ERCS response to the Scottish Civil Justice Council consultation on extending the availability of Protective Expenses Orders 6 November 2025

About ERCS

The Environmental Rights Centre for Scotland is an environmental law charity. We advocate for policy and law reform to improve environmental rights and ensure compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Introduction

We support some of the changes proposed by the Scottish Civil Justice Council ('SCJC') in its 15 August 2025 consultation on extending the availability of protective expenses orders.

We welcome that the consultation's policy objectives include "To improve access to justice" and "To improve Aarhus compliance".[1]

However, in the context of Scotland's longstanding non-compliance with the Aarhus Convention and the recent October 2025 report of the Aarhus Convention Compliance Committee ('ACCC') which confirms that non-compliance is ongoing,[2] the goal should be to achieve full compliance, not to improve compliance.

It is also important to note the SCJC's role in Scotland's longstanding non-compliance. The SCJC has produced three sets of amendments to the PEO rules. The PEO rules were amended in 2015, 2018 and 2024.[3] After each amendment, the PEO rules have been found by the ACCC to be non-compliant with the Aarhus Convention.[4]

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[1] Page four of the consultation document.
[2] ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (2025).
[3] Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408), Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018 (SSI 2018/348) and Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 (SSI 2024/196).
[4] The 2015 amendment to the PEO rules was reviewed by the ACCC in 2017. See ACCC, 'Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (2017) ECE/MP.PP/2017/46, paragraphs 61 to 77. The 2018 amendment was reviewed by the ACCC in 2021. See ACCC, 'Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I' (2021) ECE/MP.PP/2021/59, paragraphs 81 to 113. The 2024 amendment was reviewed by the ACCC in 2025. See ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (2025), paragraphs 143 to 213.

We encourage the SCJC to reflect on that history and its contribution to Scotland's longstanding non-compliance.

We ask the SCJC to adopt the aim of achieving compliance with the Aarhus Convention when it considers its next steps following this consultation.

We are concerned that this consultation proposes to transfer several of the features of the PEO regime from the Court of Session which have long been known to be non-compliant with the Aarhus Convention into the Sheriff Court and Sheriff Appeal Court rules. That approach will not achieve compliance.

We ask the SCJC to use this consultation exercise to fully resolve this matter, so that this consultation exercise does not require repeated in the future. We respectfully remind the SCJC that if this consultation does not achieve compliance, the SCJC is likely to face more public criticism, further adverse press coverage and continued adverse findings from the ACCC.

Question 1 – Do you agree that the ability to seek a PEO should now be extended to the sheriff court for the summary applications that can arise under the Environmental Protection Act 1990? If not why not?

We agree that the ability to seek a PEO should be extended to proceedings under Sections 82(1) and 91(1) of the Environmental Protection Act 1990.

Proceedings under those provisions are within the scope of Article 9(3) of the Aarhus Convention because they are judicial procedures to challenge acts and omissions which contravene provisions of national laws relating to the environment. Proceedings under those provisions must therefore be not prohibitively expensive in order to comply with Article 9(4) of the Aarhus Convention.

The introduction of a PEO application process may help ensure such proceedings are not prohibitively expensive.

Question 2 – Do you have any concerns or suggested changes to the wording of the proposed cost protection rules as set out in the new Part LV of the Summary Application Rules?

3.55.3 Applications for protective expenses orders

We recommend that draft rule 3.55.3.(4)(a)(ii) (the requirement to disclose the terms of representation for a PEO applicant) is deleted.

Please see our response to question 8 below for an explanation as to why this should be deleted.

We recommend that draft rule 3.55.3.(4)(a)(iv) (the requirement for a PEO applicant to estimate their liability for adverse expenses) is deleted.

Please see our response to question 9 below for an explanation as to why this should be deleted.

3.55.5 Terms of protective expenses orders

Draft rule 3.55.5 currently sets out that, if a PEO is awarded, it is to include a default £5,000 cap on a PEO applicant's adverse liability and a £30,000 'cross-cap' which limits an applicant's ability to recover their expenses from the respondent. These caps can be varied up or down 'on cause shown'.

Draft rule 3.55.5(1)(a) should be changed to the effect that the £5,000 cap can only be decreased.

Draft rule 3.55.5(1)(b) should be deleted so that PEOs do not impose a limit on the ability of a PEO applicant to recover their expenses from their opponent.

Please see our response to question 7 below for a justification for these recommendations.

3.55.6 Expenses of application

Draft rule 3.55.6 indicates that a PEO applicant will be liable for up to £500 in expenses so far as occasioned by their PEO application, and that limit may be increased "on exceptional cause shown".

We recommend that draft rule 3.55.6 be changed so that a PEO applicant has no liability for any expenses relating to their PEO application.

£500 is an arbitrary sum which will be prohibitively expensive for some PEO applicants. There is no explanation in the consultation document as to how the £500 figure was arrived at. There is no evidence that the SCJC has considered its affordability for litigants.

The ability to increase the £500 liability limit on exceptional cause shown will introduce unnecessary uncertainty into the PEO application process. If the £500 cap on liability is retained, the wording "other than on exceptional cause shown" should be deleted from draft rule 3.55.6(2).

3.55.7 Expenses of interveners

Draft rule 3.55.7 indicates that a PEO applicant will not be liable to pay expenses to interveners, except on cause shown.

We recommend that the wording "except on cause shown" is deleted from draft rule 3.55.7(1) and that draft rule 3.55.7(2) is deleted. This would ensure that a PEO applicant faces no liability to pay expenses to interveners.

Please see the comments under heading 10.2 below for a justification for these recommendations.

Question 3 – Other than summary applications; are there other types of actions raised within the sheriff court where you think lodging a motion for an Environmental PEO should be an option? If so, please provide examples?

Private nuisance actions are within the scope of Article 9 of the Aarhus Convention. Their exclusion from the PEO rules is one of the reasons why the PEO rules are non-compliant.[5]

To achieve compliance with the Aarhus Convention, we recommend that the ability to apply for a PEO is extended to private nuisance litigation and to any other litigation which falls within the remit of Article 9 (such as summary applications made under Section 28 of the Land Reform (Scotland) Act 2003 in relation to the extent of access rights and rights of way).

We recommend that the SCJC carries out or commissions research in order to identify further actions within the scope of Article 9.

Question 4 – Do you agree that the ability to seek a PEO afresh, or to have one carried forward, should be extended to the Sheriff Appeal Court? If not why not?

We agree that the ability to seek a PEO afresh, or to have one carried forward, should be extended to the Sheriff Appeal Court.

The ACCC has explained that, "When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner".[6]

Appeals to the Sheriff Appeal Court can fall under Articles 9(3) and 9(4) of the Aarhus Convention and the extension of the PEO regime is necessary to ensure compliance with the Convention.

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[5] ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (2025), paragraphs 148 to 151.
[6] ACCC, 'Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland', (2011) ECE/MP.PP/C.1/2010/6/Add.3, paragraph 128.

Question 5 – Do you have any concerns or suggested changes to the wording of the proposed rules as set out in the new SAC Chapter 28A?

The problems we identified above regarding the draft Summary Application Rules are also found in the new SAC Chapter 28A. Our response below mirrors the response provided to Question 2.

28A.3. Applications for protective expenses orders

Draft rule 28A.3.(3)(a)(ii) (the requirement to disclose the terms of representation for a PEO applicant) should be deleted.

Please see our response to question 8 below for an explanation as to why this should be deleted.

Draft rule 28A.3.(3)(a)(iv) (the requirement for a PEO applicant to estimate their liability for adverse expenses) should be deleted.

Please see our response to question 9 below for an explanation as to why this should be deleted.

28A.5. Terms of protective expenses orders

Draft rule 28A.5 currently sets out that, if a PEO is awarded, it is to include a default £5,000 cap on a PEO applicant's adverse liability and a £30,000 'cross-cap' which limits an applicant's ability to recover their expenses from the respondent. These caps can be varied up or down 'on cause shown'.

Draft rule 28A.5(1)(a) should be changed to the effect that the £5,000 cap can only be decreased.

Draft rule 28A.5(1)(b) should be deleted so that PEOs do not impose a limit on the ability of a PEO applicant to recover their expenses from their opponent.

Please see our response to question 7 below for a justification for these recommendations.

28A.6. Expenses of application

Draft rule 28A.6 indicates that a PEO applicant will be liable for up to £500 in expenses so far as occasioned by their PEO application, and that limit may be increased "on exceptional cause shown".

We recommend that draft rule 28A.6 be changed so that a PEO applicant has no liability for any expenses relating to their application.

There is no explanation in the consultation document as to how the £500 figure was arrived at. £500 is an arbitrary sum which may be prohibitively expensive for some PEO applicants. There is no evidence that the SCJC has considered its affordability for litigants.

The ability to increase the £500 liability limit "on exceptional cause shown" will introduce unnecessary uncertainty into the PEO application process. If the £500 cap on liability is retained, the wording "other than on exceptional cause shown" should be deleted from draft rule 28A.6(2).

28A.7 - Expenses of interveners

Draft rule 28A.7 indicates that a PEO applicant will not be liable to pay expenses to interveners, except on cause shown.

We recommend that the wording "except on cause shown" is deleted from draft rule 28A.7(1) and that draft rule draft rule 28A.7(2) is deleted. This would ensure that a PEO applicant faces no liability to pay expenses to interveners.

Please see the comments under heading 10.2 below for a justification for these recommendations.

Question 6 – Do you agree that the current ability to seek a PEO within the Court of Session should also be available within a multiparty action initiated under Group Procedure? If not why not?

We agree that the ability to seek a PEO in the Court of Session should be extended within multiparty actions initiated under group procedure.

Question 7– Do you have a view on whether rule 58A.7 should continue to support the court increasing the caps upwards by exception, or whether that reference to "on cause shown" should be deleted so that this rule reverts to using "fixed maximum sums"?

Rule 58A.7 currently sets out that, if a PEO is awarded, it is to include a default £5,000 cap on a PEO applicant's adverse liability and a £30,000 'cross-cap' which limits an applicant's ability to recover their expenses from the respondent.

The cap and the cross-cap can be varied up or down 'on cause shown'.

In its recent report the ACCC found that, with respect to the phrase "on cause shown" in Rule 58A.7:

> ...this phrase remains vague and may have a chilling effect on claimants. The Committee makes clear that the core issue remains that the PEO rules allow for the costs cap for claimants to be varied upwards.[7]

We have two recommendations with respect to Rule 58A.7.

Rule 58A.7.(1)(a) – make the £5,000 cap a fixed maximum sum

First, Rule 58.A.7.(1)(a) should be amended so that the £5,000 cap is a fixed maximum sum which can be reduced on cause shown.

The £5,000 cap on a PEO applicant's adverse liability should only be able to be decreased. The ACCC has found that £5,000 should be the maximum amount of costs payable by a claimant in proceedings under article 9 of the Convention, with the possibility for a court to lower that amount if the circumstances of the case make it reasonable to do so.[8]

Rule 58.A.7.(1)(b) – remove the £30,000 cross-cap

Second, Rule 58.A.7.(1)(b) should be deleted so that PEOs do not impose a limit on the ability of a PEO applicant to recover their expenses from their opponent.

Cross-caps act as a barrier against PEO applicants obtaining quality legal representation and are problematic for maintaining equality of arms in litigation. The £30,000 default cross-cap limit is arbitrary. Many cases require expenditure above this amount for a petitioner to be able to secure effective legal representation.

The ACCC has found that reciprocal cost caps raise equality of arms issues in litigation.[9]

Cross-caps lack any legal basis in the Aarhus Convention. The ACCC has found that the requirements of prohibitive expense and fairness apply to the claimant, not the respondent.[10]

The reasons for introducing cross-caps were to 'level the playing field' and 'avoid a petitioner running up exorbitant litigation costs'.[11] This reasoning was fundamentally flawed.

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[7] ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (October 2025), paragraph 158.
[8] Ibid, paragraph 156.
[9] ACCC, 'Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland', (2011) ECE/MP.PP/C.1/2010/6/Add.3, paragraph 132.
[10] Ibid, paragraph 135.
[11] Scottish Government, 'Legal Challenges to Decisions by Public Authorities under the Public Participation Directive 2003/35/EC: A Consultation' (2012), paragraphs 37 and 38.

The playing field in environmental litigation is uneven to the detriment of Aarhus-type litigants. PEOs are necessary to address the inequality of resources which exists between parties in environmental litigation. The notion of an uneven playing field which exists between public bodies and environmental litigants, to the detriment of public bodies, is unsupported by evidence.

Granting a PEO without a cross-cap does not provide *carte blanche* for a litigant to incur unreasonable and excessive costs. Civil litigants in Scotland are subject to the ordinary rules and principles governing the recovery of expenses in litigation. The conduct of the parties during litigation is one of the factors which a court may take into account when assessing the parties' liability for expenses at the conclusion of litigation. It is very unlikely that any unnecessary or exorbitant expenses incurred by one of the parties would be recoverable at the conclusion of litigation.

Comments in the consultation document

The 'hypothetical example' provided at paragraph 50 of the consultation document of a situation where a PEO cap above £5,000 could be appropriate demonstrates an important misunderstanding around the financial liabilities of a PEO applicant. It states that:

> *Hypothetically - if a public fundraising exercise had been undertaken and only £25,000 of those funds remained when £30,000 (or more) was required to get that case to a conclusion then the "interests of justice" could be better served by the court increasing the normal £5,000 cap to £30,000 as that would see the £25,000 of funds raised from the public used for its intended purpose; and leave the party exposed to a maximum of £5,000 if they lost.*

This example fails to consider the liability of a PEO applicant to pay their own legal representatives. In the above example, the PEO applicant would have no funds left to pay those costs. The PEO applicant in that example would face liability to pay £5,000 in adverse expenses, plus their own legal fees. It is very likely in that situation that the litigation would be prohibitively expensive for the PEO applicant.

We have two comments regarding the statement at paragraph 52 of the consultation document that, "The adverse consequence of removing that ability to shift a cap upwards is that society then expects the party that was "successful in expenses" to simply absorb that monetary shortfall between that £5,000 cap and the calculation of the judicial expenses they might otherwise have been awarded".

First, the absorption of any such shortfalls seems unlikely to cause significant problems for most public bodies and such shortfalls are reasonable in light of the need to ensure that the PEO system is compliant with the requirements of the Aarhus Convention.

Second, the ACCC has found that ""fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant".[12]

Question 8 - Do you have a view on whether rule 58A.5 should continue to require applicants to provide information on the terms on which they are legally represented, or whether section (3) (a) (ii) should be withdrawn?

We recommend that Rule 58A.5(3)(a)(ii) is deleted.

Disclosure of the terms of a PEO applicant's representation should not be required as part of a PEO application.

The ACCC has stated that:

> *The Committee does not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid- to long-term.*[13]

We have four comments regarding the explanation at paragraph 56 of the consultation document that:

> *...the existence of pro bono representation is seen as being a positive factor as it conveys that a lawyer has sufficient confidence in the merits of a case to voluntarily provide their own time. Whilst that informs the court on one factor it needs to consider it was not something that would be determinative of whether or not that PEO was granted.*

First, if the above statement is correct, it indicates that Rule 58A.5(3)(a)(ii) is a means of allowing a Court to assess the merits of the case. However, the merits of a case are already considered by the Court when determining a PEO application under Rule 58A.1(3)(b)(ii) (which requires consideration of whether a PEO applicant has reasonable prospects of success). This suggests Rule 58A.5(3)(a)(ii) is unnecessary, because it effectively duplicates Rule 58A.1(3)(b)(ii).

Second, the statement in the consultation document that information about the terms of a PEO applicant's representation is, "not something that would be determinative of whether or

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[12] ACCC, 'Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland', (2011) ECE/MP.PP/C.1/2010/6/Add.3, paragraph 135.

[13] ACCC, 'Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I', (2021) ECE/MP.PP/2021/59, paragraph 100.

not that PEO was granted", is further evidence that Rule 58A.5(3)(a)(ii) is an unnecessary requirement which should be removed.

Third, the claim that pro-bono representation is indicative of the strength of the legal claim is not evidenced. The decision of a lawyer to provide legal representation on a pro-bono basis may involve many factors outwith the merits of the case such as the financial position of their client, their relationship to their client and the legal topics of interest to that lawyer.

Fourth, lawyers should not be expected to work for free in cases of important public interest. Goodwill and charity cannot provide comprehensive access to justice, as required by the Convention.

Question 9 - Do you have a view on whether rule 58A.5 should continue to require applicants to provide their own estimate of the likely expenses that could be awarded against them, or whether section (3) (a) (iv) should be withdrawn?

Rule 58A.5(3)(a)(iv) should be deleted.

The ACCC has identified Rule 58A.5(3)(a)(iv) as a non-compliant feature of the PEO rules.[14] The ACCC recently explained that:

> *…applicants may underestimate respondents' expenses and that a PEO may be denied on the basis that the original estimate is deemed not prohibitively expensive, yet actual expenses may increase beyond initial estimates as the case progresses. As a result, the objective of ensuring that access to justice is not prohibitively expensive, as required under the Convention, could be undermined.*[15]

Requiring an applicant to provide their own estimate of their likely adverse expenses liability makes the application process more burdensome. Making an accurate estimate is difficult and requires significant time and preparation. It will likely incur additional legal fees for PEO applicants.

The proposal to reword Rule 58A.5(3)(a)(iv) in a manner which requires the respondent to provide the estimate carries a similar risk of underestimation.

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[14] ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (2025), paragraphs 174-177.
[15] Ibid, paragraph 176.

Question 10 – Do you have any other suggested improvements regarding the PEO Rules, over and above those already raised directly with the Council or indirectly via the compliance committee?

10.1 Replace the PEO regime with qualified one-way cost shifting

We recommend that the PEO regime in the Court of Session and the proposed PEO regime for the sheriff courts and Sheriff Appeal Court are replaced entirely with a system of qualified one-way cost shifting ('QOCS') for litigation which falls with the scope of Article 9 of the Aarhus Convention.

The PEO regime fails to ensure that environmental litigation is not prohibitively expensive. Even with a PEO, legal proceedings remain unaffordable for many individuals and NGOs.

QOCS were introduced for personal injury litigation in Scotland and could be introduced in environmental litigation. The arguments accepted by the Scottish Government for the introduction of QOCS in personal injury cases apply also to most Aarhus cases, namely the imbalance of power and resources between the parties.

As noted in the Jackson Review, QOCS puts parties who are in an asymmetric relationship (such as the parties in almost all Aarhus-type litigation) onto a more equal footing, ensuring that litigants are not denied access to justice because of the prospect of potential liability.[16]

If QOCS were introduced in environmental judicial review proceedings, for example, it would mean that in most cases a petitioner would not be liable for the expenses of any other parties if the judicial review was unsuccessful. However, the petitioner would still be able to claim their expenses from the respondent if the petition was successful.

QOCS would be much simpler than the current and proposed PEO regimes in the court rules. The introduction of QOCS would remove the need for PEO applications. PEO applications are inherently expensive and time-consuming – contrary to their stated aim of improving access to justice.

The introduction of QOCS would avoid satellite litigation over disputed PEO applications.

The introduction of QOCS would conserve judicial resources. If the PEO regime was replaced with QOCS then the courts would no longer have to consider and determine PEO applications, nor would they have to deal with any disputes arising from PEO applications.

10.2 Remove the uncertainty over liability in relation to interveners

Rule 58A.10 of the Court of Session states that, "Expenses are not to be awarded in favour of or against a relevant party, except on cause shown".

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[16] Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (2009), p89.

In its recent report, the ACCC found that:

> *…the Committee notes with concern that the exception "on cause shown" is vague and undefined. The lack of clarity regarding the cases in which PEO applicants could be liable for interveners' costs, creates uncertainty regarding costs exposure. Such uncertainty may have a deterrent effect on claimants and discourage them from seeking access to justice.*[17]

In order to ensure compliance with the Aarhus Convention, the wording "except on cause shown" must be deleted from Rule 58A.10.

10.3 Ensure that PEOs carry over in appeals to the UK Supreme Court

In its 15 April 2025 opinion in *Wildcat Haven Community Interest Company v The Scottish Ministers*, the Inner House decided that a PEO granted in a petition for judicial review did not cover an application for permission to appeal to the UK Supreme Court ('UKSC').[18]

As explained above, the ACCC has found that when considering compliance with Article 9(4), it considers the cost system "as a whole and in a systemic manner".[19]

The PEO rules should be amended to ensure that PEOs carry over to applications for permission to appeal to the UKSC by default.

10.4 Introduce a standardised PEO application form

A standardised PEO application form should be adopted.

This would have several benefits. It would assist applicants to fully understand the information and documents which need provided as part of a PEO application, as well as the manner in which PEO applications are made.

A standardised PEO application form would assist legal representatives. It would likely be of particular benefit to any PEO applicants without legal representation.

A standardised PEO application form would help conserve judicial resources. It would help ensure the courts receive all of the necessary information they need to determine PEO applications efficiently.

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[17] ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (2025), paragraph 187.
[18] *Wildcat Haven Community Interest Company v The Scottish Ministers* [2025] CSIH 10.
[19] ACCC, 'Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland', (2011) ECE/MP.PP/C.1/2010/6/Add.3, paragraph 128.

Question 11 – Do you agree with the rule change made that makes provision for confidentiality to be sought when lodging a motion for a PEO?

Question 12 – Do you agree with the rule change made that supports carrying a PEO over on appeal in the same manner regardless of who is appealing?

Question 13 – Do you agree it is useful for rule 58A.10 to replicate the information available from case precedent regarding intervener's expenses?

We broadly welcome the changes introduced by the SCJC in 2024.

The ACCC recently found that those changes were insufficient to achieve compliance with the Aarhus Convention.[20]

We ask that the SCJC uses this consultation exercise to fully resolve Scotland's longstanding failure to comply with the Aarhus Convention.

[20] ACCC, 'Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom' (2025), paras 143-213.