

ARTICLE

Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective

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Abstract

Since the Escazú Agreement entered into force in 2021, many have looked forward to the realization of its goal of further entrenching environmental democratic rights and enabling sustainable development in Latin America and the Caribbean (LAC) region. The severe environmental and related human rights challenges in the region have caught global attention, and the Agreement is most timely in its pursuit of contributing to addressing the situation. This article assesses the quality of, and the extent to which, the right of the public to participate in environmental decision-making processes under the Escazú Agreement can enable the regime to achieve its goal, and how best this right might be strengthened where necessary. This assessment is executed within the context of local peculiarities of the LAC region and good practice in the field, as reflected in the Aarhus Convention and the UNEP Bali Guidelines. The study finds that while aspects of the participatory right regime in the Escazú Agreement are sound – and align with or go beyond existing good practice – some key provisions require improvement in order to increase the effectiveness of the Agreement.

Keywords: Escazú Agreement, Aarhus Convention, Bali Guidelines, Public participation, Environmental decision making, Sustainable development

1. INTRODUCTION

This article considers the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), which entered into force in April 2021.¹ Specifically,

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¹ Escazú (Costa Rica), 4 Mar. 2018, in force 22 Apr. 2021, available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.

it evaluates the extent to which the public's right to participate in environmental decision-making processes, as provided in the Escazú Agreement, contributes to ensuring better environmental protection and sustainable development in Latin America and the Caribbean (LAC) region.

The Escazú Agreement is the first regional environmental treaty in the LAC region and is therefore worthy of attention.² It seeks to entrench 'environmental democracy'³ in the region through the development of Principle 10 of the United Nations (UN) Declaration on Environment and Development (Rio Declaration),⁴ as referred to in its preamble.⁵ The Agreement fulfils a pledge by several LAC countries to work towards a treaty to implement Principle 10 in the region following the 2012 Rio+20 Conference.⁶ Concluded under the auspices of the UN Economic Commission for Latin America (ECLAC), the Escazú Agreement is open to participation by all 33 countries of the LAC region.⁷ So far, it has been ratified by 13 countries, and signed by 24.⁸ The aim of the Escazú Agreement is:

to guarantee the full and effective implementation in ... [the LAC region] of the rights of access to environmental information, *public participation in the environmental decision-making process* and access to justice in environmental matters ... [thus] contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.⁹

This article, however, focuses more narrowly on the Agreement's Article 7 provision on the public right to participate in environmental decision-making processes as a means for ensuring environmental protection and sustainable development. This right aims to ensure that

² The World Bank, 'Earth Day Marks Entry into Force of Escazú Agreement, a New Environmental Law Treaty for Latin America and the Caribbean', 22 Apr. 2021, available at: <https://www.worldbank.org/en/news/feature/2021/04/22/earth-day-marks-entry-into-force-of-escazu-agreement-a-new-environmental-law-treaty-for-latin-america-and-the-caribbean>.

³ 'Environmental democracy' is a subset of the political thought of participatory democracy that emphasizes the critical role of the public, besides government and developers, in ensuring effective environmental governance and sustainable development, through the provision of the public rights to access information and participate in decision-making processes, and of access to justice in environmental matters: G. Bandi, 'Introduction into the Concept of Environmental Democracy', in G. Bandi (ed.), *Environmental Democracy and Law: Public Participation in Europe* (Europa Law, 2014), pp. 3–7.

⁴ Adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf. Principle 10 of the Rio Declaration promotes the idea that public access to information, decision-making processes, and justice in environmental matters is vital for effective environmental governance.

⁵ Escazú Agreement, Preamble, paras 1–2.

⁶ UN Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, adopted by 10 governments from LAC at the UN Conference on Sustainable Development, Rio de Janeiro (Brazil), 20–22 June 2012, UN Doc. A/CONF.216.13, available at: https://accessinitiative.org/sites/default/files/declaracion_principio_10_english.pdf.

⁷ UN Economic and Social Council Res. 2021/31, 'Follow-up to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean', 22 July 2021, UN Doc. E/RES/2021/31, 30 July 2021, available at: https://www.un.org/eco-soc/en/documents/resolutions?year%5Bvalue%5D=2022&page=72&order=field_symbol&sort=asc.

⁸ Treaty status available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=en.

⁹ Art. 1 Escazú Agreement (emphasis added).

‘the governed should engage in their own governance’, a practice that is ‘rapidly expanding in both law and practice’.¹⁰ Relevant for the LAC region, the UN Human Rights Council has recently highlighted the crucial nature of the public right to participate in environmental decision-making processes, recognizing it as a fundamental human right.¹¹

Civil society actors, such as the Peruvian Society of Environmental Law and many others, were heavily involved in formulating the Escazú Agreement.¹² An important point on their agenda was to have the public formally recognized as a stakeholder in environmental decision making ‘in ... [the LAC region] where lack of participation and information about the environmental impacts of extractive and infrastructure projects are at the heart of much of the region’s many socio-environmental conflicts’.¹³ For instance, ‘[o]ne of the main conflict hotspots is the Amazon region, where affected populations demand greater participation in decision-making, from the planning stages onwards, regarding any natural resource exploitation activity’.¹⁴ Notoriously, environmental governance in the region has been characterized by government and developer repression of citizens who insist on sustainable development.¹⁵ To normalize relations between these stakeholders, and in order to achieve sustainable development in the region, public participation in environmental decision making is key. Public participation contributes to legitimizing and boosting the credibility and public acceptability of relevant development institutions and their decisions.¹⁶ It also contributes to the avoidance of, or in any event a reduction in, environmental conflicts in the LAC region; it facilitates governmental accountability; it increases public environmental awareness and gives the public an opportunity to express its concerns; finally, it improves the quality of environmental decisions by making them more reflective of local needs and values, thereby contributing to sustainable development.¹⁷ Moreover, loans and other types of aid from international financial institutions are increasingly made conditional upon countries being able to demonstrate ‘good governance’ through ‘accountability, transparency and participation’ in public administration.¹⁸

¹⁰ G. Pring & S.Y. Noe, ‘The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development’, in D.N. Zillman, A.R. Lucas & G. Pring (eds), *Human Rights in National Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resource* (Oxford University Press, 2002), pp. 11–76, at 11.

¹¹ UN Human Rights Council, ‘The Right to a Safe, Clean, Healthy and Sustainable Environment’, 5 Oct. 2021, UN Doc. A/HRC/48/L.23/Rev.1.

¹² CIVICUS, ‘ESCAZÚ: The Work of Civil Society Made a Huge Difference’, 12 Feb. 2019, available at: <https://www.civicus.org/index.php/media-resources/news/interviews/3728-escazu-the-work-of-civil-society-made-a-huge-difference>.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Global Defenders, *At What Cost?* (Global Witness, 2019), p. 8.

¹⁶ See B. Barton, ‘Underlying Concepts and Theoretical Issues in Public Participation in Resource Development’, in Zillman, Lucas & Pring, n. 10 above, pp. 77–120, at 77, 105. See also D. Bodansky, ‘Legitimacy’, in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 704–23.

¹⁷ P. Burton, ‘Conceptual, Theoretical and Practical Issues in Measuring the Benefits of Public Participation’ (2009) 15(3) *Evaluation*, pp. 263–84, at 265.

¹⁸ D. Kapur & R. Webb, ‘Governance-related Conditionality of the International Financial Institutions’, *UN Conference on Trade and Development G-24 Discussion Paper Series*, No. 6, UN Doc. UNCTAD/

In the light of the above, this article evaluates the contribution of the Escazú Agreement to sustainable development in the LAC region through its right to public participation. This assessment is made using as benchmarks: (i) recognized good practice in the field, as reflected in the regional 1998 UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention)¹⁹ and the global 2010 UN Environment Programme (UNEP) Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines),²⁰ and (ii) the social peculiarities and interests of the LAC region, such as its deep cultural diversity and increasing societal inequalities.²¹ This helps to shed light on the strengths and weaknesses of the Escazú Agreement and to identify necessary improvements to enable it to meet its objectives.

2. ENVIRONMENTAL PUBLIC PARTICIPATION, SUSTAINABLE DEVELOPMENT AND THE LAC REGION

This section argues that adequate public participation rights in environmental decision-making processes are critical for achieving sustainable development in the LAC region. It will begin by highlighting the crucial nexus between the right to participate and sustainable development, before examining its normative status in the LAC region. This will reveal the need for a strong and effective rights-based regime under the Escazú Agreement which, to an extent, is currently lacking.

2.1. Sustainable Development through Environmental Public Participation

The concept of sustainable development was first promoted at the 1972 UN Conference on the Human Environment, and is reflected in the Stockholm Declaration, which it adopted.²² The 1987 Brundtland Commission Report *Our Common Future* then raised the global profile of the concept further, which it defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.²³ Though it is evolutive in nature,²⁴ three key dimensions

GDS/MDPB/G24/6, Aug., 2000, p. 7, available at: <https://unctad.org/system/files/official-document/pogdsmdpbg24d6.en.pdf>.

¹⁹ Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <http://www.unece.org/env/pp/treatytext.html>.

²⁰ UNEP Decision SS.XI/5, Part A, 26 Feb. 2010, UN Doc. UNEP/GCSS.XI/11, available at: <https://www.unep.org/resources/publication/guidelines-development-national-legislation-access-information-public> (Bali Guidelines).

²¹ UN Educational, Scientific and Cultural Organisation, ‘Regional Trends: Latin America and the Caribbean’, available at: <https://en.unesco.org/culture-development/regional-trends/latin-america-caribbean>.

²² Declaration of the United Nations Conference on the Human Environment, Stockholm (Sweden), 16 June 1972, UN Doc. A/CONF.48/14/Rev. 1, Principles 4, 13, 15–20, available at: <https://digitallibrary.un.org/record/523249?ln=en>.

²³ The World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 43.

have been identified: environmental, economic, and social.²⁵ Of these dimensions, environmental sustainability is arguably ‘the primary and most indispensable requirement for sustainable development in the sense that development may not endanger the natural systems that support life on earth’,²⁶ including its social and economic aspects.

In order to reasonably achieve and maintain sustainable development, it is important to make space for the public at the table where environmental decisions are made. Public participation in environmental decision making ensures that proposed developments are compatible with, and do not compromise, the environment and interests of those affected. If the public is kept in the dark regarding developments with environmental effects, there is no means for decision makers to genuinely understand the public’s priorities, accommodate its concerns, and secure the manifold benefits of its informed input in such processes.²⁷ It is essential to acknowledge that while adequate laws on public participation are necessary, they are not sufficient in themselves to achieve in practice a satisfactory level of public involvement in environmental decision making: ‘Cultural changes are needed, especially in countries with deeply entrenched customs based on official secrecy’,²⁸ like many in LAC. Yet, the provision of effective laws on public participation is arguably the most fundamental element in catalyzing and sustaining the required cultural changes in government.²⁹ This point has been sufficiently demonstrated by the literature, which shows that adequate laws that create effective rights, clear duties, and acceptable standards of behaviour significantly contribute to reshaping the contrary attitudes and dominant predispositions of public institutions.³⁰

Therefore, several global measures to promote sustainable development – with widespread official commitment, including from countries in the LAC region – enjoin states to ensure that the public is given a real opportunity to contribute to, and influence, the making of environmental decisions. For instance, in the outcome document of the

²⁴ K.J. de Graaf & L. Squintani, ‘Sustainable Development, Principles of Environmental Law and the Energy Sector’, in M.M. Roggenkamp, K.J. de Graaf & R. Fleming (eds), *Energy Law, Climate Change and the Environment* (Edward Elgar, 2021), pp. 41–51, at 43.

²⁵ S. Gaines, ‘The Energy Revolution as Sustainable Development’, in L. Squintani & H.H.B. Vedder, *Sustainable Energy United in Diversity: Challenges and Approaches in Energy Transition in the EU* (Intersentia, 2014), pp. 7–23.

²⁶ De Graaf & Squintani, n. 24 above. See also P. Merkouris, ‘Sustainable Development and Best Available Techniques in International and European Law’, in K.E. Makuch & R. Pereira (eds), *Environmental and Energy Law* (Wiley-Blackwell, 2012), pp. 37–60, at 39.

²⁷ Pring & Noe, n. 10 above, p. 22.

²⁸ UN Economic and Social Council, ‘Assessment of Progress in Sustainable Development since Rio 1992 for Member States of the United Nations Economic Commission for Europe’, 25 Sept. 2001, UN Doc. ECE/AC.22/2001/3, p. xiv, available at: <https://digitallibrary.un.org/record/448837?ln=en>.

²⁹ See S. Kravchenko, ‘Strengthening Implementation of MEAs: The Innovative Aarhus Compliance Mechanism’, in D. Zaelke, D. Kaniaru & E. Kruzikova (eds), *Making Law Work: Environmental Compliance and Sustainable Development* (Cameron May, 2005), pp. 258–61, at 259.

³⁰ See G. Tardi, ‘Law as a Counterweight to Politicisation in Democratic Public Management’ (2012) 38(4) *Commonwealth Law Bulletin*, pp. 591–615, at 595–6; and R. Michaels, ‘“One Size Can Fit All”: Some Heretical Thoughts on the Mass Production of Legal Transplants’, in G. Frankenberg (ed.), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar, 2013), pp. 56–78, at 68ff.

2012 UN Conference on Sustainable Development, ‘The Future We Want’,³¹ states underscored that ‘institutions at all levels that are ... transparent, accountable and democratic’ and ‘broad public participation’ are essential for achieving sustainable development;³² they also specifically encouraged action at the regional and national levels to promote ‘public participation ... in environmental matters’.³³ A related instrument is the 2010 UNEP Bali Guidelines, which contain detailed provisions for improving environmental public participation, and have been hailed for their role as a milestone and foundation for the progressive achievement of sustainable development.³⁴

In 2015, the UN General Assembly took concrete steps to promote global sustainable development by adopting 17 Sustainable Development Goals (SDGs) and their respective targets and indicators, to be achieved by 2030.³⁵ Although it has been argued that the SDGs lack coherence and direction in a manner that may impede the political and legal significance of sustainable development,³⁶ they have increasingly become the planning priority of most countries and regions around the world.³⁷ SDG 16 is of particular interest here as it formulates the aim to ‘[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. Achieving this SDG, according to its associated targets 16.6 and 16.7, requires states to ensure, respectively, ‘transparent institutions at all levels’ and ‘responsive, inclusive, participatory and representative decision-making at all levels’. The UN Committee of Experts on Public Administration therefore has similarly highlighted ‘Participation’ – in terms of multi-stakeholder involvement in matters and decisions that affect them – as one of the principles of effective governance necessary for the ‘full realization of the [SDGs]’.³⁸

Beyond these global instruments, there are specific measures targeted at helping small island developing states (SIDS), many of which are in the LAC region, to achieve sustainable development. They include the 1994 Barbados Programme of Action for

³¹ UN General Assembly (UNGA), ‘The Future We Want’, 20–22 June 2012, UN Doc. A/RES/66/288, available at: <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf>.

³² *Ibid.*, paras 10, 43.

³³ *Ibid.*, para. 99.

³⁴ S. Stec, ‘Developing Standards for Procedural Environmental Rights through Practice: The Changing Character of Rio Principle 10’, in J. Jendroška & M. Bär (eds), *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia, 2017), pp. 3–18.

³⁵ UNGA, ‘Transforming our World: The 2030 Agenda for Sustainable Development’, 21 Oct. 2015, UN Doc. A/RES/70/1, available at: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

³⁶ K. Bosselmann, *The Principle of Sustainability*, 2nd edn (Routledge, 2016), p. 5.

³⁷ See A.O. Chimhowu, D. Hulme & L.T. Munro, ‘The “New” National Development Planning and Global Development Goals: Processes and Partnerships’ (2019) 120 *World Development*, pp. 79–89; and UN Development Group, ‘The Sustainable Development Goals are Coming to Life: Stories of Country Implementation and UN Support’, 18 July 2016, available at: <https://unsdg.un.org/sites/default/files/SDGs-are-Coming-to-Life-UNDG-1.pdf>.

³⁸ Secretariat of the UN Committee of Experts on Public Administration, ‘Principles of Effective Governance for Sustainable Development’, July 2018, UN Doc. E/2018/44-E/C.16/2018/8.

the Sustainable Development of SIDS,³⁹ the 2005 Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of SIDS,⁴⁰ and the 2014 SIDS Accelerated Modalities of Action (SAMOA) Pathway.⁴¹ These measures explicitly underscore the crucial role of wide public participation in environmental decision-making processes in achieving sustainable development.⁴² The next section turns to the current status of public participation in environmental decision making in the LAC region, in order to then better appreciate the importance for the region of an Escazú Agreement with an effective public participation regime.

2.2. *The LAC Region: Situation Analysis*

Public administration in the LAC region has been characterized by ‘increasing disconnection between citizens and public institutions’ and a lack of adequate public participation in environmental decision making, which has undermined effective governance.⁴³ Nevertheless, during the last few decades and in the light of their multi-lateral commitments, countries in the LAC region have made considerable efforts towards ensuring public participation in environmental decision making. In most countries in the region there is now an explicit or implicit constitutional right of public participation in decision making, including as it relates to the environment.⁴⁴ There is also increasing recognition in the region that public participation in (environmental) decision making is a human right, as confirmed in decisions of the Inter-American Court of Human Rights,⁴⁵ as well as in national court judgments.⁴⁶ In addition, about

³⁹ UN, ‘Report of the Global Conference on the Sustainable Development of Small Island Developing States’, Bridgetown (Barbados), 25 Apr.–6 May 1994, UN Doc. A/CONF.167/9, Ch. 1, Resolution 1, Annex II, 1994.

⁴⁰ UN, ‘Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States’, Port Louis (Mauritius), 10–14 Jan. 2005, UN Doc. A/CONF.207/11, Ch. 1, Resolution 1, Annex II, 2005.

⁴¹ UNGA, ‘SIDS Accelerated Modalities of Action (SAMOA) Pathway’, 14 Nov. 2014, UN Doc. A/RES/69/15.

⁴² See, e.g., Barbados Programme of Action, n. 39 above, paras 26, 34, 47–8; Mauritius Strategy, n. 40 above, paras 14–5, 44–5, 74; and SAMOA Pathway, n. 41 above, paras 27, 40, 79.

⁴³ See Organisation for Economic Co-operation and Development (OECD), CAF Development Bank of Latin America & UN Economic Commission for Latin America and the Caribbean (ECLAC), ‘Institutions to Make the State Deliver in Latin America and the Caribbean’, in OECD et al., *Latin American Economic Outlook 2018: Rethinking Institutions for Development* (OECD, 2018), pp. 170–1; and A. Akhmouch, ‘Water Governance in Latin America and the Caribbean: A Multi-Level Approach’, *OECD Regional Development Working Papers*, 2012/04, 2012, pp. 41–2, available at: <https://www.oecd.org/regional/regionaldevelopment/50064981.pdf>.

⁴⁴ UN ECLAC, ‘Observatory on Principle 10 in Latin America and the Caribbean of the ECLAC’, available at: <https://observatoriop10.cepal.org/en>.

⁴⁵ See *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Ser. C No. 172 (28 Nov. 2007), paras 129, 133; and *Claude-Reyes et al. v. Chile* (Merits, Reparations and Costs) IACtHR Ser. C No. 151 (19 Sept. 2006), paras 79, 86–7. See also E. Grant, ‘The American Convention on Human Rights and Environmental Rights Standards’, in S. Turner et al. (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press, 2019), pp. 60–92, at 70–4.

⁴⁶ See Inter-American Commission on Human Rights (IACHR), *National Jurisprudence on Freedom of Expression and Access to Information*, OEA/Ser.LV/II.147 CIDH/RELE/INF.10/13, 5 Mar. 2013, paras 28, 183. See generally U. Etemire, ‘A Fresh Perspective on the Human Right to Political

eight countries in the region, some of which are parties to the Escazú Agreement, now have general legislation on public participation in public affairs.⁴⁷ Further, the public right to participation in *environmental* decision-making processes is now specifically recognized in some *environmental* legislation in most of the countries.⁴⁸

Despite this progress towards more inclusive environmental decision making, on the whole the public remains largely excluded from such processes in the LAC region, and this is a real obstacle to sustainable development.⁴⁹ Trujillo buttresses this point with two case studies from Brazil and Mexico. In the Brazilian case, the government planned to expand electrical transmission lines, which were to pass through 125 kilometres of a certain community. The local communities resisted the project, mainly because they were not involved by the government in the decision-making process leading to its approval, citing the irreversible impact of the project on their environment.⁵⁰ Next, as part of efforts to switch from fossil to greener energy, the Mexican government granted permits to private companies to establish solar energy farms in the southern region of the country, without the participation of the concerned public. In resisting nearly every project, the affected communities argued that ‘they should have been consulted not only before the project started but when the government decided to implement this new energy generation strategy’.⁵¹ In both cases the implementation of the projects suffered excessive delays and increased costs – costs that were either born by consumers or led to the projects being halted altogether – as a result of the government’s failure to ensure public participation in the decision-making process from the outset.⁵²

A further example of the continued challenge of inadequate public participation in the LAC region is the situation in the Amazon rainforest that cuts across nine LAC countries.⁵³ The Amazon is the largest and most biodiverse rainforest in the world.⁵⁴ Its present significant degradation, which is endangering millions of Indigenous people who live in and rely directly on the forest, is also a source of global concern, given the planetary importance of its ecosystem.⁵⁵ The Amazon’s dire environmental status is mainly as a result of human activities such as infrastructural development, deforestation, large-scale industrial extraction, and agribusiness expansion in the

Participation and Environmental Decision Making in Nigeria’ (2018) 26(4) *African Journal of International and Comparative Law*, pp. 565–84.

⁴⁷ UN ECLAC, n. 44 above. See also nn. 61–5 below.

⁴⁸ *Ibid.*

⁴⁹ CIVICUS, n. 12 above.

⁵⁰ M.A.H. Trujillo, ‘Infrastructure Development in Latin America and its Challenges with Local and Indigenous Communities’, Italian Institute for International Political Studies, 30 Mar. 2020, available at: <https://www.ispionline.it/en/pubblicazione/infrastruttura-sviluppo-latino-americana-e-sue-sfide-locali-e-indigeno-comunitarie-25512>.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ The 9 LAC countries are: Bolivia, Brazil, Colombia, Ecuador, French Guiana, Guyana, Peru, Suriname, and Venezuela.

⁵⁴ R. Pereira & B. Garcia, ‘Editorial: The Legal Protection of the Amazon Rainforest’ (2021) 30(2) *Review of European, Comparative and International Environmental Law*, pp. 157–61, at 157.

⁵⁵ See J. Bendel & T. Stephens, ‘Turning to International Litigation to Protect the Amazon?’ (2021) 30(2) *Review of European, Comparative and International Environmental Law*, pp. 173–83.

forest.⁵⁶ Such activities, which are usually executed or permitted by governments, are commonly unsustainable in scale and nature, and are accompanied by severe negative socio-environmental effects.⁵⁷ Recent research shows that, among others, a core reason for this situation in the Amazon is inadequate public participation in, or government exclusion of the concerned public from relevant environmental decision-making processes in order to mitigate public pressure against the establishment or continuance of environmentally unsustainable projects and activities.⁵⁸ It is also noteworthy that the ability of the affected public to engage in informed and meaningful participation is compromised by the general lack of transparency on the part of governments and developers with regard to relevant environmental information in the region.⁵⁹

To some extent, the continued lack of adequate public participation in environmental decision making in the LAC region arises from governmental non-compliance with, and inadequate implementation of existing participation laws in the various countries.⁶⁰ However, much of these problems are also rooted in the fact that in several LAC countries the legal framework, in general, and the provisions supporting (environmental) public participation, in particular, suffer from the following three deficiencies. Firstly, they are sectorial, and not general, in nature. For example, in the Bahamas, Grenada, Jamaica, Saint Lucia, and Saint Vincent and the Grenadines, provision for public participation in environmental matters is made only in physical planning and/or disaster management legislation, and not in general environmental legislation.⁶¹ This narrow approach does not support participation in many other types of environmental decision, such as decisions on environmental restoration and energy transition.

Secondly, the provisions on participation tend to be brief, and do not elaborate and operationalize existing (environmental) participation rights, which better enables effective compliance with the provision and the utilization of the right. This is the

⁵⁶ See Amazon Watch, 'The Amazon Sacred Headwaters: Indigenous Rainforest "Territories for Life" under Threat', Dec. 2019, available at: <https://amazonwatch.org/news/2019/1209-the-amazon-sacred-headwaters>; P. Fearnside, 'Challenges for Sustainable Development in Brazilian Amazonia' (2018) 26(2) *Sustainable Development*, pp. 141–9.

⁵⁷ Ibid.

⁵⁸ See C.A.R. Agudelo et al., 'Land Use Planning in the Amazon Basin: Challenges from Resilience Thinking (2020) 25(1) *Ecology and Society*, article 8, available at: <https://doi.org/10.5751/ES-11352-250108>; M. Battiste & M. Reyes, 'Stakeholder Engagement: A Foundation to Sustainable Development in the Amazon', *GT Global*, 10 Sept. 2020, available at: <https://dt-global.com/company/blog/september-10th-2020/stakeholder-engagement-in-the-amazon>.

⁵⁹ J. Ennes, 'Illegal Logging Reaches Amazon's Untouched Core, "Terrifying" Research Shows', *Mongabay*, 15 Sept. 2021, available at: <https://news.mongabay.com/2021/09/illegal-logging-reaches-amazons-untouched-core-terrifying-research-shows/>; F. Wenzel et al., 'Paper Maze and Lack of Transparency Cloak Investment in Companies Involved in Amazon Deforestation', *Mongabay*, 11 Aug. 2020, available at: <https://news.mongabay.com/2020/08/paper-maze-and-lack-of-transparency-cloak-investment-in-companies-involved-in-amazon-deforestation/>; UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders', 3 Aug. 2016, UN Doc. A/71/281, paras 34, 50, 69, available at: <https://digitallibrary.un.org/record/831293?ln=en>.

⁶⁰ UN ECLAC, 'Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean: Towards Achievement of the 2030 Agenda for Sustainable Development', 2018, UN Doc. LC/TS.2017/83, pp. 103–5, available at: https://repositorio.cepal.org/bitstream/handle/11362/43302/S1701020_en.pdf?sequence=1&isAllowed=y.

⁶¹ To access the laws, see UN ECLAC, n. 44 above, 'Participation', available at: <https://observatoriop10.cepal.org/en/rights/participation>.

case with the legal provisions on participation in countries like Chile, Cuba, and Suriname.⁶² For instance, in Suriname, the Environmental Framework Act⁶³ provides for the public right to participate without details of the participation procedure and how the public and its views are to be incorporated into the decision-making process.⁶⁴ Thirdly, they lack substantive quality, and therefore the ability to facilitate effective participation. For example, in Barbados, Grenada, Haiti, Nicaragua and several others, the relevant laws lack key requirements for ensuring effective participation, such as the effective dissemination of information on the environmental assessment process and opportunities to participate, as well the obligation of the authority to effectively consider public inputs and observations in arriving at the final decision.⁶⁵

Indeed, inadequate government compliance with, and implementation of participation laws could arise from a lack of a clear, coherent, and comprehensive regulatory framework on the subject matter.⁶⁶ Thus, ECLAC and the Caribbean Court of Justice (CCJ) Academy of Law, in a joint report, concluded that ‘some challenges in the implementation of environmental access rights [in LAC] remain’, and key aspects requiring attention include ‘establishing [a] clear regulatory framework for ... ensuring adequate, timely and inclusive participation in environmental decision-making, with the active participation of all stakeholders (including the directly affected public and specific groups or communities)’.⁶⁷ This need has been further stressed by ECLAC: ‘The region needs to move forwards with the establishment of standards that can guarantee full and effective public participation in environmental impact assessments ... [and] *precise* legal obligations for public participation’.⁶⁸

The Escazú Agreement is well positioned to address those needs. The next section therefore turns to the adequacy of the Escazú Agreement, and examines whether it indeed can help countries with weak or inadequate participatory laws to develop better national legal frameworks which can improve official compliance with, and the implementation of, such national regimes.

3. PUBLIC PARTICIPATION: ESCAZÚ IN THE CONTEXT OF GOOD PRACTICE

The Escazú Agreement bases its approach to public participation in environmental decision-making processes on the aforementioned binding Aarhus Convention and the voluntary Bali Guidelines. Together, these two instruments constitute and embody

⁶² For the relevant laws and provisions, see *ibid.*

⁶³ No. 97 of 2020, available at: <https://observatoriop10.cepal.org/en/instruments/environmental-framework-act-no-97-2020>.

⁶⁴ See Environmental Framework Act, *ibid.*, Arts 1, 3, 11.

⁶⁵ For details, see UN ECLAC, n. 60 above, pp. 81–91.

⁶⁶ J. Ebbesson et al., *The Aarhus Convention: An Implementation Guide*, 2nd edn (UNECE, 2014), p. 60.

⁶⁷ UN ECLAC & CCJ Academy of Law, ‘Ensuring Environmental Access Rights in the Caribbean: Analysis of Selected Case Law’, 2018, UN Doc. LC/TS.2018/31/Rev.1, p. 7, available at: https://repositorio.cepal.org/bitstream/handle/11362/43549/S1800510_en.pdf.

⁶⁸ UN ECLAC, n. 60 above, pp. 103–4 (emphasis added).

good practice in the field of public participation in environmental decision making.⁶⁹ As explained below, they provide a yardstick for evaluating the contribution of the Escazú Agreement, taking into account also the specific social conditions of the LAC region, as noted earlier. The relevance of each of these instruments will be discussed in turn.

Scholars acknowledge that the Aarhus Convention ‘does provide helpful structures and mechanisms’,⁷⁰ and that its provisions are ‘worthy of emulation’⁷¹ where there is the need to establish or strengthen the right of the public to participate in environmental decision making. Indeed, the Aarhus Convention has significantly strengthened environmental democracy and progressed sustainable development in not only industrialized but also transitional and developing countries that make up the UNECE region in which it applies.⁷² Given this broad spectrum of application, though a regional treaty, its ‘potential to serve as a global framework for strengthening citizens’ environmental rights’ and ‘the application of Principle 10 in other regions of the world’, with relevant adaptation, has been widely acknowledged.⁷³ This view is supported by the UN Economic Commission for Africa (UNECA) in relation to Africa,⁷⁴ and there are even debates about whether China should ratify the Aarhus Convention.⁷⁵ It is therefore not surprising that the Escazú Agreement drew ideas from the Aarhus Convention.⁷⁶

The potential of the Aarhus Convention to provide an example of ‘good practice’ is further substantiated by the fact that the Convention’s provisions have influenced judicial decisions involving non-parties to the Convention.⁷⁷ Such provisions, moreover,

⁶⁹ See S. Whittaker, *The Right of Access to Environmental Information* (Cambridge University Press, 2021), pp. 33–59; U. Etemire, ‘Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice’ (2014) 3(1) *Transnational Environmental Law*, pp. 149–72, at 151–6; G. Parola, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (De Gruyter Open, 2013), p. 91.

⁷⁰ E. Barritt, ‘Global Values, Transnational Expression: From Aarhus to Escazú’, in V. Heyvaert & L. Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar, 2020), pp. 198–214, Part II.

⁷¹ L. De Silva, ‘Escazú Agreement 2018: A Landmark for the LAC Region’ (2018) 2(1) *Chinese Journal of Environmental Law*, pp. 93–8, at 93.

⁷² K. Sommermann, ‘Transformative Effects of the Aarhus Convention in Europe’ (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 321–37. See generally, Ebbesson et al., n. 66 above.

⁷³ S. Stec & S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (UN, 2000), p. v. See also U. Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Routledge, 2015).

⁷⁴ UNECA, *Improving Public Participation in the Sustainable Development of Mineral Resources in Africa* (UNECA, 2004), pp. 15–6, 37.

⁷⁵ S. Whittaker, ‘The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing’ (2017) 6(3) *Transnational Environmental Law*, pp. 509–30, at 511.

⁷⁶ De Silva, n. 71 above, p. 94. See also M. Lavrik, A. Jimenez & M. Vilela, ‘The Earth Charter and the Regional Treaties Implementing Access Rights: Principle 10 of the Rio Declaration’, *Earth Charter International*, June 2018, pp. 16–2, available at: https://earthcharter.org/wp-content/uploads/2020/02/Principle-10_Aarhus-and-Escazu-Treaty-Article-1-3.pdf.

⁷⁷ See, e.g., European Court of Human Rights (ECtHR), *Taşkın v. Turkey*, Appl. No. 46117/99, Judgment, 10 Nov. 2004. In this case, although Turkey was not a party to the Aarhus Convention, the ECtHR directly read the provisions of the Aarhus Convention into the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to which Turkey is a party, ‘in a particularly extensive form’ in deciding the matter; see A. Boyle, ‘Human Rights and the Environment: Where Next?’

have been relied upon as a model by non-party states outside UNECE – including countries in the LAC region – in developing their national legislation.⁷⁸ The Aarhus Convention has also served as the basis for the promotion of the tenets of public participation in international forums, such as the UN climate regime.⁷⁹ Furthermore, in 2021, Guinea Bissau acceded to the Aarhus Convention,⁸⁰ making it the first non-UNECE country to take advantage of Article 19(3) of the Convention, which uniquely allows any country to become party to the regime.⁸¹ Other non-UNECE countries are following suit: for example, Mongolia has started the accession process,⁸² and Cameroon has expressed its interest to the UNECE Secretariat in becoming a party.⁸³ This makes the Aarhus Convention the only regional environmental treaty to have a party from outside its primary regional domain, with the clear potential to attract more of such countries. These facts, indeed, exemplify the transcontinental and international relevance of Aarhus.

In contrast to the Aarhus Convention, the Bali Guidelines are global in nature. Although voluntary and non-binding, they prescribe minimum international standards for environmental democratic rights to help ‘States, primarily developing countries’ develop adequate laws and practices for implementing their Principle 10 commitments.⁸⁴ In structure and content, Bali draws significantly on the more detailed Aarhus Convention.⁸⁵ To a large extent, this suggests that many of the principles, rights, and approaches in the latter instrument are also applicable at the global level. According to Stec, the adoption of the Bali Guidelines ‘marked an important milestone in international standard-setting and the establishment of good practices related to

(2012) 23(3) *European Journal of International Law*, pp. 613–42, at 624. ECHR, Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

- ⁷⁸ E.g., Chile has largely adopted the Aarhus Convention’s definition of ‘environmental information’ in its revised General Environmental Framework Law (2010), Law No. 20.417: J.B. Soto, ‘El acceso a la información pública y la justicia ambiental’ [‘Access to Public Information and to Environmental Justice’] (2010) 34 *Revista de derecho (Valparaíso)*, pp. 571–96. For the influence of the Aarhus Convention (n. 19 above) on Brazilian legislation, see S.A.N. da Nóbrega, ‘Access to Environmental Information: A Comparative Analysis of the Aarhus Convention with Brazilian Legislation’ (2011) 2 *Environmental Law Network International*, pp. 87–95, at 87–8.
- ⁷⁹ S. Duyck, ‘Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime’ (2015) 22(4) *Review of European, Comparative & International Environmental Law*, pp. 123–38.
- ⁸⁰ UNECE, Meeting of the Parties (MoP) to the Aarhus Convention, ‘Draft Decision on Accession of Guinea Bissau to the Convention’, 10 Mar. 2021, UN Doc. ECE/MP.PP/WG.1/2021/21, available at: https://unece.org/sites/default/files/2021-04/ECE_MP.PP.WG.1_2021_21_E.pdf.
- ⁸¹ Geneva Environmental Network, ‘Welcome Guinea-Bissau: Opening a New Dimension for Aarhus Convention’, Aarhus MOP7 Side Event, 15 Oct. 2021, available at: <https://www.genevaenvironmentnetwork.org/events/welcome-guinea-bissau-opening-a-new-dimension-for-aarhus-aarhus-mop7-side-event>.
- ⁸² UNECE, MoP to the Aarhus Convention, ‘Report of the Seventh Session of the Meeting of the Parties’, 17 Feb. 2022, UN Doc. ECE/MP.PP/2021/2, para. 84, available at: https://unece.org/sites/default/files/2022-07/ECE_MP.PP_2021_2_E.pdf.
- ⁸³ UNECE, MoP to the Aarhus Convention, ‘Report of the Second Extraordinary Session of the Meeting of the Parties’, 15 Oct. 2010, UN Doc. ECE/MP.PP/2010/2, paras 19 and 20, available at: https://unece.org/fileadmin/DAM/env/pp/prtr/docs/2011/ece_mp_pp_2010_2_eng.pdf.
- ⁸⁴ Bali Guidelines, n. 20 above, Preamble.
- ⁸⁵ U. Etemire, ‘Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights’ (2016) 28(3) *Journal of Environmental Law*, pp. 393–413, at 398–403.

application of Principle 10'.⁸⁶ The Bali Guidelines were developed with input from nations and civil society groups around the world and adopted by the UNEP Governing Council.⁸⁷ It is noteworthy that the UNEP Governing Council is a political body elected by the UNEP General Assembly on a three-year term to provide environmental policies, and is made up of 53 states from every region of the world.⁸⁸ Latin American states alone permanently hold ten of those seats, which gives the region a significant opportunity to ensure that global environmental policies like the Bali Guidelines are relevant to the region and are broadly reflective of its interests.

It is in consideration of the foregoing that the subsequent analysis of the quality and potential of the Escazú Agreement to facilitate effective public participation in environmental decision making in the LAC region will largely benefit from references to both the Aarhus Convention and Bali Guidelines.

3.1. *The Scope of the Right to Participate under the Escazú Agreement*

Article 7 of the Escazú Agreement broadly provides for the right of the public to participate in environmental decision-making processes. In this respect, detailed answers to the twin questions of 'who is entitled to participate?' and 'what projects and activities are subject to participation?' are relevant in determining the scope and value of the right offered. Each is discussed in turn.

Who is entitled to participate?

The Escazú Agreement generally refers to 'the public' as the beneficiary of the right to participate in environmental decision making. Its Article 2(d) defines 'the public' as 'one or more natural or legal persons ... *that are nationals or that are subject to the national jurisdiction of the State Party*'.⁸⁹ This narrow definition can be critiqued as it excludes the public beyond state borders, and arguably is at variance with the principle of non-discrimination provided for in Article 3(a) to guide states in their implementation of the treaty. In other words, with regard to the identification of the public entitled to participate, Article 2(d) unduly limits the usefulness of the principle of non-discrimination as it relates to nationality and domicile, even in a situation with potential transboundary environmental effect where the best approach requires the involvement of members of the public from different nations.⁹⁰ Article 2(d) falls short of good practice as reflected in the Aarhus Convention and the Bali Guidelines, where 'the public concerned' who hold the participatory right is defined in a non-discriminatory manner without any limitations as to nationality and domicile of

⁸⁶ Stec, n. 34 above, p. 5.

⁸⁷ Etemire, n. 85 above, p. 398.

⁸⁸ See UNGA Res. 2997(XXVII), 'Institutional and Financial Arrangements for International Environmental Co-operation', 15 Dec. 1972, UN Doc. A/RES/2997(XXVII), Art. 1, available at: <http://www.un-documents.net/a27r2997.htm>.

⁸⁹ Emphasis added.

⁹⁰ See E. Mitrotta, 'Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas', in Jendroška & Bär (eds), n. 34 above, pp. 363–86.

natural and legal persons.⁹¹ Interestingly, the preliminary version of the Escazú Agreement contained a broader, non-discriminatory definition of ‘the public’,⁹² which was intentionally replaced in the course of negotiation with the present limiting definition. Stec and Jendroška shed light on the undermining effect on participation of this approach by Escazú:

The Escazú Agreement has drawn a line between the nationals or residents of each State Party and those across the border and has accorded no rights to the latter. The Parties have thus agreed to a situation in which their own people could have no right to receive information from the authorities of a neighbouring country about transboundary matters that affect their right to a healthy environment and to sustainable development. Nor would a Party be able to use the Agreement to argue that its citizens be allowed to participate in an environmental impact assessment under Article 7(2) if the EIA is conducted across a border ... The negotiating states, in their efforts to limit their obligations in the case of matters arising within their own territory, have inadvertently failed to protect their own nationals in possible cases of adverse transboundary effects arising from neighbouring countries.

The discriminatory effect on the grounds of nationality is in direct conflict with the Agreement’s principle of non-discrimination and violates general provisions of international law related to non-discrimination [E.g., American Convention on Human Rights ... Arts 1, 17(2), 24, 27(1)].⁹³

However, subject to its discriminatory disposition, the Escazú Agreement’s definition of the public is clear on the fact that *all* natural and legal persons can participate in the relevant environmental decision-making processes. At least nationally, it has been argued that the approach of the Escazú Agreement is unambiguous in ensuring unrestricted public access to decision-making processes and avoiding the possibility of being used by officials to exclude any person from participation, unlike the Aarhus Convention and the Bali Guidelines under which members of the public who intend to participate can be refused access to the procedure if they do not meet the stated criteria of ‘the public affected or likely to be affected by, or having an interest in’ the decision.⁹⁴ However, the said limiting effect of these criteria in the Aarhus Convention and the Bali Guidelines may be more superficial than practical. Indeed, one cannot reasonably expect that a member of the public who has no ‘interest’ in the decision would wish to participate in its making. Moreover, the criterion of ‘having

⁹¹ Arts 2(5) and 3(9) Aarhus Convention; see also footnote to Bali Guidelines, n. 20 above, Guideline 8.

⁹² UN ECLAC, ‘Preliminary Document of the Regional Instrument on Access to Information, Participation and Justice on Environmental Matters in Latin America and the Caribbean’, 5 May 2015, UN Doc. LC/L.3987 (Preliminary Version of the Escazú Agreement), Arts 2, 5(12), available at: https://repositorio.cepal.org/bitstream/handle/11362/37953/1/S1500260_en.pdf.

⁹³ S. Stec & J. Jendroška, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) 31(3) *Journal of Environmental Law*, pp. 533–45, at 544.

⁹⁴ S. Guerra & G. Parola, ‘Implementing Principle 10 of the 1992 Rio Declaration: A Comparative Study of the Aarhus Convention 1998 and the Escazú Agreement 2018’ (2019) 2(55) *Revista Jurídica*, pp. 1–33, at 20.

an interest in' the decision has been interpreted by authoritative sources in a manner that, by implication, is essentially open-ended and capable of including any person.⁹⁵

What is more, both the Aarhus Convention and the Bali Guidelines explicitly include non-governmental organizations (NGOs) 'promoting environmental protection and meeting any requirements under national law' as part of the concerned public eligible to participate.⁹⁶ Their role is important because they bring together 'expertise and resources, [and] generally have greater ability to effectively exercise their rights ... [of participation] than individual members of the public'.⁹⁷ In this respect, Article 2(d) of the Escazú Agreement simply mentions 'organizations' as part of the public entitled to participate under the regime. This will include, among others, 'organizations ... that promote environmental protection', which states are required to recognize and protect in Article 4(6) of the Escazú Agreement, as well as 'organizations that promote and defend human rights in environmental matters' which have their participation right specifically protected under Article 9 of the Escazú Agreement.⁹⁸

In essence, the Escazú Agreement's approach in Article 2(d) is generally broader and goes beyond that in the Aarhus Convention and Bali Guidelines, in the sense that it subsumes, and is not restricted to, 'environmental' NGOs. Furthermore, while the Aarhus Convention and Bali Guidelines allow states some discretion to allow requirements in their national laws that could exclude some environmental NGOs from participation,⁹⁹ the Escazú Agreement does not create an opportunity for this. In fact, during the negotiation of the regime, efforts by some countries to include a proviso that could have provided states with a similar discretion were successfully opposed by other

⁹⁵ See UNECE, Compliance Committee, 'Findings and Recommendations with regard to Communication ACCC/C/2010/50 concerning Compliance by the Czech Republic', 29 June 2012, UN Doc. ECE/MP.PP/C.1/2012/11, para. 66 (the Aarhus Convention Compliance Committee holding that 'the definition of "the public concerned" under the Convention is still very broad ... whether members of the public have an interest in the decision-making depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity' (emphasis added). See also Ebbesson et al., n. 66 above, p. 57 (noting that '[w]ith respect to the criterion of "having an interest", the definition appears to go well beyond the kind of language that is usually found in legal tests of "sufficient interest" ... In particular it should be read to include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity. Potentially affected interests may also include social rights such as the right to be free from injury or the right to a healthy environment. It also applies, however, to a category of the public that has an unspecified interest in the decision-making procedure' (emphasis added)).

⁹⁶ Arts 2(5) and 3(9) Aarhus Convention; see also footnote to Bali Guidelines, n. 20 above, Guideline 8.

⁹⁷ UNECE, Compliance Committee, 'Report of the Compliance Committee on its Seventh Meeting (Addendum): Findings and Recommendations with regard to Communication ACCC/C/2004/05 concerning Compliance by Turkmenistan', 18 Feb. 2005, UN Doc. ECE/MP.PP/C.1/2005/2/Add.5, para. 16, available at: <https://unece.org/fileadmin/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.5.e.pdf>.

⁹⁸ See J. Jendroška, 'Procedural Environmental Rights: Observations on the Escazú Agreement as Compared with the Aarhus Convention', in K. de Graaf et al. (eds), *Grensoverstijgende Rechtsbeoefening: Liber Amicorum Jan Jans* (Uitgeverij Paris, 2021), pp. 345–53, at 349–50.

⁹⁹ It is quite clear that such requirements must not be discriminatory, overly burdensome or politically motivated, and that each party's legal framework must generally encourage the establishment of environmental NGOs and their participation in relevant decision-making processes; see Art. 3(4) Aarhus Convention, and Ebbesson et al., n. 66 above, p. 58.

countries.¹⁰⁰ The only limitation of the Escazú Agreement's approach is that such an organization must be 'subject to the national jurisdiction of the State Party', as noted earlier, whereas under the Aarhus Convention and Bali Guidelines the eligible environmental NGOs will include those with a transboundary and international character.

Which projects and activities are subject to participation?

The second query focuses on the projects and activities that are 'environmental decisions' subject to public participation. As discussed below, the relevant environmental decisions relate either to (i) specific projects and activities, or (ii) the preparation of strategic measures like policies, plans, programmes and legally binding instruments. On the first, the Escazú Agreement only obliges states in Article 7(2) to 'guarantee mechanisms' for public participation in decisions 'with respect to projects and activities ... *that have or may have a significant impact on the environment*'.¹⁰¹ Factors such as the size, location, effect,¹⁰² and even the nature and duration of proposed specific projects and activities are useful in determining whether a project or activity may have a significant impact on the environment. The Aarhus Convention contains a similar broad and flexible provision,¹⁰³ but the regime further provides for a relatively detailed list of specific projects and activities presumed to have a significant impact on the environment, the decision over which the relevant public has a right to make an input.¹⁰⁴

The Aarhus Convention list has the advantage of enabling public authorities to promptly – and with barely any controversy – determine that the environmental decision concerning a particular project or activity contained in the list be subjected to public participation. It also serves as early notice to potential developers and could help them to prepare more effectively to engage the public in the actualization of their projects and activities. It is, perhaps, for these benefits and more that the preliminary version of the Escazú Agreement contained a list of projects and activities in several critical sectors (excluded from the final document) that must be subjected to public participation.¹⁰⁵ Ultimately, however, no project or activity in the Aarhus Convention's list is likely to escape the broad net of Article 7(2) of the Escazú Agreement, even though nothing stops public authorities in LAC countries from developing a similar list to assist

¹⁰⁰ J.Z. Madrid, 'Definitions of the Aarhus Convention v. the Proposal for a New Latin America and the Caribbean Instrument: Mapping the Differences in the Material Scope of Procedural Environmental Rights in International Law', in Jendroška & Bär (eds), n. 34 above, pp. 39–58, at 51; the proviso sought to be included in the definition of 'the public' in Escazú was 'in accordance with national legislation or practice'.

¹⁰¹ Emphasis added.

¹⁰² Ebbesson et al., n. 66 above, p. 133.

¹⁰³ Art. 6(1)(b) Aarhus Convention. Also, see generally, Rio Declaration, n. 4 above, Principles 17 and 19.

¹⁰⁴ Art. 6(1)(a) and Annex 1 Aarhus Convention.

¹⁰⁵ Preliminary Version of the Escazú Agreement, n. 92 above, Art. 8(15), provides that '[i]n all cases, public participation shall be guaranteed in projects and activities related to mining, electricity generation, production activities and certain uses of hazardous substances and treatment and disposal of waste... [and] projects and activities relating to coastal development'. Compared with the more definite Aarhus list, this initially proposed Escazú list appears to be quite nebulous and could have included too many projects and activities with negligible (rather than substantial) impact on the environment, creating a situation where public participation will be impossible to undertake in all such cases.

them. What is more, while the Aarhus Convention allows the outright exemption from public participation of ‘proposed activities serving national defence purposes’,¹⁰⁶ the Escazú Agreement does not permit any outright exemption. Thus, overall, the scope of decisions on specific projects and activities that are subject to public participation is potentially broader under the Escazú Agreement compared with the Aarhus Convention.

Furthermore, unlike its Article 7(2), which obliges states to ‘guarantee mechanisms’ for public participation in decisions on specific projects and activities, the Escazú Agreement requires states to ‘promote’ participation in the preparation of strategic measures like policies, plans, programmes and legally binding instruments.¹⁰⁷ This comparatively weaker language, which offers states more flexibility in how, and the extent to which, they involve the public in the preparation of strategic measures generally tallies with the approach in both the Aarhus Convention and Bali Guidelines.¹⁰⁸ This approach may reflect concerns about strategic measures which potentially affect a wider spectrum of the public compared with specific projects or activities. These concerns include the fact that a mandated process which allows for comprehensive participation by the full range of stakeholders may be too burdensome and complex to undertake,¹⁰⁹ or that the cost in resources and time would negatively affect the cost-effectiveness of the process.¹¹⁰ There are, however, diverse participation strategies that have been proposed for managing such a situation and ensuring that the participation of many stakeholders is meaningful and effective.¹¹¹

Going beyond the good practice of the Aarhus Convention and Bali Guidelines – by providing for a stronger obligation imposed on states to ensure participation in the formation of strategic measures – would have better positioned the Escazú Agreement to achieve its goal of ensuring sustainable development in the LAC region. This is because public participation in decision making on specific projects and activities ‘may come too late to result in major changes in proposed activities that can protect the environment’ or adequately address public concerns.¹¹² It may in fact be difficult, if not

¹⁰⁶ Art. 6(1)(c) Aarhus Convention.

¹⁰⁷ Art. 7(3) Escazú Agreement. While the meaning of ‘legally binding instruments’ (such as rules, regulations, statutes) is clear, ‘[a] policy may ... be considered as the inspiration and guidance for actions, a plan as a set of co-ordinated and timed objectives for the implementation of the policy, and a programme as a set of projects in a particular area’: C. Wood & M. Djeddour, ‘Strategic Environmental Assessment: EA of Policies, Plans and Programmes’ (1992) 10(1) *Impact Assessment and Project Appraisal*, pp. 3–22, at 8.

¹⁰⁸ Arts 7 and 8 Aarhus Convention; Bali Guidelines, n. 20 above, Guideline 13. For the scope of these provisions, see J. Wates, ‘The Aarhus Convention: A Driving Force for Environmental Democracy (2005) 2(1) *Journal for European Environmental & Planning Law*, pp. 2–11, at 6.

¹⁰⁹ M. Gauthier, L. Simard & J. Waaub, ‘Public Participation in Strategic Environmental Assessment (SEA): Critical Review and the Quebec (Canada) Approach’ (2011) 31(1) *Environmental Impact Assessment Review*, pp. 48–60, at 51.

¹¹⁰ H. Abaza, R. Bisset & B. Sadler, *Environmental Impact Assessment and Strategic Impact Assessment: Towards an Integrated Approach* (UNEP, 2004), pp. 67–8.

¹¹¹ *Ibid.*, p. 68.

¹¹² B.J. Richardson & J. Razzaque, ‘Public Participation in Environmental Decision-Making’, in B.J. Richardson & S. Wood (eds), *Environmental Law for Sustainability* (Hart, 2006), pp. 165–94, at 180. See also H.M. Alshuwaikhat, ‘Strategic Environmental Assessment Can Help Solve Environmental Impact Assessment Failures in Developing Countries’ (2005) 25(4) *Environmental Impact Assessment Review*, pp. 307–17.

impossible, to settle, at the specific project level, matters that relate to the ‘cumulative effects of other projects within the same or related programmes’.¹¹³ Usually, strategic measures broadly constitute the general framework that restricts or allows, directly or impliedly, certain types of specific project and activity and the manner of their deployment. They essentially lay the foundation for, and inform the development of, specific projects.¹¹⁴ It is therefore little wonder that the Mexican community referred to in Section 2.2 above not only protested against their exclusion from the decision-making process leading to the approval of the specific energy project in their community, but also their non-involvement in the development of the broader energy transition strategy that informed this project. Thus, right from the 1992 Rio Conference on Environment and Development, there have been calls for states to strengthen public participation in the formation of strategic measures, as is the case with environmental decisions on specific projects and activities.¹¹⁵

3.2. *The Public Participation Process*

The public right to participation in environmental decision making, as provided for in the Escazú Agreement, is subject to several requirements, which this section will explore.

Duty to effectively inform the public

When an environmental decision is to be made, the public must have both the right and opportunity to access all relevant information to participate in an effective, informed, and meaningful manner in the process.¹¹⁶ According to the International Association of Impact Assessment (IAIA) Public Participation Best Practice Principles, ‘increased interest and motivation to participate occur by diffusing simple and understandable information to the affected and interested public’.¹¹⁷ Thus, the Escazú Agreement rightly obliges states to provide the public in an effective, comprehensible and timely manner with the following:

- as a minimum, certain specified information about the proposed project/activity (such as its nature, location, foreseen impact) and the associate public participatory procedure (place, date, time, public authority in charge, etc.);¹¹⁸
- all other necessary and additional information that will enable the public to give effect to its right to participate in the environmental decision-making process.¹¹⁹

¹¹³ A. Gilpin, *Environmental Impact Assessment: Cutting Edge for the Twenty-First Century* (Cambridge University Press, 1995), p. 172.

¹¹⁴ R. Therivel & M.R. Partidario, ‘Introduction’, in R. Therivel & M.R. Partidario (eds), *The Practice of Strategic Environmental Assessment* (Earthscan, 1996), pp. 1–12, at 5.

¹¹⁵ Gilpin, n. 113 above, p. 76.

¹¹⁶ Pring & Noe, n. 10 above, p. 11.

¹¹⁷ P. Andre et al., ‘Public Participation: International Best Practice Principles’, IAIA, Special Publication Series No 4, Jan. 2006, p. 2.

¹¹⁸ Art. 7(6) and (17) Escazú Agreement.

¹¹⁹ *Ibid.*, Art. 7(4) and (6)(d).

The requirement for the participating public to be given access to a specific set of (environmental) information that is directly relevant to the environmental decision in issue, and then to environmental information in general, aligns with good practice as reflected in the Aarhus Convention and Bali Guidelines.¹²⁰ However, while the latter generally require states to inform the public through ‘appropriate’ or ‘effective’ means about the proposed project/activity and its opportunity to participate, the Escazú Agreement goes beyond this general approach. It provides more precise and useful guidance for states by obliging them to inform the public ‘through appropriate means, *such as in writing, electronically, orally and by customary methods*’.¹²¹ Unlike the Aarhus Convention and Bali Guidelines, the Escazú Agreement thus addresses the social, cultural, and economic differences and inequalities within society that, when not taken into account, may obstruct the communication of vital information to members of the public.¹²²

Ensuring early and reasonable timeframes for participation

Generally, one of the key shortcomings of traditional procedures for public participation is that participation takes place too late during the environmental decision-making process.¹²³ Article 6(4) of the Aarhus Convention addresses this problem by stipulating that ‘[p]arties shall provide for *early* public participation, *when all options are open* and effective public participation can take place’.¹²⁴ The Bali Guidelines contain a similar provision which reflects good practice.¹²⁵ In other words, the authorities must not have entered into any agreement with project proponents or made any environmental decision that would limit the range of possible decisions that they could make on an environmental matter before public participation in the process. To be sure, ‘the ability to consider a “no action” alternative (also called the “zero option”) under which a proposed activity may be withdrawn implies that a full range of potential decisions is under consideration’.¹²⁶ The IAIA Public Participation Best Practice Principles are supportive of such participation early in the process, noting that so doing ‘builds trust among participants, gives more time for [public participation], improves community analysis ... increases opportunities to modify the proposal in regards to the comments and

¹²⁰ Art. 6(2) and (4) Aarhus Convention; Bali Guidelines, n. 20 above, Guidelines 8 and 10.

¹²¹ Art. 7(6) Escazú Agreement (emphasis added).

¹²² See M. Poustie, *Environmental Justice in SEPA’s Environmental Protection Activities: A Report for the Scottish Environment Protection Agency* (SEPA, 2004), pp. 87–8.

¹²³ J. Jendroška, ‘Public Participation in Environmental Decision-Making: Interactions between the Convention and EU Law and Other Key Legal Issues in Its Implementation in the Light of the Opinion of the Aarhus Convention Compliance Committee’, in M. Pallemerts (ed.), *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law* (Europa Law, 2011), pp. 92–147, at 133.

¹²⁴ Emphasis added.

¹²⁵ Bali Guidelines, n. 20 above, Guideline 8. See also UNEP, *Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (UNEP, 2015), p. 74.

¹²⁶ UNEP, *ibid.*

opinions gathered during the [public participation] process ... and improves the public image of the proponent'.¹²⁷

The timing of participation is addressed through Article 7(4) of the Escazú Agreement, which mandates states to ensure public participation in the environmental decision-making process 'from the early stages'. Arguably, this provision does not go far enough in effectively obliging states to ensure public participation when all options are still open, as good practice requires. As it appears, it is worded in a manner that may allow states to involve the public in the decision-making process at an early stage, but not necessarily before some decisions and agreements have been reached between the authority and the proponent of the activity in issue. This is what the reference to 'early stages' connotes. Article 7(4) was deliberately weakened from the preliminary version during the negotiation of the regime, in a manner that arguably favours state discretion. Indeed, the preliminary version of the Escazú Agreement mostly adopted the Aarhus Convention's language in requiring states to 'ensure public participation when all options and solutions are still possible'.¹²⁸

While the above discussion on early participation relates to the timing of when to engage the public, Article 7(5) of the Escazú Agreement addresses its *timeframe*. Article 7(5) requires states to ensure that the procedure is characterized by 'reasonable timeframes that allow sufficient time to inform the public and for its effective participation'. This accords with good practice as captured in the Aarhus Convention and Bali Guidelines.¹²⁹ The provision implies a reasonable amount of time for the participation procedure and its different phases, on which basis the Aarhus Convention Compliance Committee noted in a particular case that '[a] time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project'.¹³⁰ Also, the provision is concerned with ensuring reasonable *timing* for participation activities. Thus, the Compliance Committee in another case held that 'the timing of the commenting period, which was during the summer holiday season or during the Christmas holiday season ... cannot be considered reasonable'.¹³¹ In the end, a reasonable timeframe will not only create the opportunity for effective public input, but will give public authorities 'sufficient time to manage the process of public participation and to [properly] process the information provided by the public'.¹³²

¹²⁷ Andre et al., n. 117 above.

¹²⁸ Preliminary Version of the Escazú Agreement, n. 92 above, Art. 8(2).

¹²⁹ Art. 6(3) Aarhus Convention; see also Bali Guidelines, n. 20 above, Guideline 8; and UNEP, n. 12 above, p. 75.

¹³⁰ UNECE, Compliance Committee, 'Report of the Compliance Committee on its Nineteenth Meeting (Addendum): Findings and Recommendations with regard to Communication ACCC/C/2006/16 concerning Compliance by Lithuania', 7 Mar. 2008, UN Doc. ECE/MP.PP/2008/5/Add.6, para. 69, available at: https://unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf.

¹³¹ UNECE, Compliance Committee, 'Report of the Compliance Committee on its Twenty-sixth Meeting (Addendum): Findings and Recommendations with regard to Communication ACCC/C/2008/24 concerning Compliance by Spain', 8 Feb. 2011, UN Doc. ECE/MP.PP/C.1/2009/8/Add.1, paras 90–2, available at: https://unece.org/DAM/env/pp/compliance/C2008-24/DFR/ece.mp.pp.c.1.2009.8.add.1_as_resubmitted.pdf.

¹³² Ebbesson et al., n. 66 above, p. 142.

Right of the public to contribute effectively to the decision-making process

Making allowance for the public to effectively and practically provide their input in the environmental decision-making process is at the core of the public's right to participation. Thus, the Escazú Agreement provides that '[e]ach Party shall ensure the public's right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision-making processes'.¹³³ It further provides that this right 'shall include the opportunity to present observations through appropriate means available'.¹³⁴ Similar provisions are contained in the Aarhus Convention and Bali Guidelines.¹³⁵

Under the Aarhus Convention and Bali Guidelines, states are obliged to ensure 'effective' and 'appropriate opportunities' for public participation, and 'assist' the public in getting involved in the process.¹³⁶ While these provisions go some way to paint a picture for states of the acceptable standard of public participation, they arguably do not go far enough. They leave serious barriers to effective participation masked – such as language difference, poverty, geographical distance from participation venue, etc. – and do not place them on the front burners for state attention. In this regard the Escazú Agreement clearly goes beyond both instruments in specifically unearthing potential challenges to effective public participation, and requiring states to execute the process in a manner that is (i) 'favourable [and] ... adapted to the social, economic, cultural, geographical and gender characteristics of the public',¹³⁷ (ii) sensitive to their 'primary language ... [if] different to the official language' of the process,¹³⁸ and (iii) respectful of 'local knowledge, dialogue and interaction of different views and knowledge, where appropriate'.¹³⁹ Public authorities are also obliged under the Escazú Agreement to make efforts to identify and support the directly affected public as well as 'persons or groups in vulnerable situations' in order to facilitate their effective participation.¹⁴⁰ While these requirements of the Escazú Agreement are arguably implied in the aforementioned concise terminologies used in the Aarhus Convention and Bali Guidelines, the former is more explicit and detailed. The benefit of the latter approach is that it (i) arguably provides better clarity and awareness for government officials and the public on the acceptable standards of engagement, and (ii) promotes better compliance with the requirements by government, thus putting the public in a better position to hold the authorities accountable for their actions and omissions that fall below the prescribed standards.

What is more, public participation in environmental decision making, whether regarding specific projects and activities or strategic measures, should not end with

¹³³ Art. 7(1) Escazú Agreement.

¹³⁴ *Ibid.*, Art. 7(7).

¹³⁵ Art. 6(7) Aarhus Convention; Bali Guidelines, n. 20 above, Guidelines 9 and 11.

¹³⁶ See Arts 3(2), 6(3) and (4) Aarhus Convention; Bali Guidelines, n. 20 above, Guideline 9.

¹³⁷ Art. 7(10) Escazú Agreement.

¹³⁸ *Ibid.*, Art. 7(11).

¹³⁹ *Ibid.*, Art. 7(13).

¹⁴⁰ *Ibid.*, Art. 7(14) and (16).

the final approval of the subject-matter of the decision. This is because subsequent changes relating to the subject-matter of the approval may have a different and, possibly, deleterious effect on the environment and human wellbeing. Hence, to ensure that such changes are environmentally sustainable, the Escazú Agreement provides for public participation in decisions regarding the ‘revisions, re-examinations or updates’ of approved specific projects and activities and strategic measures.¹⁴¹ This approach is more comprehensive, encompassing, and environmentally protective, compared with that in the Aarhus Convention and Bali Guidelines.¹⁴² The latter provide only for public participation when public authorities reconsider specific projects and activities, but contain no express provision or reference in that respect in relation to strategic measures.¹⁴³

Duty to consider the outcome of participation and communicate the final decision

Once the public has provided its input into the environmental decision-making process, good practice, as reflected in the Aarhus Convention and Bali Guidelines,¹⁴⁴ requires the relevant public authority to take due account of the outcome of the public participation in making the final decision on the specific project or activity or strategic measure. Article 7(7) of the Escazú Agreement contains the same requirement. This obligation ultimately aims at improving the quality and sustainability of the final decision, by informing it, where necessary, with the views of the public. It does not give the public a right to veto the decision, or impose a duty on the public authority to accept or align the final decision with all or any of the comments received from the public.¹⁴⁵ It will be practically impossible for the authority to agree with all the public comments (especially as they may be in conflict with each other), apart from the need and their duty to curtail democratic excesses, one of which Popovic summarizes thus: ‘A tyrannical majority can be as harmful to the environment as it can be to the rights of minorities in other contexts’.¹⁴⁶ What the obligation requires is for the authority to review and to evaluate the public comments in a transparent and traceable manner, and ensure that they form part of the considerations in arriving at the final decision, in such a way that the authority will be able to show why particular outcomes or comments were accepted or rejected on substantive grounds.¹⁴⁷

¹⁴¹ *Ibid.*, Art. 7(2) and (3).

¹⁴² Art. 6(10) Aarhus Convention; Bali Guidelines, n. 20 above, Guideline 12; UNEP, n. 125 above, pp. 89–90.

¹⁴³ Art. 7 Aarhus Convention (on ‘public participation concerning plans, programmes and policies relating to the environment’) expressly incorporates Art. 6(3), (4) and (8), and not Art. 6(10), which provides for public participation when public authorities ‘reconsider or updates the operating conditions’ for specific projects. Art 8 Aarhus Convention (on ‘public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments’) also does not contain any provision like Art. 6(10), as with Guideline 12 of the Bali Guidelines, n. 20 above.

¹⁴⁴ Art. 6(8) Aarhus Convention; Bali Guidelines, n. 20 above, Guideline 11.

¹⁴⁵ UNEP, n. 125 above, p. 87.

¹⁴⁶ N.A.F. Popovic, ‘The Right to Participate in Decisions that Affect the Environment’ (1993) 10(2) *Pace Environmental Law Review*, pp. 683–709, at 702.

¹⁴⁷ UNEP, n. 125 above, p. 87.

Furthermore, Article 7(8) of the Escazú Agreement requires states:

[to] ensure that, once a decision has been made, the public is informed in a timely manner thereof and of the grounds and reasons underlying the decision, including how the observations of the public have been taken into consideration. The decision and its basis shall be made public and be accessible.

This aligns with good practice as enshrined in the Aarhus Convention and Bali Guidelines.¹⁴⁸ The provision fulfils the following two vital purposes.

Firstly, the requirement in Article 7(8) above to show ‘how the observations of the public have been taken into consideration’ prevents public authorities from circumventing this all-important task of ensuring that public inputs form part of, and possibly influence the nature of the final decision. This element also constitutes a ‘reporting and feedback’ mechanism which helps stakeholders to realize the relevance of their inputs.¹⁴⁹ This will encourage them to participate in subsequent decision-making processes, as the public may be discouraged from participating if there are doubts about whether their comments are usually considered at all. Moreover, given that under the Escazú Agreement,¹⁵⁰ as with the Aarhus Convention and Bali Guidelines,¹⁵¹ ‘members of the public whose comments were not duly taken into account [or allege a violation of any provision on public participation] will be able to challenge the final decision in an administrative or judicial proceeding on this basis’,¹⁵² this information can also serve as evidence.

Secondly, the requirement to inform the public in a ‘timely’ manner about the decision and its basis is vital for ensuring that the public has sufficient time to meet any time limits for appealing against such a decision. It furthermore prevents governments and developers from acting on the final decision to alter the environment and affect human wellbeing – possibly irreversibly – before there is an opportunity to appeal.¹⁵³ Thus, Article 6(9) of the Escazú Agreement improves on the Aarhus Convention and Bali Guidelines by requiring that the dissemination of this information ‘shall be carried out through appropriate means, which may include written, electronic or oral means and customary methods, in an effective and prompt manner’ and that the information ‘shall include the established procedure to allow the public to take the relevant administrative and judicial actions’.

4. CONCLUSION

The adoption of the Escazú Agreement as a means to give effect to Principle 10 of the Rio Declaration expresses the belief of LAC countries that public participation

¹⁴⁸ Art. 6(9) Aarhus Convention; Bali Guidelines, n. 20 above, Guideline 11.

¹⁴⁹ Andre et al, n. 117 above, p. 2.

¹⁵⁰ Art. 8(2) Escazú Agreement.

¹⁵¹ Art. 9(1)–(2) Aarhus Convention; Bali Guidelines, n. 20 above, Guideline 11.

¹⁵² UNECE, Compliance Committee, ‘Report of the Compliance Committee on its Seventh Meeting (Addendum): Findings and Recommendations with regard to Communication ACCC/C/2004/3 concerning Compliance by Ukraine’, 14 Mar. 2005, UN Doc. ECE/MP.PP/C.1/2005/2/Add.3, para. 110.

¹⁵³ UNEP, n. 125 above, pp. 88–9.

mechanisms in environmental decision-making processes are vital for achieving the goal of sustainable development in their region. Though inspired by the good practices contained in the Aarhus Convention and the Bali Guidelines, our analysis shows that the Escazú Agreement is not a replica of the former regimes but was tailored to the needs of the LAC region. Similar to those agreements, the Escazú Agreement requires sharing of information with the public in order to ensure its informed participation; it provides reasonable timeframes for the various phases of participation; it ensures that due account is taken of the outcome of the participation process in the final decision; and requires communication of the final decision to the public together with the grounds for the decision. However, it goes beyond the good practices of the Aarhus Convention and Bali Guidelines by strengthening the public's participatory rights, providing better guidance for public authorities, which could improve their overall compliance with the regime, and demonstrating sensitivity to the social, economic, geographical, and cultural character and needs of the region. For example, unlike earlier regimes, the Escazú Agreement:

- does not allow state parties to restrict the participatory right of organizations that are subject to their jurisdiction;
- does not outrightly exempt decisions on any type of specific project from being subjected to participation;
- more clearly highlights the diverse non-legal challenges to public access to information and participation and expressly requires states to surmount them and ensure effective participation; and
- makes provision for public participation in the revision and update of not only approved specific projects, but established strategic measures as well.

However, our analysis also reveals significant weaknesses in key aspects of Escazú's public participation provision. The Escazú Agreement takes a discriminatory approach to the definition of 'the public', which limits those entitled to participate to nationals and those subject to the jurisdiction of state parties. With this, the international public is largely disempowered from influencing the decisions of particular state parties that affect a shared regional and globally relevant natural resource like the Amazon. In addition, and contrary to good practice, the Escazú Agreement does not effectively oblige states to ensure public participation when all options are open. This leaves too much room for states and developers to reach agreements and take actions that may compromise the value and effectiveness of subsequent public participation in the process leading to the final decision. Also, the Escazú Agreement's provision for public participation in the development of strategic measures is weak compared with its provision for participation in decisions on specific activities. While this is also the case under the Aarhus Convention and Bali Guidelines, it is felt that this is one critical area where the Escazú Agreement should have taken the lead by mandating participation, especially as some environmental issues are best addressed at this higher strategic level than at the specific project level, if at all.

In sum, the alignment between the Escazú Agreement and the good practice of the Aarhus Convention and Bali Guidelines lends credence to arguments on the global

nature and value of norms on environmental public participation, and their potential to engender sustainable development. The provisions of the Escazú Agreement that go further than good practice are not only suitable for promoting sustainable development in the LAC region. They can now arguably be added to the body of good practice in this field of study, which may inspire and help other regions and nations looking to implement Principle 10 more effectively through law. However, the weaker provisions in the Escazú Agreement – largely a mark of political compromises during its negotiation – risk compromising the value of the public right to participate granted and its capacity to drive sustainable development in the region. Overall, considering the nature of the strengths of the relevant provisions of the Escazú Agreement, one can expect an improvement in environmental public participation in the LAC region.