

Escazú Agreement: the reactions of Chile, Colombia, Peru, Mexico and Brazil with respect to its adoption

Some Latin American countries have seemed reluctant to incorporate in their domestic laws the measures proposed by of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement). We provide an overview of the current position of Chile, Colombia, Peru, Mexico and Brazil in respect of this international treaty, signed on March 4 2018 in Costa Rica, and due to enter into force on April 22 2021.

In accordance with the indications of the Economic Commission for Latin America and the Caribbean (ECLA), this Agreement addresses aspects of environmental management and protection from a regional perspective, regulating rights of access to information, public participation and justice in matters such as sustainable use of natural resources, conservation of biological diversity, combating land degradation and climate change, and increasing resilience in the event of disasters.



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01 Principles

The principles incorporated in the agreement include: non-discrimination, accountability, prevention, intergenerational equity, maximum disclosure, and pro persona. The precautionary principle is also one of the salient features and refers to the possibility, in the event of reasonable doubt regarding the scope, seriousness or irreversible nature of damage to environmental systems, that the public authority can suspend, postpone, condition or prevent the activity from being carried out.

In terms of principles, prevention was also highlighted referring to the possibility, in the event of reasonable doubt regarding the scope, seriousness or irreversible nature of damage to environmental systems, that the public authority can suspend, postpone, condition or prevent a specific activity relating to a project, from being carried out, which according to some detractors of the agreement, can generate legal insecurity in implementing projects.

02 Access to environmental information

Countries should guarantee to all persons access to environmental information, in accordance with the principle of maximum disclosure, respecting in all cases, the exceptions enshrined in national regulations and in the agreement itself. Requests for information may be submitted without mentioning any special interest, or explaining the reasons for the request. Furthermore, the Agreement proposes certain regulations relating to timeframes and response mechanisms for the countries when such requests for environmental information are made.

03 Generation and dissemination of environmental information

The Agreement seeks to ensure that the Member States have in place mechanisms for issuing environmental information, thus guaranteeing direct communication with the public in environmental matters in each country.

04 Public participation in environmental decision-making processes

The States are required to adopt measures that will ensure public participation in decision-making processes relating to projects, activities and other procedures for environmental authorizations which have, or could potentially have, a significant impact on the environment.

05 Access to justice in environmental matters

The States will be required to guarantee access to justice for all persons, paying particular attention to the needs of the most vulnerable persons or groups, by establishing support mechanisms, which will include free technical and legal assistance.

06 Human rights defenders in environmental matters

The States undertake to take the appropriate measures to recognize, protect and promote the rights of human rights advocates in environmental matters, in order to ensure a safe environment in which people, groups and organizations can exercise their rights.



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Chile

Chile has been an active participant in the Escazú Agreement since 2014, the year that it assumed the presidency of the commission responsible for negotiating the Agreement, together with Costa Rica. However, once the term had opened for countries to confirm their participation in the Agreement (2018), the Chilean Government announced its decision to “carry out an in-depth analysis of the Agreement” prior to its endorsement and ratification. In September 2020, the Government announced that it would be “inappropriate to sign the Escazú Agreement” for the following reasons:

1. The Agreement introduces a series of undefined principles that would condition Chilean environmental law.

Several principles referred to in the Agreement have not been defined, and these will be detailed in future State Conferences, which makes for some legal uncertainty.

In addition, it is necessary to examine whether those principles could be in contravention of the law or contradict certain environmental institutions or other environmental principles recognized in current national legislation.

2. The Agreement could imply uncertain changes in the law leading to legal insecurity.

Notable among such changes were:

1. The difference between article 19 no. 8 of the Political Constitution of the Republic of Chile and article 1 of the Agreement. .
2. With respect to a self-executing norm of the Agreement, this could lead the courts of justice to rule that the Agreement prevails over domestic law.

3. It is not clear what the public’s participation would entail.
4. Uncertainty with respect to the inclusion of citizen participation in environmental decision-making processes could lead to massive judicialization of all kinds of administrative decisions.
5. The Agreement would make it easy to produce evidence of environmental damage, which would modify “the national system of evidence in matters of environmental damage”.

3. The Agreement introduces obligations for the State, which are ambiguous, extensive and indefinite, and compliance would be difficult.

1. The recognition and protection of “Human Rights Defenders in Environmental Matters”.
2. The concept of “favorable environment” for the work of persons, associations or groups involved in activities of protection of the environment.
3. The concept of “environmental qualities of goods and services” as information that should reassure consumers and users is not defined.
4. The type of environmental information or any other aspects that “private entities” are required to generate and disseminate is not specified.

4. The Agreement exposes Chile to international controversies due to the direct application of its provisions and their ambiguity.



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Colombia

The Escazú Agreement was signed by the President of Colombia on December 11 2019, and presented to Congress of the Republic in July 2020, in order for its ratification to take effect, as urged by the Executive. However, a dissenting opinion was raised in Congress against ratification of the Agreement, taking into account that several sectors have been critical of some of its possible effects if the Agreement is approved by Colombia. In any case, the Draft Bill for approval of the Agreement is currently going through Congress of the Republic.

Some aspects, which have been controversial in the debates on approval of the Agreement, include the following:

1. Bearing in mind that the Political Constitution of Colombia accords prevalence over domestic laws, of international treaties and conventions ratified by Congress that recognize human rights, some lower ranking legislation implementing aspects regulated in the Escazú Agreement could encounter problems when they are interpreted and applied. This is a particularly significant point, given that the Colombian legal system has an extensive set of regulations in matters of access to environmental information, public participation in environmental matters and access to justice. As a result, these provisions would have to be reassessed in the light of the regulations contained in the Escazú Agreement.
2. Under the terms of the Agreement, States are committed to protecting defenders of human rights in relation to environmental matters. Given the current situation in Latin America and Colombia, in particular regarding the present status of human rights defenders in connection with environmental matters, the international and local community has considered that this undertaking will be a step forward in ensuring the guarantees that will lead in practice to effective defense of the environment. However, as far as this aspect is concerned there has been some criticism of potentially creating a group of subjects destined for special protection, comprising mainly human rights advocates. Critics consider that providing special protection of this kind could have adverse effects for more vulnerable communities, as they would be unable take advantage of the same instruments and guarantees for the exercise of their rights.
3. Finally, the principle of precaution is one of the most widely criticized points in that it refers to the possibility that, should there be any reasonable doubt as to the scope, seriousness or irreversible nature of damage to environmental systems, the authorities could suspend, postpone, condition or prevent the activity from being carried out.



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Peru

Peru signed the Escazú Agreement in September 2018. However, in order to be implemented, it had to be ratified by the Congress of the Republic, pursuant to the terms of article 56 of the Political Constitution of Peru.

In this regard, on October 20 2020, following a lengthy debate on the issue, the Foreign Affairs Committee of the Congress of the Republic approved a report which (i) recommended not to approve Draft Legislative Resolution No. 4645/2019-PE of the Executive Authority, through which the Escazú Agreement would be ratified (received in Congress in August 2019), and in turn, (ii) held that the aforementioned bill should be shelved; as a result the matter was not debated in the Congress plenary session.

The debate in the Foreign Affairs Committee

The main reasons for the two opinions expressed by the Committee are as follows:

1. Majority opinion (against ratification)

One of the main reasons that motivated the failure to ratify was that the provisions on environmental matters were already regulated within the current national regulatory framework, mainly through the following: (i) Political Constitution, (ii) Law of Transparency and Access to Public Information and its Regulations, (iii) Law of Citizen Participation and Control, (iv) General Environment Law, or (v) Law of the National System of Environmental Management, among others.

Another reason was the presumed loss of sovereignty of the Peruvian State in respect of the management its own natural resources, and dispute resolution in environmental matters, as it would be compulsory to submit cases to the International Court of Justice.

Finally, it was also held that the Escazú Agreement would be a threat to the rights acquired through concessions, contracts, agreements or authorizations granted, as well as to private property, insofar as it allows access to environmental information without grounds, which could seriously deter investments, in addition to imposing obligations which private entities should not be required to support.

2. Minority opinion (in favor of ratification)

In contrast, the minority opinion, expressed in an alternative report, emphasized the fact that, although there are regulations on environmental issues, these would not be adequately enforced, and therefore an impartial supranational body would be needed to resolve environmental controversies arising in Peru.

Furthermore, the report held that the Agreement would allow improved access to all Peruvians of updated, comprehensive and ordered information on the environment, for the purposes of future decision-making; as well as increasing the effectiveness of exercising the fundamental rights of citizens relating to this matter.

It was also argued that the sovereignty of the Peruvian state would not be compromised, in that several provisions of the Agreement indicate that the application of rights of access to information and citizen participation would be exercised within the framework of national legislation, and this would be accorded a broad margin so that, based on the possibilities of each state, the terms of the Agreement could be implemented.

Finally, and from this perspective, the Escazú Agreement would strengthen the environmental institutional structure, and would improve the country's competitiveness at an international level, reducing conflict and improving legal security. As a result, investment would not fall away but conversely, ratification would bring responsible investment with the focus on sustainability.

3. Public opinion

Prior to the Foreign Affairs Committee of the Congress of the Republic approving the report recommending not to ratify the Escazú Agreement, the president of that committee made known what the majority view would be in this matter. Having discovered the way the voting would probably go, the Peruvian Environmental Law Society (SPDA) organized a joint pronouncement in which they requested that the members of Congress and the Commission reassess their position, with a view to ratifying the Escazú Agreement. National and international institutions added their voice to this call, along with citizens from different parts of Peru.

Peru is currently preparing for its presidential and congressional elections, which are planned for 11 April 2021, according to the program approved by the electoral bodies. Therefore, several bodies from the private sector such as the SPDA are lobbying for ratification of the Escazú Agreement to be part of the electoral debate, seeking to return ratification to the agenda of the Executive and Legislative Authorities as soon as possible.



Mexico

The Agreement was drawn up following a two-year preparatory period and nine meetings of the Negotiation Committee in which the State of Mexico was an active participant, and during which the country made statements interpreting the concepts of “damage” and “significant damage” in order to ensure that these two terms were in congruence with the national legal framework, specifically with the law on transparency and access to public information, as well as ecological balance and protection of the environment. Similarly, an interpretative statement was made in respect of the term “being informed promptly” in article 5, paragraph 2, section b) of the Agreement, which will be interpreted in accordance with the terms and timeframes of current national laws on matters of transparency and access to public information.

The Federal Executive Authority submitted the Agreement to the Mexican Senate, where it was unanimously approved on November 5 2020, and published in the Official Gazette of the Federation on December 9, following which Mexico became the eleventh country to ratify the Agreement. It will enter into force 90 days after depositing the eleventh instrument of ratification, acceptance, approval or adhesion to the United Nations.

Despite the fact that the Agreement has not yet entered into force in an international context, it has already been applied by the Supreme Court of Justice of the Nation in a ruling relating to the appeal for constitutional remedy 307/2016, which mentions the requirement of states to have measures in place that facilitate production of evidence of environmental damage, in light of the environmental damage that occurred in Laguna del Carpintero, Tampico, Tamaulipas.

This Agreement is the first of its kind that is legally binding and that considers the work of human rights defenders in connection with environmental matters as a matter that will strengthen democracy, rights of access and sustainable development, as well as being a pioneering instrument for the protection and safeguarding of rights.

It establishes that the parties to the Agreement will take steps to adopt the most favorable interpretation to ensure full enjoyment of, and respect for, rights of access and it will foster and encourage the use of new information and communications technologies.

The Commissions to which the Agreement was submitted for their opinion, indicated in their report to the Senate that, in the case of Mexico, the applicable regulations in matters of transparency and access to information are advanced compared to other national frameworks in the region.

They also indicated that the Agreement is not contradictory, nor does it in any way exceed the terms of the Political Constitution of the United States of Mexico, the General Law on Transparency and Access to Public Information, or the Federal law of Transparency and Access to Public Information, among other regulatory frameworks applicable to this matter. However, they did establish the need to substantially improve the country’s information systems in order to ensure that citizens are better informed of projects and decisions that could affect their rights.

It is hoped that with its entry into force, it will be necessary to adapt the various instruments of environmental policy, which include assessment of environmental impact, use of land in forested areas, and urban development programs, among others.

By virtue of the foregoing, with the approval of the Agreement it will enter the Mexican block of constitutionality and conventionality. It will therefore be applicable in the light of the principle of conforming interpretation, and greater protection should be afforded to persons in the country in light of the human rights set forth in the Agreement.



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Brazil*

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Brazil signed the Escazú Agreement during the presidency of the previous incumbent Michel Temer. At the present time, the Agreement is being analyzed by the executive authority that is, the current president Jair Bolsonaro, who continues to examine it and has not yet sent it to Congress for ratification.

According to the information obtained, following its signature, the text was sent to three ministers for examination and analysis, namely, the Ministers of Environment, Agriculture, Fisheries and Food, and the Minister of General Transparency and Control of the Union. However, to date, no further information has been obtained regarding the status of its presentation to Congress for ratification.



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