Law, integrity, due process, constructive dialogue and trust: Experiences from the Aarhus Convention Compliance Committee

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Dear Participants, dear community of the Escazú Agreement,

I am honoured to be invited to this Conference of the Parties, and share the experiences of the Aarhus Convention Compliance Committee when the ***Committee to Support Implementation and Compliance*** of the Escazú Agreement is to be elected. As a bit of background, I joined the Aarhus Convention Compliance Committee in 2005. In 2011, I became the Chair of the Committee, and I was then Chair for 10 years, until 2021.

Not only are the Escazú Agreement and the Aarhus Convention similar in many respects, and built on the same spirit of promoting participatory rights and access rights, protecting members of the public and environmental defenders, and promoting the rule of law in environmental matters. The Committees of the two treaties to review compliance and implementation also have many elements in common. I have followed the development of the Escazú Agreement from the very beginning, and I was asked to assist with comments and views in the drafting of what was to become COP Decision I/3 on the Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance, which I did.

Based on my experience in the Aarhus Convention, where I was also involved in the drafting of MOP Decision I/7 on the Compliance Committee, I think it is very good that community of the Escazú Agreement has not rushed with the details on the new Committee. While the Committee was established by the Agreement itself, the rules on its structure and function were adopted a few years later.

The situation was the same in the Aarhus Convention, and I think it was important to allow some time to establish the Committee, and also to let it

develop its working methods. This created mutual trust among the parties and also among active non-governmental organisations. At the outset, when the rules and procedures for the Aarhus Convention were negotiated, some states where concerned about an independent Committee, which would allow communications not only from parties but also from the public. As time went on, also the states that had not been overly enthusiastic in the beginning changed their views. And at the MOP 1 the Aarhus Convention the parties were comfortable and some enthusiastic with the idea of a compliance mechanism with the mandate of reviewing compliance on the basis of communications from the public. And so, the Committee was established.

I should congratulate the parties to the Escazú Agreement in particular for following this idea of not limiting the compliance mechanism to submissions by the parties. The trigger of the Committee's review by members of the public is fundamental to the practice, relevance and effectiveness of the treaty.

As of today, the Compliance Committee of the Aarhus Convention has about 200 registered cases, decided and pending. Of these cases, 197 are communications from the public, and 3 are submissions of parties. Of these 3 submissions, 2 are submissions by parties concerning another party, and 1 is a submission by a party concerning itself. In addition to this, the Committee has registered 4 requests for advice outside the scope of pending cases. Some parties also requested specific advice as part of the follow-up procedure when found non-compliant. So, of these approximately 200 cases, 197 are based on communications from the public. In other words, without communications from the public, the Committee would have had hardly anything to do – and, more importantly, the performance of the parties would have been far worse, and the issue of participatory rights and access rights in environmental matters would have been much less debated among stakeholders, including the public.

During my time as Chair, while strictly complying with Decision I/7, the Committee made significant developments in its practices and working methods. You can find a comprehensive explanation of the functions and working methods of the Committee in the document *Guide to the Aarhus Convention Compliance Committee*, agreed in 2019, available at the website of the Compliance Committee.

I think the parties to the Aarhus Convention and, importantly, to the Escazú Agreement have nothing to fear by the Compliance and Implementation

Committees. The Committees are not courts or bodies to settle disputes. They are bodies intended to promote compliance with and implementation of the treaties in a constructive and serious manner. I have also heard of worries that the Escazú Agreement could have a negative impact on investment, and I can assure you that this is not the case. There is no reason to worry about investments in this regard. We see no indication in Europe whatsoever, that the Aarhus Convention or the Compliance Committee have had any negative impact on investments. The Aarhus and Escazú treaties are about promoting the rule of law in environmental matters, and the corporate sector also wants to work with clear and predictable rules.

In sharing the lessons learned by the Aarhus Convention, I want to highlight 5 key elements for the structure and functions of the Committee:

The first is about **LAW**. As I said, the Compliance Committee is not a court. It is an independent and impartial body to promote compliance by reviewing the performance of the parties with a legally binding treaty. This is an exercise of international law. Therefore, it is important that the Committee acts in a responsible manner in all its activities. When interpreting the treaty as part of its review of implementation and compliance, it must do so "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," as set out in the Vienna Convention on the Law of Treaties. The Committee is there to promote performance in compliance with international obligations of the parties, to ensure participatory rights and access rights and to protect environmental defenders.

The second key element is **INTEGRITY**. To live up to its mandate, the Committee under the Escazú Agreement has to act with integrity. It must be independent and impartial. The Aarhus Convention Compliance Committee has always acted independently and with integrity. And it has not been biased vis-à-vis the parties or members of the public.

To act with integrity, the Committee must make sure that its members do not have any conflict of interest. During my time as Chair, we had quite a few cases where a Committee member had previously done some work, either for a government or a non-governmental organisation who was party in the case before the Committee. When that happened, the Committee member had to step down from that case and did not participate in any of the closed sessions

and deliberations of that case. The important issue here is not what the Committee member thinks herself or himself, but how it is perceived by the parties and the public at large. Nobody must think that a Committee member has a conflict of interest in a case. In some cases, when it was not clear whether the Committee member could be seen as having a conflict of interest in the case, maybe because of some work done many years ago, I asked the parties and also observers what they thought. If any party then thought the Committee member had a conflict of interest, she or he had to step down.

My third key element in the practice and working methods of the Committee is **DUE PROCESS**. By that, I mean essentially procedural fairness in the treatment of the parties and the review of compliance. While the Committee is not a court, here I think it is useful for the Committee to act in the same manner in the treatment of the parties. Yet, contrary to a court, as part of its review, the Committee is not limited to the views and information provided by the parties. In the fact-finding it is also useful to get information by observers.

In practice, due process means to treat those involved equally, act in a transparent and foreseeable way, so that the governments and the communicants are duly heard, and that their arguments and information are duly taken into account. Another point here, which was one of the most difficult issues for me as a Chair, was to try to complete cases swiftly without compromising on due process. The Committee members are not paid and do their work for the Committee on top of other tasks. Nevertheless, I think that my work as the Chair took at least 25 per cent of my regular working time, sometimes much more. The secretariat was always working effectively and with competence. Yet, it has limited resources in terms of staff, which also mattered for the time to complete reviews of cases. So, when the Committee receives many communications, it creates back-logs, and the Committee must find ways to deal with that. This is something that the Committee of the Escazú will need to consider.

I move on to my fourth key element, which is **CONSTRUCTIVE DIALOGUE**. The review processes in themselves involve exchanges of views and arguments, and as the Chair I thought the discussions on specific cases were part of an ongoing dialogue on what to expect from the parties to the Convention. This is also the case in the follow-up procedures, when parties have been found non-compliant and are to get in compliance with the treaty. In addition, and I see that this is also part of the working method of the Committee under the Escazú

Agreement, the Compliance Committee of the Aarhus Convention organised specific open dialogue sessions on important matters related to the implementation and compliance of the Convention. This could also refer to the working methods of the Committee itself.

As an example. For the first ten years or so, the Committee held open hearings in all cases found admissible. Later on, when the case-load became heavier, it was impossible to have hearings in all cases. Therefore, I proposed to the Committee and we discussed at length in open sessions with the parties and members of the public, that we should not have hearings in all cases, if the hearing is not a necessary element. This was finally agreed. Yet, it is fundamental to hear the views of the parties on this matter. If one party thinks a hearing is needed, the Committee usually accepts that and holds a hearing. Still, it should be for the Committee to decide on the matter. The development of the working methods of the Committee was done in a transparent and inclusive way, taking into account views of the parties and observers.

The open dialogue sessions bring me to my last point, which is **TRUST**. The Aarhus Convention and the Escazú Agreement are intended to achieve the overall objective of ensuring access to information, public participation and access to justice in environmental matters, and of protecting environmental defenders – and thus to contribute to the protection of the right of every person of present and future generations to live in a healthy environment. This is what everyone in the Aarhus and Escazú communities should strive for. To contribute to that end, it is also fundamental that the treaty bodies, like the Compliance Committees, actively work to promote trust: trust in their activities and trust in the review procedures.

The key matters that I have just highlighted help to do so. Acting in accordance with international law, ensuring integrity and due process, and engaging in dialogues with the parties promote trust. These are all essential elements to ensure the participatory and access rights of the public, to promote compliance by the parties, and thus to contribute to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.

Thank you!