hand.

(3) In many cases, at the time the Court determines whether a claim is within the scope of art.9(3), the claimant will be alleging that the defendant was required to take into account an environmental consideration, and the defendant will be denying that, with the result that that question will have to be determined at a substantive hearing. The effect of the Appellant's case is that the claim must nonetheless be held to be within the scope of art.9(3), even though the Court may decide at the substantive hearing that there was no requirement to take into account environmental considerations at all. The result is that the scope of art.9(3) is not determined by the nature and purpose of the relevant provisions of national law in the abstract (as the parties to the Aarhus Convention intended), but rather by one party's case as to what national law requires, which may be no more than barely arguable. However, art.9(3) does not apply to alleged "*contraventions of alleged national laws relating to the environment*": see §29(3) above.

(4) The Appellant's case is also unworkable for a further reason. In many cases, the Court will refuse permission to proceed and will simultaneously have to determine whether the claim falls within the scope of art.9(3). The Court may have held that the claimant's case that the defendant was required to take into account an environmental consideration is unarguable. It is unclear whether the Appellant's case is that such a claim nevertheless falls within the scope of art.9(3), by virtue of an allegation about national law which the Court has actually decided has no arguable merit. If that is the Appellant's case, it illustrates that its proposed construction of art.9(3) has no principled limitations on its scope. The only way, however, that such a claim would, on the Appellant's case, fall outside art.9(3) was if the scope of that provision turned on the merits of the claim, which (the Respondents understand) the Appellant does not contend to be the correct test.

99. An authority, in administering a statutory scheme whose purpose is not to protect or regulate the environment, may also be alleged to have misconstrued or to have failed to have applied, without good reason, a policy of theirs concerning the environment.

(1) Under the UK's constitutional arrangements, "*[p]olicies are different from law*": *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 *per* Lord Sales & Lord Burnett of Maldon CJ at §3. The "*fact that the executive cannot create laws by making policies is based on sound constitutional reasons relating to the separation of powers*": *R (Good Law Project) v Prime Minister* [2023] 1 WLR 785 *per* Sir Geoffrey Vos MR, Dingemans & Elisabeth Laing LJJ at §56. The Aarhus Convention itself distinguishes between "*national law*" and "*policies*". A policy does not, therefore, of itself form part of national law relating to the environment. Nor does it form "*part of the rules with which [a] public body must comply*", as the Appellant contends (AWC, §63, emphasis added).

(2) Under domestic law, a policy adopted by a public authority may give rise to legal effects as a result of public law principles, including the obligation under public law to follow a lawful policy absent a good reason to the contrary. That, however, does not convert either (i) the policy itself into a provision of national law; or (ii) a non-environmental legislative provision into a provision of national law relating to the environment.

(3) In some cases, the issue will be whether a defendant misconstrued or failed to follow, without good reason, a particular policy which it is common ground applied. In other cases, however, there may be a dispute between the parties as to whether or not the policy applied, or existed at all. The defendant may, for example, contend that the claimant's case rests on an erroneous construction of the relevant policy, which did not in fact apply, or that there was no relevant policy. That issue will typically have to be determined at a substantive hearing. The effect of the Appellant's case is art.9(3) must apply to such a claim, even though the Court may decide at the substantive hearing that the relevant policy did not apply to the decision under challenge, or did not exist. For materially similar reasons to those at §§98(3)-98(4) above, the result is that art.9(3)'s scope is not determined by the nature and purpose of the relevant provisions of national law (as the parties to the Aarhus Convention intended), but rather by the content of the claimant's case, which may be no more than barely arguable, as to the meaning and effect of an alleged policy which is not itself part of national law. It is also liable to result in the scope of art.9(3) turning on the merits of the claim, which is not the correct approach.

(4) That is not to say that a failure to construe correctly or (without good reason) to apply a policy can never constitute a contravention of national law relating to the environment. That is no part of the Respondents' case. Many statutory schemes for the protection or regulation of the environment require regard to be had to policies for the protection or regulation of the environment. *Venn*, as the Court below held, provides an example: CA Judgment, §§103-107, §§139-142. Section 5(8) of the Planning Act 2008 is another.

(5) For these reasons, the Court is invited to reject the Appellant's case (AWC, §79) that a mere allegation of a breach of a policy that is connected in some way to the environment involves an allegation of contravention of a provision of national law relating to the environment. It is also invited not to follow the reasoning of the CJEU in the *EIB case* to the extent (if at all) it is said this casts light on the meaning of the Aarhus Convention:

(a) In the *EIB case*, the European Investment Bank had broad general powers to grant financial assistance under articles 9(1) and 19(3) of the Bank's statute. It is impossible to characterise these as provisions of law relating to the environment.

(b) The EIB had, however, adopted various criteria in the form of a Statement of Environmental and Social Principles and Standards and a climate strategy aimed at mobilising finance for the transition to a low-carbon and climate-resilient economy. Under general principles of EU law, the EIB could not depart from those criteria in its lending activity "*without justification*": §88. The CJEU held that the statement and strategy constituted "*environmental law*" within the meaning of art.2(1)(f) of the Aarhus Regulation as they circumscribed the exercise of the EIB's discretion, despite the fact that neither was legislation nor established rules binding in every case. With respect, this conflates policy and legal obligation.

(c) It is difficult to follow the basis on which the CJEU concluded that the resolution of the EIB under challenge was a measure "*under*" the statement or strategy (as required by art.2(1)(g) of the Aarhus Regulation). The CJEU has previously held that a policy is not the basis on which an administrative decision is adopted, even if the policy may form a ground on which the decision can be challenged: Joined Cases C-189/02 P and others *Dansk Rørindustri v Commission* [2005] 5 CMLR 17 at §212. The Court's contrary reasoning in the *EIB* case on this point again conflates policy with law.

100. A decision-maker may also take into account environmental considerations, whether because they were material on the facts, or because they elected to do so in the exercise of their discretion, but is then alleged to have acted irrationally. The Court below rightly held that the mere fact the claim concerns the environment (or an effect on the environment) does not turn the public law obligation to act rationally into a provision of national environmental law, because the nature or purpose of the provision in question remains "*non-environmental*": CA Judgment, §143. There is nothing unprincipled about this approach, contrary to what the Appellant maintains (see AWC, §80). It is entirely consistent with the choice the parties to the Aarhus Convention made not to apply art.9 merely to decisions or claims concerning the environment in a general sense, or to contraventions concerning the environment.[59]

101. For these reasons, and contrary to the Appellant's case (AWC, §§58-61), the Court of Appeal was correct to overrule the decision of Thornton J in *Friends of the Earth* for the reasons it gave: CA Judgment, §§114-119, §150. In particular:

(1) In *Friends of the Earth*, the defendants were exercising funding powers under the Export and Investment Guarantees Act 1991 ("**the 1991 Act**"). The Secretary of State requested advice about climate change from the Export Guarantees Advisory Council, whose function, under s.13(3) of the 1991 Act, was to "*give advice to [him], at his request, in respect of any matter relating to the exercise of his functions under this Act*": see §11. In addition, the Export Credit Guarantee Department, which is a Department of the Secretary of State under s.13(2) of the 1991 Act, had a policy of taking environmental considerations into account before making funding decisions. The Secretary of State's decision was challenged on grounds relating to the environment: see §4.

(2) As the Court of Appeal observed, the defendants in *Friends of the Earth* were acting under a statutory scheme which was not concerned with the environment, and there was no suggestion that any provision in the legislation required environmental effects or environmental policies to be taken into account, for the purpose of protecting or regulating the environment. The Secretary of State had, however, chosen to take advice on climate change: CA Judgment, §150.

(3) Thornton J erred in holding that the case was analogous to *Venn* (§12), because *Venn* concerned a statutory scheme which aimed to protect or regulate the environment,

[59] As to the Appellant's attempt in this context to rely on the decision in *Austin* and contend that the facts should determine whether the claim falls within the scope of art.9(3), see, in particular, §29-30 and §56 above.

whereas the 1991 Act had no such purpose. Nor was she correct to suggest that the contrary approach would "*depriv[e] Art.9(3) of its broad effect, which is well understood*": §12. It appears to be common ground this is not a workable test for whether art.9(3) applies: AWC, §19(b). In any event, for the reasons given above, the principled limitations on the scope of art.9(3) cannot be circumvented by appeals of this kind to its broad scope, and art.9(3) has its intended effect on the Respondents' case.

(4) The Appellant's case as to why Thornton J was correct (AWC, §61), on analysis, amounts to nothing more than an assertion that a claim that any decision-maker who takes into account environmental considerations (either voluntarily or pursuant to a policy to do so), and allegedly errs in law in their consideration of environmental matters falls within the scope of art.9(3). It should be rejected for the reasons given above.

102. **Sixth**, there will be cases in which public authorities (particularly Ministers of the Crown) act otherwise than under powers conferred by statute, including under the prerogative. If it is alleged an authority exercising a non-statutory power contravened statute, whether the claim falls within art.9(3) will turn on whether the statute is a provision of national law relating to the environment. It may, however, be alleged that the authority contravened a public law principle in the discharge of non-statutory functions. This class of case does not arise for decision in the present appeal, and it is unnecessary to address it in detail. Given, however, that prerogative powers cannot be said to have been conferred for environmental purposes or to form part of national law relating to the environment, it is highly unlikely that such a case could fall within art.9(3).[60] For example, had the Appellant challenged the Government's decision to ratify the UK-Australia FTA on public law grounds similar to those advanced in this case, that would not have disclosed an allegation of a contravention of a provision of national law relating to the environment.[61]

103. **Seventh**, art.9(3) also applies to private law as well as public law claims. Where a private person or public authority is alleged to have contravened a rule of private law contained in statute, the application of art.9(3) will turn on whether the statute is a provision of national law relating to the environment. The correct approach where a defendant is alleged to

[60] See also *R (Royal Mint Court Residents' Association) v Secretary of State for Housing, Communities and Local Government* [2026] EWHC 904 (Admin) *per* Lieven J at §§18-21, which concerned a challenge to a decision of the Home Secretary to provide an extensive range of mitigation measures in relation to the development of a foreign embassy in the interests of national security. The Judge held the claim fell outside the scope of art.9(3).
[61] No such challenge was brought and it would not have been justiciable if it had.

breached non-statutory rules of private law does not arise for decision in this case. In principle, the test must be whether the purpose of the relevant rule is to protect or otherwise regulate the environment. On this basis, the holding of the Court of Appeal in *Austin* to the effect that claims for private nuisance are capable of forming part of national law relating to the environment is readily explicable. As noted at §§55-56 above, it is unnecessary to consider the correctness of other aspects of the reasoning in that case, which should not (in any event) be applied to public law claims.

(ii) The application of the relevant principles in this case

104. The Court of Appeal was correct to hold that the Appellant's claim for judicial review did not fall within the scope of art.9(3) of the Aarhus Convention.

105. **First**, for the reasons set out in Section B above, Part 1 of the 2018 Act is not concerned with the environment, its protection or regulation. It is a statute providing for an indirect tax of general application (*viz.* import duty). Part 1 of the 2018 Act does not, therefore, constitute "*provisions of national law relating to the environment*" within the meaning of art.9(3) of the Aarhus Convention, even if subordinate legislation made under it (such as the 2023 Regulations) may have consequential effects on economic activity, and thus on GHG emissions, with an incidental impact upon the environment.

106. The Appellant's case is that Part 1 of the 2018 Act can be characterised as provisions of national relating to the environment because "*a responsible decision-maker may well elect to take environmental matters into account*" when discharging its statutory functions under Part 1: AWC, §81. This illustrates the exorbitant scope of its approach. On its case, the only statutory schemes which could not constitute national law relating to the environment are those which expressly or impliedly preclude environmental considerations being considered. As such, almost any broad statutory power in the economic sphere (including powers to levy taxes or to provide financial assistance to industry)[62] would fall within art.9(3), provided the grounds of the claim in some way related to the environment. There is nothing to indicate this was intended by the parties to the Aarhus Convention, who did not provide for a test of whether the contravention relates to the environment.

107. **Second**, Grounds 1-2 of the Appellant's claim raise allegations that the Respondents, when making the 2023 Regulations, exercised their powers under Part 1 of the 2018 Act in

[62] See, *e.g.*, the Industrial Development Act 1982.

breach of a number of public law principles, and so acted outside the scope of the powers conferred upon them by ss.9 and 11 of the 2018 Act. Neither provision is (even arguably) national law relating to the environment. Accordingly, an allegation that the Respondents exercised their powers under these provisions in breach of public law principles is not an allegation of a contravention of national law relating to the environment, notwithstanding that the subject matter of the grounds is environmental in a general sense, and environmental considerations were voluntarily taken into account in the decision under challenge.

108. The Appellant also contends that Grounds 1-2 raise allegations of contraventions of national law relating to the environment, because, on its case, the Respondents were required to consider environmental matters when making the 2023 Regulations as a result of a policy to do so: AWC, §75(b), fn66, fn73. This is insufficient to amount to an allegation of a contravention of national law relating to the environment for the reasons given at §99 above. In any event, a policy to publish an impact assessment covering the impacts of an FTA (whether these be social, economic or environmental) is not a policy for the protection of the environment.

109. In any event, the Respondents deny that the supposed policies on which the Appellant relies had any application to the decision to make the 2023 Regulations (as opposed to unchallenged decisions made in exercise of the Government's prerogative powers). That issue will fall to be determined at the substantive hearing. As such, if the Appellant's case were accepted, the scope of art.9(3) would not be determined by the nature and purpose of the relevant provisions of national law in the abstract (as required), but rather the (contested) content of the Appellant's case as to the meaning of certain statements made by the Government. That is not the right approach. This case is therefore *a fortiori Friends of the Earth* and the *EIB case*, where there was no issue that regard had to be had to the relevant policies when the funding decisions under challenge were made.

110. **Third**, Ground 3 alleges a breach of s.28(1) of the 2018 Act, in conjunction with art.4(1)(f) of the UNFCCC.

(1) As the Court of Appeal held, Parliament has not given any indication that the purpose of s.28, as opposed to any other provisions of Part 1, is to protect or regulate the environment. It is an entirely general duty to have regard to international arrangements to which the UK is party relevant to the function being exercised. It is thus "*the same as any general, statutory obligation to have regard to relevant considerations*" (CA

Judgment, §145), as confirmed by s.15(1)(b) of the 2018 Act. As set out at §98 above, such a duty is not a provision of national law relating to the environment, even if, on the facts, it requires an environmental arrangement to be taken into account.

(2) The Appellant contends that Parliament must have been aware that "*a very large corpus of international environmental treaties and arrangements have a fundamental bearing on the domestic implementation of trade arrangements*": AWC, §75(a). That is beside the point, because Part 1 of the 2018 Act does not confer any general power to implement trade arrangements. It confers specific powers to make provision in relation to import duty, including to give effect to preferential tariff treatment accorded under FTAs. The international agreements to which the Appellant refers, while on occasion relevant to implementing trade agreements, have little if any bearing on the exercise of the particular powers conferred by Part 1 of the 2018 Act at issue in this case, and the Appellant makes no serious attempt to explain how they are relevant to setting import duty. The fact that Parliament did not consider s.28(1) would typically require regard to be had to international environmental agreements is supported by §130 of the Explanatory Notes, which gives "*agreements with the WTO*" as the sole example of arrangements that might fall to be taken into account under s.28(1).

(3) The Appellant also relies on a number of statements (whose effect is disputed) by the previous Government and references in the UK-Australia FTA to the need to address climate change (AWC, §75(b)) in support of its case (AWC, §76) that Parliament intended environmental considerations to be taken into account. This further argument is hopeless. The statements in question all significantly post-date the enactment of s.28 of the 2018 Act, and none (even arguably) has anything to do with s.28. These statements are, at most, relevant to the Appellant's separate argument that the Respondents had a policy to take into account environmental considerations before making the 2023 Regulations (see AWC, §79).

(4) The fact that the purpose of s.28(1) is not to protect or regulate the environment is reinforced by the fact that the duty is to "*have regard*" to the arrangements in question. There is no duty to give effect to them, and the authority may give them such weight (or none) as it considers appropriate in the exercise of its discretion: *R (Friends of the Earth) v Secretary of State for Transport* [2021] 2 All ER 967 *per* Lord Hodge & Lord Sales at §121. As the Court of Appeal held, the object of the duty is "*[s]imply to ensure that the*

decision-maker is aware of, or advised of, such arrangements": CA Judgment, §146. That is consistent with the decision of Cockerill J in *Western Sahara Campaign UK v Secretary of State for International Trade* [2022] EWHC 3108 (Admin), to the effect that s.28(1) is a "*good housekeeping*" provision: §146.[63] The Appellant's criticisms of the Court of Appeal's reasoning (AWC, §77) amounts to no more than an assertion that any entirely general duty to have regard to relevant considerations constitutes national law relating to the environment. That is wrong for the reasons given above.

(5) The Court of Appeal was thus correct to hold that it was "*impossible*" to characterise s.28(1), in conjunction with "*any potential application to environmental arrangements*", as a legal provision for the protection or regulation of the environment: CA Judgment, §146. In any event, as noted above, the Respondents will deny at the substantive hearing that s.28(1) required them to take into account art.4(1)(f) of the UNFCCC in making the 2023 Regulations. In those circumstances, to hold that s.28(1), in conjunction with art.4(1)(f) of the UNFCCC, amounts to a national law relating to the environment would mean that the scope of art.9(3) would not be determined by the nature and purpose of the relevant provisions of national law in the abstract (as the parties to the Aarhus Convention intended), but rather the (contested) content of the Appellant's case as to the meaning and effect of s.28(1) on the facts of this case. The Appellant concedes more than once that its contention that s.28(1) of the 2018 Act, read with art.4(1)(f) of the UNFCCC, is a national law relating to the environment depends on its case under Ground 3 succeeding in due course: AWC, §2(a), §74, §82. That is a telling confirmation that its proposed construction of art.9(3) is wrong.

(6) It is, in any event, important to take a realistic approach to the nature of the Appellant's case under Ground 3, notwithstanding the way in which it is ostensibly framed. As the Court of Appeal observed, all art.4(1)(f) of the UNFCCC contains is a high-level requirement to take climate change considerations into account in relevant social, economic and environmental policies and actions and to employ appropriate methods, such as impact assessments, with a view to minimising *inter alia* adverse effects on the environment. It leaves it for the decision-maker to decide how that is to be done. In this

[63] In *Western Sahara*, Cockerill J held that s.28 does not require a "*general sweep of all international law*", but rather a "*focussed exercise*", with the exercise of a particular power at its centre, with the aim of ensuring that "*a new treaty or arrangement being given effect to in law does not cut across an old one*": §146. She went on to observe that where a trade agreement is implemented, therefore, it was "*hard to see*" what kinds of international arrangements it would be necessary to have regard to other than the trade agreement being implemented: §148.

case, there "*is no doubt that the Secretary of State and HM Treasury did take climate change considerations into account when deciding to make the 2023 Regulations. The issue here is about the way in which that was done*": CA Judgment, §146. Thus, even on a preliminary analysis, it is clear that Ground 3 raises no real issue about s.28(1) or article 4(1)(f) of the UNFCCC at all. The real issue is whether the Respondents' discharged their functions under ss.9 & 11 of the 2018 Act (rather than s.28) consistently with public law principles. The Appellant practically concedes this, when it states that the issue is whether there was "*irrational consideration of climate change*" (AWC, §78), something which has nothing to do with taking into account climate change considerations, which is all that s.28(1) even arguably requires.

111. In those circumstances, the Court of Appeal did not err in holding that none of the Appellant's grounds alleged a contravention of national law relating to the environment.

(iii) The position if not all of the Appellant's grounds fall within the scope of art.9(3)

112. The application of Section IX of CPR Part 46 where one or more, but not all grounds of review fall within art.9(3) did not arise for decision in the Courts below, because (i) Lang J held that all of the Appellant's grounds were within the scope of art.9(3) (AC Judgment, §§12-13); and (ii) the Court of Appeal held that none were (CA Judgment, §148). It is unnecessary for this Court to consider the question, because if it held that any of the Appellant's grounds were within the scope of art.9(3), the Respondents would, pragmatically and in the interests of avoiding further satellite litigation on this issue, agree that the Aarhus costs caps should apply to the entire claim.

113. The only case in which this issue has been substantively considered is *Lewis*, where Eyre J held that it was sufficient, for the Aarhus costs limits to apply to the entire claim, for a single ground to fall within the scope of art.9(3): see §§34-36. This decision did not turn on the terms of the UK's obligations under the Aarhus Convention, but on the terms of what is now Section IX of CPR Part 46. For the avoidance of doubt, it is not common ground that this part of the decision in *Lewis* is correct, or "*reflects the approach of... the courts in this jurisdiction*" generally or "*national practice*": AWC, §71, §82.[64] In particular, there is nothing in the wording of Section IX of CPR Part 46 which indicates that the Rules Committee

[64] Contrary to what the Appellant implies (AWC, fn55), the issue does not appear to have been argued in *Green Lane Association v Central Bedfordshire Council* (fn57 above), where the Deputy Judge considered all of the grounds with one "*possible exception*" fell within art.9(3): see §43.

intended to "*gold-plate*" the UK's obligations under the Aarhus Convention.[65] Eyre J's approach would also have absurd results. For example, an entire claim would be subject to the Aarhus costs limits even where all of the grounds permitted to proceed to a substantive hearing did not fall within the scope of art.9(1)-(3), but a ground on which permission was refused did, provided that ground was brought in good faith.

E. CONCLUSION AND REASONS

114. The Respondents invite the Court to dismiss the Appellant's appeal and to affirm the Order of the Court of Appeal of 13 May 2025 for the following among other—

REASONS

(1) On its proper interpretation, art.9(3) of the Aarhus Convention applies to proceedings raising allegations of contraventions of specific provisions of national law concerned with the environment, its protection or regulation. It does not apply simply because a claim, or a ground on which it is brought, concerns the environment, or because the conduct under challenge has an effect on, or some connection with the environment.

(2) Part 1 of the 2018 Act, under which a duty of customs is charged on imported goods, does not contain any provisions of national law relating to the environment, because, even if the exercise of powers conferred by that Part may have an incidental impact on the environment and environmental matters may be taken into account, the legislative purpose is not to protect or regulate the environment.

(3) Public law principles do not, in themselves, constitute provisions of national law relating to the environment. Whether a public law principle constitutes a national law relating to the environment depends on whether the statutory provision to whose exercise the principle attaches itself forms part of national law relating to the environment. As such, Grounds 1-2 of the Appellant's claim, which raise allegations of breach of public law principles in the exercise of powers conferred by ss.9 and 11 of the 2018 Act, do not raise an allegation of a contravention of provisions of national law relating to the environment.

[65] See also *North East Pylon Pressure Campaign v An Bord Pleanala* (fn9 above) at §44; AWC, fn55.

(4) Where a statutory scheme does not contain provisions of national law relating to the environment, a general duty in it to have regard to relevant considerations (whether as a result of public law principles or by virtue of a particular statutory provision) does not constitute a provision of national law relating to the environment either. As such, Ground 3 of the Appellant's claim for judicial review, which raises an allegation of breach of s.28(1) of the 2018 Act by virtue of a failure to take into account art.4(1)(f) of the UNFCCC, does not raise an allegation of a contravention of a provision of national law relating to the environment. In any event, the only issue in fact liable to arise under Ground 3 is whether the Respondents contravened public law principles in the exercise of their functions under ss.9 & 11 of the 2018 Act.

SIR JAMES EADIE KC
MALCOLM BIRDLING KC
RICHARD HOWELL
ADAM RILEY

30th April 2026