Why the ESCAZU Agreement Matters: Environmental rights, Justice, and Public participation in the Caribbean

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court

University of the West Indies St Augustine Public Lecture: Why the ESCAZU Agreement Matters

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PUBLIC LECTURE

WHY THE ESCAZU AGREEMENT MATTERS:

Environmental rights, justice and public participation in the Caribbean

By

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Introduction

I have been asked to speak about why the Escazú Agreement matters to the Caribbean. Before attempting to do so it might be well to remind ourselves as to what the Agreement is and what it contains.

The Escazú Agreement

Escazú is a small town located on a hill about five miles from downtown San José, the capital of Costa Rica. This town was the place where, on 4th March 2018, the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and*

the Caribbean was adopted. The Escazú Agreement is the first binding treaty on environmental matters among the countries of Latin America and the Caribbean; it is the only treaty stemming from the Rio Conference on Sustainable Development 2012 (Rio+20); and it is the only treaty in the world to include specific provisions to protect environmental human rights defenders.

The process for negotiating the Agreement began at Rio+20 with the adoption of the *Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean*. Between 2012 and 2014 there were four preparatory meetings, and thereafter nine meetings of the Negotiating Committee. The Agreement was adopted at the Ninth Meeting in Escazu.

On 27 September 2018, in the context of the 73rd Session of the United Nations General Assembly in New York, the Agreement was opened for the signature by the 33 countries of Latin America and the Caribbean. To date, the Agreement has been signed by 22 countries 14 from Latin America and 8 from the Caribbean. Under Article 22, the Agreement requires the ratification by 11 countries to enter into force. To date it has been ratified by 5 countries: 2 from Latin America and 3 from the Caribbean. So, with a score line of 3-2 the Caribbean is clearly winning the ratification race.

Origin and Content of Agreement

The Escazú Agreement contains a Preamble, 26 Articles and one Annex. It is firmly established in the Preamble that the Agreement has its genesis in the famous Principle 10 of the Rio Declaration on Environment and Development 1992. Thus, the second Preambular Paragraph to the Agreement reads:

> "*Reaffirming Principle 10 of the 1992 Rio Declaration on Environment and Development, which establishes the following*:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Principle 10 thus laid the foundation for the three critical access rights that the Escazú Agreement was to build on some twenty-six years later. **Article 1** specifies that the objective of the Agreement is to guarantee the full and effective implementation in Latin America and the Caribbean of the three access rights. A related objective is to create and strengthen capacities and cooperation thus contributing to the ability of present and future generations to live in a healthy environment and to their right to sustainable development.

Article 2 is the definitions section. In **Article 3** the Parties commit to be guided by certain principles in implementing the Agreement, including principles of equality; non-discrimination; transparency; maximum disclosure; accountability; non-regression; intergenerational equity; permanent sovereignty of States over their natural resources; and the preventive and precautionary principles.

Article 4 contains general provisions regarding, for example, the guarantee by each party of the right of every person: to live in a healthy environment; to the free exercise of environmental rights; and to provide an enabling environment for the work of persons that promote environmental protection. Each party commits to adopt the necessary legislative, regulatory and administrative measures to guarantee the implementation of the Agreement.

Articles 5 and 6 contain elaborate provisions on access to environmental information. There is a broad requirement on each Party to ensure the public's right of access to environmental information in its possession, custody or control, in accordance with the principle of "maximum disclosure". There are several paragraphs dealing with the circumstances in which access may be refused (these circumstances are very limited) and each Party must establish or designate an independent oversight mechanism to monitor and report on the access to information. The mechanism may be given power to sanction breaches. Each Party guarantees, to the extent possible within available resources, to generate and disseminate environmental information relevant to their functions in a systematic, proactive and timely manner.

Public participation is dealt with in **Article 7**. Each Party shall ensure the public's right to participate in environmental decision-making based on domestic and international normative frameworks. Public participation must be allowed from the early stages of decision-making in relation, for example, to land-use planning, policies, as well as the drafting of rules and regulations which may have a significant impact on the environment. Public participation procedures must have reasonable timeframes that allow sufficient time for effective public involvement. Communication with the public must be through "appropriate means, such as in writing, electronically, orally and by customary means."

Access to justice is provided for in **Article 8**. Each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of 'due process'. Access must include the right to challenge and appeal any decision related to access to environmental information and public participation. Thus 'access to justice' could be seen as the means to safeguard the other 2 access rights. The Agreement goes on to provide that access to justice must be by procedures that are effective, timely, transparent and impartial; and that are not prohibitively expensive. There should be broad legal standing in relation to environmental litigation. Special attention is given to persons or groups in vulnerable situations: states are to establish support mechanisms, including, as appropriate, free technical and legal assistance (**Article 8.5**).

The three access rights [1. Information, Public participation, Justice] are supported by **Articles 10 and 11** which contain provisions on concrete capacity-building and co-operation measures, including potentially: the training of civil servants, capacity-building programs, provision of adequate equipment and resources, and the promotion of education and public awareness. There are then several provisions on institutional arrangements including the establishment of a virtual clearing house (**Article 12**); a voluntary fund to support implementation of the Agreement (**Article 14**); a Conference of the Parties (**Article 15**); the Secretariat (**Article 17**); and a Committee to Support Implementation and Compliance (**Article 18**). Procedures for settlement of disputes are specified in **Article 19**; and **Articles 20-26** deal with the normal final clauses expected in an international treaty. The Annex contains a list of the 33 countries eligible to participate in the Agreement.

Why the Agreement Matters to the Caribbean

In my view, the Escazú Agreement matters to the Caribbean because it affirms and strengthens the region's commitment to respecting the environmental access rights of its citizens and because it promotes the adherence by the Caribbean to sustainable development. Simultaneously, the Agreement challenges the Caribbean to undertake new paradigms in collaboration and to make the necessary accommodations in its jurisprudence in the service of environmental access rights. I propose to expand of each of these matters.

1. Affirmation of Caribbean commitment to environmental rights.

The Caribbean has a long and proud tradition of enunciating policies that promise and promote what today is referred to as 'environmental access rights'. This region was one of the first to draw attention to these environmental issues and I have made the point several times during the negotiating process of the Escazu Agreement that the Caribbean was among the pioneers in the

elaboration of access rights at the regional, international and national levels. In many ways, as the young generation would say, “we own this”.

Regional level

The Port of Spain Accord on the Management and Conservation of the Caribbean Environment was signed by Ministers of the Environment in Port of Spain in 1989; that is, a full three years before the 1992 Rio Declaration. The Accord identifies as a strategic approach to environmental protection, the promotion of public education and awareness and the collection and dissemination of environmental information. In 1991, one full year before the 1992 Rio Declaration, and again here in Trinidad and Tobago, the Port of Spain Consensus of the Caribbean Regional Economic Conference was adopted. The Consensus gave “pride of place” to human resources development and made clear that economic development was to be pursued within the broad context of democratization, social partnership, and human resources enhancement.

In 2001, the Caribbean adopted the Revised Treaty of Chaguaramas (‘RTC’) which include important elements related to Principle 10 of the Rio Declaration. For example, Article 226 of the RTC declares that nothing in the treaty shall be construed as preventing the adoption or enforcement by any Member State of measures relating to the conservation of natural resources or the preservation of the environment. This clearly could include measures related to environmental rights of individuals; and Article 222 grants all persons of a Contracting Party (natural or juridical) the entitlement to bring proceedings before the Caribbean Court of Justice to enforce their rights.

These three instruments, [1. POS Accord; 2. POS Consensus, RTC] together with the CARICOM Charter of Civil Society, laid a solid foundation for the later development of environmental access rights in the Caribbean Community.

At the sub-regional level, the Organisation of Eastern Caribbean States (OECS) embedded access rights in two instruments: (i) the Saint George's Declaration of Principles for Environmental Sustainability 2001; and (ii) the Revised Treaty of Basseterre, 2010.

The Saint George's Declaration sets out a broad framework of 21 Principles: Principles 1, 3, 4, 5 and 7 specifically relate to access rights. Member States have the obligation to take active transparency measures (such as the creation of centralized or networked national data management systems) related to the status of natural resources; and to facilitate the meaningful and informed participation of civil society and the private sector, in decision-making on the environment.

The Revised Treaty of Basseterre not only includes the environment as one of the areas of policy coordination and harmonization, but more importantly makes the Saint George's Declaration binding and therefore gives legal force to what were previously only political commitments.

International level: Multilateral Environmental Agreements

The Escazu Agreement is an important addition to the existing network of international binding obligations towards the environment. Multilateral Environmental Agreements (MEAs) have often recognized the interlinkages between the fulfilment of their specific objectives and access rights. Accordingly, there are important references to the rights to information, participation and justice in many different binding international agreements which been accepted by Caribbean States.

To take the 2 conventions that stemmed from the 1992 Rio Conference. The United Nations Framework Convention on Climate Change includes in **articles 6 and 12**, provisions on climate change public awareness, education, access to information and public participation. The subsidiary 2015 Paris Agreement Climate Change also establishes an enhanced transparency framework, whereby Nationally Determined Contributions (NDCs) are recorded in a public registry. Parties

must regularly provide a national inventory report of anthro-po-genic emissions by sources and removals by sinks of greenhouse gases. States must also provide information necessary to track progress made in implementing and achieving their NDCs.

The Convention on Biological Diversity (CBD) mandates that countries allow for public participation in environmental impact assessments. The CBD also facilitates the exchange of relevant information and the development of educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.

Other MEAs also include important provisions on access rights. One of the most recent is the 2013 Mi-na-mata Convention on Mercury. That Convention states that information on the health and safety of humans and the environment shall not be regarded as confidential. It also establishes a public register of notifications regarding the importation of mercury and a public record of exemptions from compliance and allows the Secretariat to make available to the public information on mercury-added products and their alternatives,

The Caribbean has been active in ratifying these and many other related MEAs. All Caribbean countries have ratified the 1992 Climate Change Convention as well as the 1992 CBD. All Caribbean countries have also ratified the UN Convention to Combat Desertification; the Vienna Convention for the Protection of the Ozone Layer; and the Montreal Protocol on Substances that Deplete the Ozone Layer. There has also been unanimous acceptance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the 2015 Paris Agreement. 12 of the 13 English-speaking countries of the Caribbean have ratified the Stockholm Convention on Persistent Organic Pollutants. Out of deference to any person here from Grenada, I will NOT say which Caribbean country is yet to ratify this convention.

The national level

At the national level, the Caribbean has been the pacesetters in important aspects of access rights. Common law principles, largely inherited from the United Kingdom, have existed, at least theoretically, from time immemorial; certainly, long before environmentalism became vogue. Principles such as natural justice, right to a fair hearing, and legitimate expectations all support the modern environmental Agenda. The *Pear Tree Bottom case (2005*), one of the leading cases in the region on access to public participation and to information, based the obligation of the national environmental agency to conduct consultations on the fact that the agency had published their policy guidelines that gave rise to a legitimate expectation in the public that they would be consulted and that their comments would be taken into account. The agency could not lawfully give its consent for the development to go forward until this legitimate expectation of the public had been satisfied. Some of the common law principles related to natural justice and fair hearing are relevant and some have become embodied in legislation such as the Administrative Justice Act of Barbados.

In the early days of the environmental movement, before the emergence of environmental legislation *per se*, planning laws were used to advance environmental protection. These laws were adopted from the United Kingdom, based on the venerable Housing and Town Planning Act of 1909. It became a central feature of planning law that the public was to be involved in the process of adopting the 'Development Plan' that would dictate the types and locations of development projects that could be undertaken. Today, environmental legislation makes clear that planning and environmental authorities must act in conjunction to protect natural resources.

The national efforts to give specific legislative effect to the right of access to environmental information were spearheaded by Belize which was the first country in Latin America and the Caribbean to adopt a Freedom of Information Act. This was done in 1994 and the broad provisions of the Act allow for the requesting of environmental information possessed by the Government. Since 1994, Freedom of Information Acts have been adopted in 6 another Caribbean states.

The advent of modern comprehensive environmental legislation took environmental protection and respect for access rights, to a new level. This type of legislation has been enacted in several Caribbean countries most notably: Jamaica (1991); Belize (1992); St Kitts and Nevis (1996); Guyana (1996); Trinidad and Tobago (2000); St Lucia (2001); and Antigua and Barbuda (2003). The Environmental Management Act 2000 of Trinidad and Tobago is especially instructive. Under part IV of the Act, the Environmental Management Authority ('EMA') must compile information relating to the environment and ensure preservation of administrative records for not less than 45 days after the final action was taken. An appellate process is established whereby any interested person may petition the Environmental Commission on the ground that the EMA failed to comply with the requirements for publication of information. Where the EMA refuses to disclose environmental information, it must provide a written explanation for its refusal.

Caribbean Constitutions contain general provisions that can be used to support the obligations in the Escazu Agreement. Provisions on the rule of law and on due process are clearly relevant. We need only to remind ourselves that Article 8 of the Agreement requires the granting of access to justice in accordance with the guarantees of 'due process'. Increasingly, Constitutions are making specific provision on environmental rights. For example, Article 149J of the Guyana Constitution provided that "everyone has the right to an environment that is not harmful to his or her health or well-being" and Article 25 spoke to the "duty to participate in activities designed to improve the environment and protect the health of the nation." (I need to research the present status of these).

2. *Strengthening adherence to sustainable development, the SDGs and Human Rights*

So, the Escazú Agreement reinforces Caribbean commitments at the regional, international and national levels to access rights. Beyond this the Agreement also encourages the implementation of obligations assumed by countries in relation to the pursuit of sustainable development, the Sustainable Development Goals (SDGs), and the advancement of human rights.

The 2030 United Nations Agenda for Sustainable Development adopts a holistic, balanced and comprehensive approach to development from a human rights perspective based on equality and non-discrimination. Its 17 SDGs, and its 169 targets, link access rights with human rights and sustainable development. Specifically, SDG 16 promotes peaceful and inclusive societies; requires the guaranteeing of equal access to justice, effective, reliable and transparent institutions; and the adoption of inclusive, participatory and representative decisions. It also requires public access to information and the promotion of non-discriminatory laws and policies for sustainable development. Environmental democracy links human rights, the right to a healthy environment and public policy, making the combination fundamental to achieve the SDGs.

Explicit Caribbean commitment to sustainable development goes back to the Barbados Programme of Action for Sustainable Development of Small Island Developing States of 1994. This commitment was reiterated in the Mauritius Strategy for the Further Implementation of the Program of Action for the Sustainable Development of SIDS of 2005, and the Samoa Pathway of 2014. These instruments all placed increasing emphasis on public awareness, environmental data and information, and stakeholder participation in developmental activities related to matters such as tourism, forests, biodiversity or oceans. The Caribbean commitment was recently reaffirmed at the Fifth Council of Ministers on Environmental Sustainability, held in Montserrat on 11 July 2018. The Ministers adopted Decision 26 which noted the Escazu Agreement and its relevance to environmental sustainability in the Caribbean and encouraged Member States to support its ratification.

3. Finally, the Agreement challenges the Caribbean to engage in new paradigms for environmental protection

South-south cooperation

The Agreement is eloquent testimony to the fact that instead of always thinking in terms of North-South exchanges, the time has come to consider South-South cooperation. The process which concluded with the adoption of the Escazu as a binding Regional Agreement is an example of how the countries of Latin America and the Caribbean can, by respectful dialogue, tackle common challenges and strengthen environmental governance to favour social and economic progress as well as environmental sustainability. While substantively, the Escazu Agreement writes a new chapter by Latin America and the Caribbean in the strengthening of environmental democracy, it also importantly, provides a template by which South-South dialogue can proceed on a range of other matters such as cooperation in health, education, and trade.

Embracing new environmental obligations (defenders of the earth)

The most unique provision in the Escazu Agreement – one which has put it on the global map, so to speak – is the provision requiring states to protect defenders of the environment. Article 9 requires each party:

- to ensure a safe and enabling environment for persons and groups that promote and defend human rights in environmental matters;
- to take adequate and effective measures to recognize, protect and promote the rights of defenders of the environment; and
- to take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidation suffered by environmental defenders.

This provision was of especial importance to Latin America where threats to the life and limb of environmentalists are very real. Several environmental defenders have been murdered and many others intimidated. The threat is not as severe in the Caribbean, but the provision places a clear spotlight on persons who strive to protect our environment. (associate with progressive int'l agreement)

Integration of new environmental concepts into our jurisprudential arrangement

Finally, there is the challenge to consider how best to integrate some of the concepts of the Escazu Agreement into our jurisprudence. There are several such challenges scattered through the Agreement. Even Article 9 on protection of defenders of the environment, laudable as its objective appears to be, has been seen as problematic by some. Under our constitutional arrangements it is rather unusual to single out a specific group of adult persons for special protection of the law. We tend to extend the protection of the law equally to all – at least that's the theory. I know that Article 9 has caused some Caribbean capitals pause. But evidently, not all.

Take one other example: the "non-regression" principle. Essentially, this principle suggests that advances made in environmental law cannot be rolled back. An environmental law may be kept or may be extended but it cannot be repealed. But this clearly creates constitutional difficulties. The Constitution is supreme and it gives Parliament the exclusive power to make law for peace, order and good governance of the country. That implies the power to unmake law. So, obviously, in those Caribbean states that have accepted or will accept the Agreement, the judiciary will have to see how it can best to accommodate the non-regression principle within our constitutional framework.

It is probably appropriate to conclude with a list produced by Mr Kishan Kumarsingh, representative of Trinidad and Tobago to the Escazu process, of some of the benefits generated by the Escazu Agreement. Mr Kumarsingh suggests that the Agreement adds value in that:

1. It recognizes and sets out the contents of environmental access rights and thus deepens democracy.
2. Evidences shared values and interests and thus contributes to social cohesion across Latin America and the Caribbean.
3. Fosters South-South cooperation.

4. Enhances the region's reputation internationally.
5. Promotes stability and prevents conflicts.
6. Assists in garnering resources and capacity building; and
7. Supports the implementation of international agreements.

Respectfully, I am in broad agreement with these sentiments as expressed by the learned Representative.

Thank you.