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United Nations Economic Commission for Europe  
Aarhus Convention and its Protocol on Pollutant  
Release and Transfer Registers  
Mr. Michel Forst  
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Berne, October 30<sup>th</sup>, 2023

Dear Mr. Forst,

Thank you for your letter of August 8<sup>th</sup>, 2023 to the Federal Department of Foreign Affairs (FDFA), which has been transferred to the competent federal authority, the Federal Office of Environment (FOEN).

As already stated in previous sessions and in national implementation reports, Switzerland supports efforts to protect environmental defenders and does not condone the penalization, persecution or harassment thereof for seeking to exercise their rights under the Aarhus Convention. Switzerland is aware of the ongoing legal disputes between the Bruno Manser Fonds and Saktó. In particular, the Swiss Embassy in Kuala Lumpur is familiar with Dr. Straumann and the Bruno Manser Fonds and had several personal exchanges in the recent past.

After a thorough legal analysis, Switzerland considers that the Aarhus Convention does not apply in the presented case. To our understanding, the applicability of Article 3 (8) AC is linked, among other things, to the following criteria:

- Firstly, the text of the provision does not contain any reference to an extraterritorial scope of application. According to a statement by the Compliance Committee of the Aarhus Convention, the provision in Article 3 (8) AC applies to the «penalization, persecution or harassment by private natural or legal persons *that the Party concerned did not take the necessary measures to prevent.* »<sup>1</sup>. It seems plausible, that measures of this nature can only be taken on the Party's respective territory, hence that we can only guarantee and safeguard the free exercise of the Aarhus Convention's three pillars within Switzerland.
- Secondly, Article 1 AC requires parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. So, while Article 3 (8) AC does protect environmental defenders, it only does so in the context of these three pillars. Due to the territorial aspects mentioned above, it also seems reasonable that the exercise of the affected right must take place in the territorial scope of the Convention, so that the protection

<sup>1</sup> See the Compliance Committee's findings on communication ACCC/C/2014/102 (Belarus), ECE/MP.PP/C.1/2017/19, para. 70, [https://unece.org/fileadmin/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.19\\_e.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.19_e.pdf).



can take effect and be enforced. In other words, the acts must occur in relation to an exercised right guaranteed by the Convention within the sphere of power of a party.

To our knowledge, however, it seems the activities carried out by the Bruno Manser Fonds and Dr. Straumann are outside the scope of protection of the Convention (both in terms of location and subject matter) and many facts take place in Malaysia and Canada. Consequently, several circumstances imply, that the aforementioned conditions for applicability are not met in the present case.

In addition to these concerns, the Bruno Manser Fonds, Dr. Straumann and Sakto are currently involved in ongoing litigation before the Civil Court of Basel-Stadt. Due to the principle of separation of powers, the Swiss government is prohibited from taking a position or even influencing the decision-making process. It is up to the independent Swiss courts to decide whether the claims constitute unlawful action in the pending trial.

The Aarhus Convention obliges contracting parties to ensure that the provisions of the Convention are implemented. It should be noted that Switzerland fulfills this obligation within the framework of its environmental legislation, as explained in national implementation reports. The principles of the Aarhus Convention are thus not only prescribed by international law but also constitute applicable Swiss law. On that account, we gladly take this opportunity to elaborate on the fulfillment of Switzerland's obligations under Article 3 (8) AC and on the legal remedies that may be available in the case of Strategic Lawsuits Against Public Participation SLAPPs.

In Switzerland, the free exercise of the rights pursuant to Article 3 (8) AC is guaranteed by the constitutional principle of law and justice enshrined in Article 5 of the Federal Constitution of the Swiss Confederation (Cst; SR 101) and the right to equal and fair treatment in judicial and administrative proceedings provided in Article 29 (1) Cst. According to Article 1 of the Swiss Criminal Code (SCC; SR 311.0), no one can be punished for an act that has not been expressly declared an offense by the law. Under Swiss law, exercising rights provided for in a Convention ratified by Switzerland can never be considered a criminal offense. In contrast, any persecution or harassment of persons who exercise their rights in conformity with the provisions of this Convention is considered punishable and has to be persecuted by the criminal justice authorities.

Switzerland does not have specific legislation in place for SLAPPs. However, the existing legal framework offers possibilities to protect oneself against SLAPPs. In particular, Swiss law and jurisprudence know the institute of «abuse of rights». For example, according to Article 2 (2) of the Swiss Civil Code (CC; SR 210), the law does not protect the manifest abuse of a right. According to prevailing doctrine and jurisprudence, it is up to the party claiming an abuse of rights to prove the circumstances that allow the presumption of an abuse of rights. Given this, substantiated SLAPPs can be considered an abuse of rights and dismissed as such by Swiss courts. Should such an event occur, there are also possibilities for legal action in return. The Bruno Manser Fonds has accordingly filed charges against Sakto for false accusation (Article 303 CC) and wilful defamation (Article 174 CC). In the case of SLAPPs, for example, other criminal offenses under Swiss criminal law, such as perjury by a party in civil proceedings (Article 306 CC) or misleading judicial authorities (Article 304 CC), could also be considered.

With regard to any procedural costs, it should be mentioned that the Swiss courts decide at the end of proceedings who bears the costs (cf. Criminal Procedure Code, CrimPC; SR 312.0 and Civil Procedure Code, CPC; SR 272). As a general rule, the losing party is required to bear the costs of the proceedings. This also includes the party costs to the opposing party. If a party cannot pay the court fees and its own legal fees, it is possible to apply for legal aid. Any civil claims in the criminal proceedings, particularly damages, can alternatively be asserted in separate proceedings before a civil court.

Under the Federal Act on the Free Movement of Lawyers (Lawyers Act, FMLA; SR 935.61), the principles governing the practice of the legal profession are laid down at the Federal level. Article 12 FMLA contains a list of professional rules that apply to everyone in the attorney profession and whose non-compliance

can be punished through disciplinary action. According to common understanding, the legal profession should protect the client's interests according to law and fairness. This principle requires them to protect the entrusted interests to the best of their knowledge and belief. The conscientiousness required by law also includes the duty to protect the client's interest exclusively by legally permissible means, namely not to pursue any ends and not to use means of defense prohibited by law. Therefore, lawyers are forbidden to make deliberately untrue statements, mislead judges and authorities by presenting incorrect evidence and influence witnesses or the other party or the course of proceedings with unlawful threats. How SLAPPs, proven after the fact, affect these principles can only be assessed on a case-by-case basis. In any case, working lawyers in Switzerland must act ethically and be supervised accordingly by the cantonal authorities.

We shall continue our efforts to uphold the rights established in the Convention and the protection of environmental defenders invoking these rights in Switzerland.

Yours sincerely,

Federal Office for the Environment



Katrin Schneeberger  
Director