REVISTA DIREITO PÚBLICO

THE NEED FOR AN ENVIRONMENTAL DEMOCRACY TO GUARANTEE HUMAN RIGHTS IN LATIN AMERICA: THE ESCAZÚ AGREEMENT

A NECESSIDADE DE UMA DEMOCRACIA AMBIENTAL PARA GARANTIR OS DIREITOS HUMANOS NA AMÉRICA LATINA: O ACORDO DE ESCAZÚ

DANIEL FRANCISCO NAGAO MENEZES[1], [I]
I Universidade Presbiteriana Mackenzie (UPM). São Paulo (SP). Brasil.

JUAN FERNANDO ÁLVAREZ RODRÍGUEZ[2], [II]
II Pontificia Universidad Javeriana (PUJ). Bogotá. Colômbia.

ABSTRACT: The Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) entered into force in 2021, after achieving ratification in 11 countries. This is the first environmental treaty in the region, where it considers the greatest advance in terms of environmental democracy. This text addresses the international context that currently characterizes Latin America and later focuses on the motivations, stages and characteristics of the negotiation of this binding instrument. Likewise, the text develops the meaning and scope of the main provisions of the Agreement, highlighting its nature as an environmental and human rights treaty. In addition, the current status of the treaty and the next steps to be taken are presented. Finally, the main political arguments used by certain actors to question the Escazú Agreement are discussed.

KEYWORDS: Access to information; transparency; public participation; environmental democracy; human rights.

RESUMO: O Acordo Regional sobre Acesso à Informação, Participação Pública e Acesso à Justiça em Matéria Ambiental na América Latina e no Caribe (Acordo de Escazú) entrou em vigor em 2021, após ter sido ratificado por 11 países. Este é o primeiro tratado ambiental da região, onde considera o maior avanço em termos de democracia ambiental. Este texto aborda o contexto internacional que atualmente caracteriza a América Latina e, posteriormente, enfoca as motivações, etapas e características da negociação deste instrumento vinculante. Da mesma forma, o texto desenvolve o significado e o alcance das principais disposições do Acordo, destacando sua natureza de tratado ambiental e de direitos humanos. Além disso, é apresentado o estado atual do tratado e os próximos passos a serem dados. Finalmente, são discutidos os principais argumentos políticos usados por certos atores para questionar o Acordo de Escazú.

PALAVRAS-CHAVE: Acesso à informação; transparência; participação pública; democracia ambiental; direitos humanos.

INTRODUCTION

[1] Orcid do(a) autor(a) 1: https://orcid.org/0000-0001-9151-5699
[2] Orcid do(a) autor(a) 2: https://orcid.org/0000-0002-4362-5655

The objective of this working document is to deepen the process of signing the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (LAC), better known as the Agreement on Escazu. The international scenario in which it was held will be explained, and the possible repercussions that the events of 2020 could have on it, and the stages that have been completed (OLIVER, 1983) will be exposed. In addition to the legal analysis of the main norms, the obstacles observed in the different stages of the Agreement and the scope of its provisions, this work deals with the criticisms that have been made from different countries, and the political context that explains, well the refusal of various States to sign or ratify it, or their speed in expressing their willingness to be bound by the treaty. It should be noted that the Agreement, in just two years, has achieved 24 signatures from the 33 countries to which it is open, and will soon have 11 ratifications deposited for its international entry into force.

The final conclusions of this working document present a legal-political reflection of the only treaty in LAC that seeks to improve national legislation through coordination and multilateral cooperation, so that citizens have better access to environmental courts, there is more transparency and their participation in decision-making that involves living in a healthy environmental environment is increased.

1. INTERNATIONAL CONTEXT - ORIGIN OF THE PROCESS, STAGES AND CHARACTERISTICS OF THE NEGOTIATION

Since the 2000s, changes have been observed in international relations and in the international system that have been reinforced as a result of COVID-19. These mutations affect relations between States, between them and international organizations, and within countries. Different threats and challenges have emerged or re-emerged and, unlike past challenges, they affect the whole world. In addition to international terrorism, migratory pressures, wars, drug trafficking or pandemics, threats from cyber attacks and the negative effects of climate change have recently been added.

Faced with the old and new threats facing the world, multilateralism has been showing signs of wear and tear and outdated. At the same time, the States have shown themselves to be

little prepared to respond effectively and efficiently to the phenomena that have been occurring. International terrorism or the effects of the pandemic are an example of this.

On the other hand, there have also been demonstrations of withdrawal in some States. In addition to protectionist temptations, the weakening of international organizations, the preeminence of unilateralism or bilateralism over multilateralism, there is an increase in populism that, in its radical right wing, manifests itself with anti-immigration, anti-integration, anti-globalism, and anti-traditional political discourses. , with strong racist and xenophobic accents. Similarly, denialist discourses of science are observed in the face of the impacts of climate change, which deny the contribution of the expert knowledge of specialists in the search for solutions to problems of all kinds.

A clear manifestation of these phenomena is reflected in the four years of Donald Trump's government in the United States. In addition to denouncing the 2015 Paris Climate Agreement (the legal effects of which entered into force on November 4, 2016, the day after the US elections), the country abandoned trade negotiations with the European Union (EU), withdrew its signing of the Trans-Pacific Treaty for Economic Cooperation (TPP), announced the reduction of its contribution to the operational budget of the United Nations Organization (UN), withdrew from the negotiations of the Global Compact on Migration, abandoned the nuclear deal with Iran, withdrew from the World Health Organization (WHO), the UN Human Rights Committee (OHCHR), and the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and also withdrew funds for the financing of the United Nations Agency for Palestine Refugees in the Middle East (UNRWA), to name just a few actions of and the “Trump era”.

In this international context, awareness of caring for the environment and human rights has been increasing in world public opinion. The real and tangible effects of serious environmental problems, including climate change, have led the international community to advance in a gradual process and not without obstacles, in multilateral work, both to protect human rights (universal and regional), as well as to mitigate and adapt countries and their communities to a new environmental scenario. Thus, through various international multilateral, regional and bilateral treaties, environmental issues and human rights have taken on special prominence on the international agenda. The Paris Agreement, with 175 signatories, has

become the international treaty with the most States parties. This has been complemented by sectoral treaties on the environment or of another nature, but with the inclusion of this subject.

Within the current international uncertainty, by the end of 2020 certain issues have been cleared up. Joe Biden's triumph in the United States presidential elections will generate a certain twist in the policy imposed by Trump. On the subject of this text, Biden's announcement, already early in the campaign, to reincorporate his country into the Paris Agreement is good news. Some legal doubts have arisen regarding how he will be able to do it, according to US law[3], but Biden's will has been clear in this regard.

On the other hand, the first messages from the new president of the United States also go in the direction of resuming the multilateral route, abandoned by his predecessor in the White House. This question must be carefully observed because, depending on the subjects, the return to the multilateral will have different speeds and scopes. According to Joseph Nye (Perfil, 2020), the international scenario will be marked by a "cooperative rivalry" between the United States and China, and a rapid decoupling is unlikely, given the interdependence between their economies and the costs to both sides of the war. commercial. In this scenario, the EU countries are observed trying to give shape to a "strategic autonomy", which not only implies greater economic and military autonomy with respect to the great powers, but also the internal development of the what Emmanuel Macron has called the "critical industries" (Sud Ouest, 2020). However, Latin America views the role to be played in this scenario with impotence. Politically fragmented, weighed down by instability and subjected to a strong negative impact by COVID-19 in all areas (economic, social, health, labor, etc.), it is difficult to speak of a cohesive and integrated region, capable of facing the current challenges, as confirmed by the election of the president of the Inter-American Development Bank (IDB): thanks to the Latin American votes, Trump imposed his candidate, Mauricio Claver-Carone, breaking the tradition of more than six decades of Latin American presidencies.

That said, we must go back to 2012 to identify the initiative to celebrate a multilateral and cooperative treaty between LAC countries, whose purpose, focused on environmental issues, sought to advance in terms of transparency, information, participation and access to justice, as well as as well as in the protection of human rights defenders in such matters. Its

[3] Constitution of Disabled People's International', preamble, http://dpi.org/document/documents-of-reference/dpi-constitutionen.pdf. Acess 12/01/23.

result was the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean.

As will be seen in the following sections, the definition of this instrument was achieved after a great debate, not without controversy in some countries. In this sense, during its negotiation, resentment and reluctance arose, more or less overlapping, which ended up preventing certain States from signing or ratifying the text adopted in March 2018. To do this, arguments were sometimes used that recovered conceptions of sovereignty already outdated in International Law —or directly wrong, or with malicious interpretations—; that expressed nationalist positions or clearly inspired by particular interests, and that have little or nothing to do with the object or purpose of the Escazú Agreement. Among the arguments that will be analyzed later, we can verify that interpretations of the Agreement have been presented that deviate from its letter and spirit, distorting before public opinion the true meaning and scope of the negotiating parties when adopting it and proceeding to open it for signature. of the 33 LAC States.

These reluctances illustrate the position of some sectors that see their interests threatened, and prove the need for the Escazú Agreement to enter into force and to advance decisively in the fulfillment of its purposes. If the treaty were innocuous or useless in effect, the work done for years would be in vain. The protection of the environment and human rights that it seeks for present and future generations justifies its existence.

In short, the celebration of the first international environmental treaty in LAC has taken place in a complex international context that, in some way, has also influenced the attitude of its States during the different stages of its celebration. However, in a post-Trump scenario, with a predictable gradual return to multilateralism by the superpower - which will have effects in various countries and could influence the Escazú Agreement - a change in position can be expected from those who have not wanted to sign it. or ratify. Changes in government or internal pressures could naturally or necessarily lead more States to sign and/or ratify this treaty, which already has the necessary ratifications to enter into force.

On the road to the Escazú Agreement, it is possible to notice precedents and triggers, both of a regulatory and political nature, of interest not only to know the history of this instrument, but also to keep them in mind in the current arguments regarding its prompt entry into vigor.

The main international reference regarding the rights of access to information, public participation and justice in environmental matters dates back to the United Nations Conference on Environment and Development (Brazil, 1992), known as the Summit of the Earth, which opened the signing of agreements as fundamental as the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, in addition to defining 27 principles on the matter, among which Principle 10 stands out.

At the same time, from this Conference it is also necessary to highlight Program 21, whose chapters 23 to 40 address issues related to information and public participation in decision-making. In any case, it is necessary to specify that, although access rights are enshrined in the environmental field at the Earth Summit, these are already included previously as civil and political rights in numerous instruments within the framework of the international rights system. humans. In this sense, articles 19 and 21 of the Universal Declaration of Human Rights of 1948 (UN, 1948) stand out, as well as articles 2, 14, 19 and 25 of the International Covenant on Civil and Political Rights of 1966. At the inter-American level, the American Declaration of the Rights and Duties of Man of 1948 (Article XX), Articles 13 and 23 of the American Convention on Human Rights of 1969, and the Articles 4 and 6 of the Inter-American Democratic Charter of 2001.

After the adoption of Principle 10, notable advances were made, not only at the national level, but also at the multilateral level, which testified to a growing interest of countries in incorporating access rights into their regulations. Thus, they are present in numerous multilateral environmental agreements such as the Montreal Protocol (1987), the United Nations Convention to Combat Desertification (1994), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), the Basel Convention (1989) and the Ramsar Convention (1971).

Similarly, trade agreements include environmental provisions such as the Caribbean Economic Association Agreement and the EU (CARIFORUM-CE, 2008), and the Free Trade Agreement between Chile and Canada of 1997. Likewise, access rights have has been the object of constant attention in forums and programs, and highlights the development of instruments such as the Inter-American Strategy for the promotion of public participation in decision-making on sustainable development, the Inter-American Model Law on access to public information , the United Nations Environment Program (UNEP) Guidelines for the

Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines, 2010). In particular, the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention), adopted in 1998 under the auspices of the United Nations Economic Commission, stands out. Nations for Europe (UNECE). Entering into force in 2001, along with its subsequent Pollutant Release and Transfer Register Protocol, it is the only binding agreement to date (November 2020) on environmental democracy.

More than 20 years after the Earth Summit, Decision 64/236 of the United Nations General Assembly convened the Rio+20 Conference on Sustainable Development (Brazil, 2012) to address two main issues: the green economy in the context of sustainable development and poverty eradication and the institutional framework for sustainable development. Its result was the document The Future We Want, which contains measures for the implementation of sustainable development as well as more than 700 voluntary commitments and the creation of new alliances for its promotion. This document once again addressed the environmental decision-making process, making Principle 10 more robust (which would promote the negotiation of the Escazú Agreement), and convincingly stated that "democracy, good governance and the rule of law are essential for the sustainable development, including sustained and inclusive economic growth, social development, environmental protection, and the eradication of poverty and hunger" and that "broad public participation and access to information and judicial and administrative procedures." Furthermore, the Conference encouraged action not only at the local, subnational and national levels but also at the regional level (OLIVER, 1983).

The Escazú Agreement has its origin precisely in Rio+20, the product of a proposal by Chile that materialized in the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean (OLIVER, 1990). Chile received the support of The Access Initiative, a global network of civil society organizations dedicated to improving citizen access to decision-making on environmental matters, and also had the important support of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). ECLAC has accompanied the reform processes of access to information, participation and justice in LAC in recent decades through training sessions for governments and civil society actors (DEWSBURY, 2004).

In addition to evaluating the advances regarding Principle 10, Chile weighed up the critical socio-environmental situation and its greater impact on those who are in a situation of vulnerability. Added to the foregoing were the growing demands of citizens, experts and environmental movements, advocating for the improvement of environmental management. It should be noted that Chile's entry into the Organization for Economic Cooperation and Development (OECD) in 2010 meant the strengthening of its political availability and technical capacity. Under this impulse, he proposed at the Rio+20 Conference, and within the Community of Latin American and Caribbean States (CELAC), that there be a regional instrument on environmental democracy.

As a basic argument, Chile proposed that a rights-based approach should be applied since the mere normative consecration was insufficient. This had been recognized at the Regional Preparatory Meeting for Latin America and the Caribbean for the United Nations Conference on Sustainable Development (2011), in whose conclusions it was pointed out that it was necessary to reach commitments for the full implementation of the rights enshrined in the Principle 10 of the Rio Declaration. Likewise, Chile firmly argued that a State policy was required that was not subject to political fluctuations or a lack of prioritization of the environmental dimension. Given this, an international instrument was postulated as a stability tool that is particularly beneficial for States, under a collaborative approach and the creation and strengthening of capacities.

Rio+20 thus concluded with the willingness of Chile, Costa Rica, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, the Dominican Republic and Uruguay to start a process to explore the feasibility of having a regional instrument. In addition, ECLAC was designated as the Technical Secretariat and it was established that the process would have the significant participation of all interested citizens. As a way of ensuring the solidity of the political moment, the countries committed to developing and implementing a 2012-2014 action plan.

The conduct of the first stage of implementation of the agreement was established by a board of directors made up of Chile —the country that held the presidency—, Mexico —which held the vice presidency— and the Dominican Republic, which fulfilled the role of rapporteur. In addition, in April 2013 two working groups were established. The first, on capacity building and cooperation, was led by Colombia and Jamaica; the second, on access rights and a regional instrument, was led by Brazil and Costa Rica.

By virtue of the Santiago Decision, the countries managed to advance towards the negotiation stage with practically double the number of States that had started the process at Rio+20. Indeed, the 10 original signatory countries had been joined, as of November 2014, by Argentina, Bolivia (Plurinational State of), Brazil, Colombia, El Salvador, Guatemala, Honduras, Saint Vincent and the Grenadines, and Trinidad and Tobago. It should be noted that when the presidency presented the draft decision, it stressed that it had a fundamentally political nature, since it initiated the negotiation of the instrument and contained the distinctive signs of the process: the opening to all the countries of the region, the participation of the public, capacity building and the search for effectiveness.

In line with this spirit, a Negotiation Committee was created that replaced the meetings of the focal points and the two working groups. In addition, a new board of directors was formed, made up of Chile and Costa Rica as co-chairs, and Argentina, Mexico, Peru, Saint Vincent and the Grenadines, and Trinidad and Tobago. The committee came to be made up of 24 countries with the addition of Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, and Saint Lucia.

The Escazú Agreement process is also valued for its novel modalities of public participation that contributed to endow the adopted text with legitimacy and transparency. In the agreed rules, contributions from the public were key and widely welcomed. In the first place, an extensive definition of the public was chosen, conceptualizing it as any natural or legal person or organized in community forms. Different levels of participation were also distinguished (face-to-face, informative and participatory). In the meetings held, the floor was granted in the order requested by the participants, regardless of their role (for example, government delegate, representative of an international organization, or a person from the private, academic, or NGO sector). This favored dialogue and constant accountability. Finally, all the negotiation rounds were broadcast live and direct.

In the Santiago Decision, the governments established the possibility for the public to elect two representatives so that they could maintain a continuous dialogue with the board of directors. In this regard, ECLAC supported the election of two regular representatives and four alternates in March 2015 through the regional public mechanism. This mechanism, still in operation, has as its main objectives to keep interested parties informed of the Escazú Agreement and allow their connection, coordinate public participation in international meetings

and contribute to transparency. It also serves as a complement to participation actions at the national level (MILLER, 2019). Finally, in addition to government representatives, the public and the Technical Secretariat, the process benefited from the contributions of specialists and other international organizations. These include UNEP, the United Nations Development Program (UNDP), UNECE, the Office of the United Nations High Commissioner for Human Rights (OHCHR), UNESCO, the Organization of American States (OAS), the Organization of Eastern Caribbean States (OECS), the IDB, the Amazon Cooperation Treaty Organization (ACTO), the Central American Commission for Environment and Development (CCAD), and the United Nations Office of Legal Affairs.

2. MEANING AND SCOPE OF THE MAIN ELEMENTS OF THE ESCAZÚ AGREEMENT

The preliminary document that the Negotiating Committee addressed to begin its discussions was prepared by ECLAC at the request of the countries. Their proposals to said document were incorporated by the board of directors in a compiled text whose advances, after each round, gave rise to different versions: the eighth corresponds to the adopted text. It should be noted that, at the proposal of the Board of Directors, and following the usual practice in the negotiation of multilateral agreements, the committee established a technical review legal group open to all delegations and the public, assisted by the Technical Secretariat and international advisors on the matter (QUINN, DEGENER, 2002). On the other hand, although the treaty was pending until the last round, the committee decided to negotiate from the beginning as if it were binding, considering that only this type of instrument would be capable of adapting to the alternative that would finally be chosen.

In addition to access rights, it should be noted that the approach to creating and strengthening capacities and cooperation are part of the objective, as elements that were present as goals from the beginning of the process. In addition, the objective includes what was announced in the preamble, to the extent that access rights contribute to the strengthening, among other dimensions, of democracy, sustainable development and human rights.

The treaty, after the articles referring to Definitions (article 2), establishes its principles in article 3. The Negotiation Committee specified during its discussions that these would fulfill a triple function of application, interpretation and inspiration.

Articles 5 and 6 are devoted to information under the headings of access to environmental information, and generation and dissemination of environmental information. The so-called passive transparency is then addressed, that is, the one referring to the obligation of public authorities, defined in article 2.b, to respond to requests for information, through accessibility of environmental information, denial of access, applicable conditions for delivery and independent review mechanisms. In turn, active transparency, as an obligation to provide certain information ex officio, is present in instruments such as updated environmental information systems, records of emissions and transfers of pollutants, early warning systems, national reports on the state of the environment environment and independent evaluations of environmental performance.

For its part, access to public participation in environmental decision-making processes appears in article 7, which begins with the commitment of each party to implement open and inclusive participation based on their internal and international regulatory frameworks. international. Under this premise, each party will guarantee mechanisms for public participation in the decision-making processes, reviews, re-examinations or updates related to projects and activities (article 7.2), and will promote participation in environmental matters of public interest, such as the ordering of the territory and the elaboration of policies, strategies, plans, programs, norms and regulations (article 7.3). For both cases it is required that the projects, activities or issues have or may have a significant impact on the environment. Likewise, the Agreement also promotes public participation in instances on international affairs, whether in international environmental or environmental incidence forums and negotiations, or in national instances regarding issues of international environmental forums (Article 7.12). Lastly, public participation in national consultation spaces is also promoted (article 7.13).

Among other tasks, the regulation of public participation entails ensuring that it occurs in the initial stages; provide adequate information, have reasonable deadlines; establish favorable conditions so that participation is adapted to the social, economic, cultural, geographic and gender characteristics of the public, and make efforts to identify the public directly affected by projects and activities. It should be noted that each party will guarantee

respect for its national legislation and its international obligations regarding the rights of indigenous peoples and local communities, a commitment in which Convention 169 of the International Labor Organization (ILO) stands out, whose majority of ratifications comes from Latin America (DEGENER, 2017).

For its part, access to justice in environmental matters is contemplated in article 8, which begins by highlighting the guarantees of due process (article 8.1) and establishing that each party will ensure, within the framework of its national legislation, access to judicial and administrative instances to challenge and appeal, in terms of substance and procedure, certain actions, omissions and decisions (article 8.2). Among other matters, and considering the circumstances of each country, there must also be competent state bodies with access to specialized knowledge in environmental matters; measures to facilitate the production of proof of environmental damage, when appropriate and applicable; as well as timely execution and compliance mechanisms of judicial and administrative decisions as reparation mechanisms. Likewise, alternative dispute resolution mechanisms such as mediation and conciliation should be promoted.

A fourth pillar refers to the capacities necessary to implement and comply with the standards of the instrument. The Escazú Agreement contemplates the commitment of the parties to create and strengthen their national capacities based on priorities and needs (article 10.1). To this end, it exemplifies some of the measures that can be adopted, such as training authorities and public officials in access rights in environmental matters; develop and strengthen awareness and capacity building programs in environmental law and access rights; provide the competent institutions and organizations with adequate equipment and resources; promote education, training and awareness on environmental issues, through the inclusion of basic educational modules on access rights for students at all educational levels; have specific measures for people or groups in a situation of vulnerability, such as interpretation or translation in languages other than the official one, when necessary, and recognize the importance of associations, organizations or groups that contribute to training or raising public awareness on rights of access.

For its part, article 11 provides that the parties will cooperate to strengthen their national capacities in order to implement said international instrument effectively (numeral 1), paying special consideration to the least developed countries, landlocked developing countries and the

small island developing States in LAC (numeral 2). Along these lines, a virtual information exchange center with universal access on access rights is established, operated by ECLAC in its capacity as Secretariat, and may include legislative, administrative and policy measures, codes of conduct and good practices, among others (article 12). It should be noted that this approach is reinforced in the absence of punitive and sanctioning mechanisms.

In the Agreement, the focus placed on people and groups in vulnerable situations is transversal, and highlights the support and recognition for the work of people, associations, organizations or groups that promote the protection of the environment and defend it. Furthermore, the Escazú Agreement is the only treaty in the world that contemplates specific provisions in relation to human rights defenders in environmental matters. Specifically, article 9, entitled "Human rights defenders in environmental matters", establishes that a safe and conducive environment will be guaranteed; Adequate and effective measures will be taken to recognize, protect and promote their rights, and to prevent, investigate and punish attacks, threats and intimidation.

Articles 13 to 25 were under special order of the co-chairs. They made a proposal on this part that was finally agreed upon in the ninth round of negotiations. In this regard, the following support tools linked to implementation stand out, in addition to the already indicated mechanisms regarding cooperation. First of all, as is traditional in a multilateral agreement, the body that will examine and promote the application and effectiveness of the Agreement will be the Conference of the Parties (COP), which will hold, as it decides, ordinary meetings at regular intervals, and extraordinary meetings when necessary. deems necessary (article 15). It should be noted that, within its procedural rules, those relating to significant public participation will be included. For its part, the Secretariat is located in ECLAC, whose functions are specified in article 17. Finally, article 18 establishes a Support Committee for Application and Compliance as a subsidiary body of the COP, of a consultative, transparent nature , not contentious, not judicial and not punitive.

Considering that ECLAC operates as the Secretariat of the Agreement, we emphasize that this Commission recognizes that there are various definitions of what good governance is, but emphasizes that they are all based on the fact that decisions are adopted and implemented through clear processes, and that effective and consistent policies are achieved. It also stresses

that, in this context, good governance lies in proposing an integrated political-social model and in ensuring that the established norms are complied with by all the actors.

Regarding the notion of sustainable development, although it was already mentioned at the Conference on the Human Environment held in Stockholm in 1972, it is recurrent to cite the report Our Common Future (1987), from the World Commission on Environment and Development created by the United Nations in 1983. It states that the environment is sustainable when it meets the needs of the present without compromising the ability of future generations to meet their own needs. In turn, the concept of sustainable development is presented as an aspiration that makes it possible to reconcile and balance economic, social and environmental objectives.

The instrument agreed at the United Nations General Assembly in 2015, called Transforming our world: the 2030 Agenda for Sustainable Development, is of particular relevance on the international agenda. It is a document prepared through interaction and consultation between various actors that provides a roadmap for States, organizations, companies and civil society to implement a renewed commitment to achieving the three dimensions of sustainable development: economic , social and environmental. It is then considered as a universal transit, in favor of people, the planet, peace, prosperity and partnerships. In this sense, it proposes the participation of States, civil society, academia and the private sector to achieve its 17 Sustainable Development Goals (SDGs) and 169 targets. It is worth highlighting the synergy of the Escazú Agreement with SDG 16, related to promoting peaceful and inclusive societies for sustainable development, facilitating access to justice for all and building, at all levels, effective and inclusive institutions that are accountable. However, an interpretation consistent with the entirety of the 2030 Agenda shows that the Escazú Agreement contributes transversally to it and to the goals of other SDGs, such as those aimed at making cities and human settlements inclusive, safe, resilient and (SDG 11), and to guarantee the availability and sustainable management of water and sanitation for all (SDG 6). By the way, the motto of leaving no one behind, with which the 2030 Agenda has been known, is closely consistent with the highlighted focus on people and groups in vulnerable situations contemplated in the Escazú Agreement.

In the same way, reports and resolutions of the United Nations Human Rights Council have addressed issues of the Escazú Agreement, such as the relationship between human rights

and the environment, or the relevance of environmental defenders, among others. In particular, the United Nations Special Rapporteur on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment (BOWEN, 2009).

Consequently, it has argued that all human rights are vulnerable to environmental degradation, in the sense that the full enjoyment of all human rights depends on an enabling environment. In addition, he has relieved the procedural obligations that the human rights system imposes on States with regard to the protection of the environment. These include duties that are grounded in civil and political rights, but have been clarified and expanded in the environmental context on the basis of all human rights that are endangered by environmental damage (Knox, 2013).

Within the framework of the OAS, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1988) also stands out, whose article 11, entitled Right to a healthy environment, states that : 1. Every person has the right to live in a healthy environment and to have basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment. In addition, said provision is preceded by the recognition in the Preamble of the close relationship that exists between economic, social and cultural rights, and civil and political rights.

For its part, the advisory function of the Inter-American Court of Human Rights (IACHR) stands out, especially Advisory Opinion OC-23/17 of November 15, 2017 requested by Colombia, referring to the environment and human rights which, by the way, welcomed the negotiation process that would culminate in the treaty examined and of which the following elements should be highlighted: the IACHR refers in detail to the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, insofar as environmental degradation affects the effective enjoyment of all human rights. Likewise, it highlights the relationship of interdependence and indivisibility that exists between human rights, the environment and sustainable development, since the full enjoyment of all human rights depends on a favorable environment. Likewise, the Court indicates that, along with the Protocol of San Salvador, the right to a healthy environment must be included among the economic, social, and cultural rights protected by Article 26 of the American Convention.

Finally, the Vienna Declaration and Program of Action of 1993 affirms that all human rights are universal, indivisible and interdependent and are interrelated (KAYESS, FRENCH, 2008), which is recognized in the Escazú Agreement, particularly in relation to the human right to the environment. sound and access rights.

3. CURRENT STATUS OF THE PROCESS AND NEXT STEPS

It is important to clarify the procedure for the conclusion of the treaty, the stages carried out and the scope of each of them. In the debate of some States, there has been confusion regarding the concepts and nature of the Escazú Agreement for the purposes of its application. These conceptual errors, due to ignorance or bad faith, have caused confusion both in public opinion and in parliamentarians, and even in political authorities. Proof of this is what was stated both by the Minister of Foreign Affairs of Chile, Andrés Allamand, and by the legal director of the same ministry, in the session of the Senate Environment Commission, in September 2020, held to hear the arguments of the Chilean government regarding its refusal to sign the Agreement despite having been its promoter, and having negotiated and adopted it (TRAUSTADÓTTIR, 2009).

The Escazú Agreement is a treaty that the doctrine qualifies as formal. It is submitted to all the formalities of celebration regulated by the Vienna Convention on the Law of United Nations Treaties of 1969, that is, negotiation and adoption of the text, authentication (usually through signature), ratification (or other manner that is agreed according to the internal legislation of the States), exchange, deposit or notification of ratification and deposit, registration and publication of the treaty.

It should be clarified that the signature is the procedure by which the negotiating States establish the text of the treaty, declare it authentic, faithful to the agreement previously reached at the end of the negotiation and which, in principle, remains unalterable (unless agreed by all the parties, which would give rise to a new negotiation, a new adoption, and a new authentication or signature). Through the signing of this kind of formal treaties, the States are not yet bound by the terms thereof. The ratification, acceptance, approval or accession, on the other hand, is the expression of the consent to be bound by the treaty which, in the case of the

Escazú Agreement, is made known to the other States parties through the deposit in the hands of the Depositary.

3.1 Assignments

As indicated, Article 21 of the Escazú Agreement establishes the norms that regulate the signing of the international instrument. In this way, the text established a period of two years, from September 27, 2018 to September 26, 2020, to receive the signatures of those LAC States mentioned in Annex 1 of the instrument.

Within the period contemplated, 24 States signed this international instrument: Antigua and Barbuda, Argentina, Brazil, Costa Rica, Ecuador, Guatemala, Guyana, Haiti, Mexico, Panama, Peru, the Dominican Republic, Saint Lucia and Uruguay signed it on the first business day (September 27, 2018). Subsequently, Paraguay (September 28, 2018), Bolivia (November 2, 2018), Saint Vincent and the Grenadines (July 12, 2019), Grenada, Jamaica, Saint Kitts and Nevis (all three on September 26, 2018). 2019), Nicaragua (September 27, 2019), Colombia (December 11, 2019), Belize (September 24, 2020) and Dominica (September 26, 2020).

However, those States included in Annex 1 that have not signed the international instrument within the period contemplated and that wish to be bound by it, may adhere to the Agreement as stated in Article 21. Thus, Chile, Venezuela, Bahamas, Barbados, Cuba, El Salvador, Honduras, Suriname, and Trinidad and Tobago may still contract the obligations contemplated in the Agreement; for this they must formulate a declaration in accordance with the clause that allows adhesion and deposit it with the Depositary.

3.2 Ratifications

The form of internal approval, which is then used to ratify the Agreement - as an expression of consent by a State to be bound by a treaty -, is regulated by domestic law, mainly by the constitutional norms of each country. Article 21 of the Agreement establishes the need for the States parties to ratify it, noting that this Agreement will be subject to the ratification, acceptance or approval of the States that have signed it. In turn, it indicates that the instruments of ratification, acceptance or approval must be deposited with the Depositary who, in

accordance with article 25, is the Secretary General of the United Nations. With this, the will of a State to be bound is made known to the rest of the parties.

There have been 11 ratifications by States that have signed the Agreement, and nine of these have been deposited. This is the situation of Antigua and Barbuda (it did so on March 4, 2020), Bolivia (Plurinational State of) (on September 26, 2019), Ecuador (on May 21, 2020), Guyana (on April 18, 2020), Nicaragua (on March 9, 2020), Panama (on March 10, 2020), Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Uruguay (all three on September 26, 2019). Two countries are awaiting the deposit: Argentina (which approved the ratification in its Congress on September 25, 2020) and Mexico (the Senate approved the Agreement on November 6, 2020).

In addition, ratifications include a requirement for the treaty to enter into international force. Article 22 states that this Agreement shall enter into force on the ninetieth day from the date on which the eleventh instrument of ratification, acceptance, approval or accession was deposited. In this way, the Agreement will enter into full force counted 90 days from the deposit of the eleventh instrument, so it is enough for the governments of Argentina and Mexico to carry it out. This 90-day period also applies to those ratifications or accessions that are carried out after.

After the adoption of the Agreement, the signatory countries have continued to work with the significant participation of the public, since, as stipulated in the Final Act of the Negotiating Committee, the modalities of participation apply mutatis mutandis until the first COP. Thus, the first meeting of the signatory countries took place on October 11 and 12 in Costa Rica, with the participation of representatives from 19 countries (Antigua and Barbuda, Argentina, Bolivia, Costa Rica, Ecuador, Grenada, Guatemala, Guyana, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, and Uruguay). Likewise, Cuba and Colombia participated as observers and international organizations and experts accompanied the meeting.

The countries focused on analyzing the following issues that will form part of the agenda of the first COP: the rules of procedure, including the modalities for meaningful public participation (article 15.4.a); the financial provisions necessary for the operation and implementation of the Agreement (articles 14 and 15.4.b), and the rules of composition and operation of the Support Committee for Application and Compliance (article 18.1). In said

meeting, strategies and alliances for a prompt entry into force and implementation of the Agreement were also discussed. As a contribution to this discussion, ECLAC coordinated a survey on challenges and priorities completed by the countries during the regional workshop held in April 2019. As a result, it was observed that the challenges and priorities were mainly aimed at cross-cutting aspects such as environmental education, the preparation of national work plans for the implementation of the agreement, the strengthening of institutions, cooperation alliances, support for people and groups in vulnerable situations, and the need to advance in the signing and ratification processes. After these aspects, access to justice, access to information and human rights defenders in environmental matters stood out. Additionally, the survey highlighted, among other points, cooperation opportunities, exchange of experiences, technical assistance and support from regional organizations, donors and development banks (KAYESS, FRENCH, 2008).

4. DEBATES AND POLITICAL APPROACHES AROUND THE ESCAZÚ AGREEMENT IN LATIN AMERICAN COUNTRIES

LAC has been involved in an ideological transition since 2018. If at the end of that year a large part of the national governments were made up of cabinets oriented to the progressive sector —consolidated during the past decade—, currently, with some exceptions, there has been a shift towards more conservative trends. In this sense, countries like Chile, Brazil and Uruguay —which had sustained long legacies of governments close to the left such as those of Dilma Rousseff in Brazil, Michelle Bachelet in Chile or Tabaré Vázquez in Uruguay— have gone on to have governments in five years that are more conservatives, under the figures of Jair Bolsonaro, Sebastián Piñera or Lacalle Pou, respectively. The exceptions to this political change are reduced only to Mexico and Argentina, which have once again turned to more progressive sectors with the elections of Andrés Manuel López Obrador, Alberto Fernández, Gustavo Petro and, Luis Inácio Lula da Sila.

No obstante, si bien existe un profundo cambio político en el ámbito latinoamericano, este no se ha plasmado de manera uniforme y coordinada en la política exterior. Por el contrario, las elecciones del presidente del BID o la salida de Estados miembros de la Unión de Naciones Suramericanas (UNASUR) son ejemplos de una descoordinación, fragmentación y

desarticulación de la respuesta de los actores en la región, que apuestan más por una política exterior que vele por los intereses propios.

In this sense, since the adoption of the Escazú text, there are no considerable factors that allow us to understand an external logic articulated to explain the signing or non-signing (or ratification, as the case may be) of the Agreement. Rather, the political decision of each State corresponds to decisions regarding internal affairs, far from any bloc strategy or related to political color. Such is the case of Chile: despite being the main promoter and one of the main negotiators of the Agreement; of having a key role in international and environmental matters, presiding over COP25, and of calling on the rest of the Latin American and Caribbean community to sign the Agreement, has come to delay its signing after the arrival of Sebastián Piñera to the presidency, arguing with arguments hesitant to affect their national interests. The same has happened in Brazil, a country in which —after the signing of the treaty under the presidency of Michel Temer— the rise of Jair Bolsonaro, and his sovereignist and climate change denialist agenda, has interrupted the possibilities of its ratification. However, the opposite occurs with Uruguay or Colombia, where their respective governments, after holding elections and shifting to the right, have taken the initiative to adopt the text and move towards its ratification. And even countries like Argentina, Ecuador and Mexico have signed and ratified the Agreement despite the strong changes in their political orientation.

It must be taken into account that there are particularities in the ratification processes in LAC countries, which in some cases even require the pronouncement of a Constitutional Court or Tribunal. Also considering the political context outlined, it is possible to distinguish four stages: a) countries that have not signed the Agreement and/or have stated that it is inconvenient; b) countries that have signed the Agreement, but whose ratification is not yet pending in their congresses; c) countries that are discussing the Agreement in their congresses, and d) countries that have ratified the Agreement and are party to it.

4.1 Countries that have not signed the Agreement and/or have stated that it is inconveniente

These countries are reduced to Cuba, Chile, El Salvador, Honduras and Venezuela; for its part, Peru is the only subscriber whose Congress has rejected the Agreement. It should be

noted that both Cuba and Venezuela were not part of the Negotiation Committee, notwithstanding that Cuba attended the first meeting of signatory countries, which took place in 2019, as an observer. In contrast, Chile, the proponent country of this regional instrument; Peru, which was part of the process from Rio+20 and the board of directors; Honduras, which joined the process for the second meeting of focal points, and El Salvador, the country that participated in the last meeting of said group, have not shown willingness to fully join the Agreement.

Apart from these countries, most of the world's attention was focused, understandably, on the surprising absence of Chile at the opening of the firm, and on its erratic position, which culminated —a few days after the closing of the subscription period— in its decision to withdraw from the agreement. Through a report, without signatures, numbering, date or initials of responsibility, the Executive indicated that the Escazú Agreement was not convenient for the interests of the country. It should be noted that Chile went through totally opposite positions. First of all, consistent with his role as co-chairman in directing the process until the first COP and by virtue of the mandate conferred by the countries at the conclusion of the negotiation, it made a joint declaration with Costa Rica, inviting the 33 governments of the region to sign this important treaty and contribute through its implementation to a more comprehensive protection of the environment and the strengthening of Human Rights. Likewise, they reiterate that the Escazú Agreement inaugurates, from the particularities of Latin America and the Caribbean, a new standard for the construction of environmental democracy.

Despite this express declaration and commitment, surprisingly, days after the opening of the signing of the Escazú Agreement, Chile withdrew from the ceremony. This was interpreted as a political gesture in the face of the imminent ruling of the International Court of Justice, for the dispute with Bolivia, misinterpreting the dispute settlement clause of the Escazú Agreement and its mention of this International Court. Almost two years after the aforementioned ceremony in New York, the Chilean government has stated that it is still "studying" the treaty (the same one that the country negotiated and adopted), later slipping that it would not be a priority. Finally, in September 2020, just a few days after the closing of the signing period, the government announced that it would not sign it because it considered that it was not convenient for the interests of the country.

For its part, in Peru, the Executive Branch sent the respective draft legislative resolution to the National Congress in August 2019, stressing that the treaty is convenient to the interests of the country, among other aspects, due to what was indicated by the environmental portfolio regarding to the strengthening of the mandate for the implementation of the three access rights, which, although they are included in the national legislation and binding international regulations for Peru, find elements in the Agreement that strengthen their implementation and application.

For said report, the technical opinion of the Ombudsman's Office, the Public Prosecutor's Office, the Ministry of Economy and Finance, the Ministry of Agriculture and Irrigation, the Ministry of the Environment, the Ministry of Energy and Mines was taken into account. , the Ministry of Culture, the Ministry of Justice and Human Rights, the Ministry of Health, the Ministry of Transport and Communications, the Ministry of Production, and the Presidency of the Council of Ministers, in addition to the Environment Directorate and the Directorate of Human Rights as competent dependencies of the Chancellery.

That same month of August 2019, the management was referred to the Foreign Relations Commission, which, highlighting the little knowledge of the incumbents, held 13 sessions where almost 50 guests participated. Present were academics, ministers, former ministers, regional governors, mayors, representatives of professional associations, ambassadors, members of the armed forces, representatives of native communities and indigenous communities, representatives of chambers of commerce, members of youth associations, NGO representatives, unions and representatives of the general public. On October 20, an opinion was presented to the Commission to reject the ratification, most of which included the interventions and appealed to reasons such as the affectation of sovereignty and the violation of equality before the law by Article 9 of the Escazú Agreement. The opinion was approved by nine votes and rejected by three, so the bill was shelved. The congressmen of the minority vote presented a dissident report as a symbolic act, hoping that it would be useful for the next legislature.

4.2 Countries that have signed the Agreement, but it is not under discussion in their congresses

In this group are Brazil, Guatemala and the Dominican Republic, countries that signed the Agreement on the first day of its opening for signature, but whose analysis is still at the headquarters of the Executive.

In addition, the case of Paraguay stands out, a country that was also among the first signatories, and where the Agreement entered Congress in June 2019. In his official letter, he alluded, among other points, to the fact that the content and spirit of the Agreement was in consistent with the Paraguayan internal legal system. However, the government proceeded to withdraw it in December 2019, invoking the constitutional provision of article 212, which empowers the Executive to withdraw from Congress the bills it had sent, or to withdraw from them, unless they were approved by the Chamber. originally. Although the reasons for the withdrawal were not made explicit, except for the quote from the aforementioned article, local media have indicated that it was due to the questioning of certain business groups but, above all, to the statements of the Archbishop of the Catholic Church, regarding to the fact that the Agreement would be a threat that comes from the UN, which intends to reach an agreement on all the agreements, and impose previous resolutions concerning abortion, gender ideology or euthanasia. It should be noted that the project had received an approval opinion a few months before from the Energy, Natural Resources, Population, Environment, Production and Sustainable Development Commissions, and from the Legislation, Codification, Justice and Labor Commissions of the Chamber of Senators.

4.3 Countries processing the Agreement in their congresses

These are Costa Rica and Colombia. The first country signed the Agreement on September 27, 2018, while Colombia did so on November 11, 2019. In February 2019, Costa Rica formally began the process of file 21,245 in the Legislative Assembly, which begins by stating that:

> Costa Rica ha mantenido una reconocida tradición de respeto y garantía de los derechos humanos y destaca que Costa Rica no solo ha sido pionera en la construcción del derecho ambiental, incorporando en su Constitución Política el artículo 50 que dispone el derecho a un ambiente sano y ecológicamente equilibrado. También ha sido iniciadora de la aplicación de diversos instrumentos para la salvaguarda de este derecho (Asamblea Legislativa de la República de Costa Rica, 2019).

After obtaining its approval in the first debate, in February 2020, the file was sent for mandatory consultation to the constitutional judge. The Constitutional Court, in a majority vote, declared the existence of a procedural defect, due to the lack of consultation of the bill with the Supreme Court of Justice, by detaching the imposition of obligations for the Judiciary to provide free technical assistance. As a consequence, the Agreement must take the process back to the first debate.

Colombia signed the Escazú Agreement in the framework of the Great National Conversation opened with regard to claims and protests in that country, which included environmental issues. The text urgently reached Congress on July 20, 2020.

4.4 States party to the Escazú Agreement

To date, the following countries have ratified the Agreement: Bolivia, Ecuador, Uruguay, Nicaragua, Panama, Argentina and Mexico. In addition, these countries, with the exception of Bolivia, signed the Agreement as soon as it was available for said procedure, that is, on September 27, 2018. As indicated, as soon as Argentina and Mexico deposit their respective instruments of ratification —together to the deposits already made by Antigua and Barbuda, Guyana, Saint Vincent and the Grenadines, and Saint Kitts and Nevis—, the 11 ratifications required by the treaty will be available to enter into force within the period indicated by it.

Argentina ratified the Agreement through Law No. 27,566, published on October 19, 2020 (Congress of the Argentine Nation, 2020) and the deposit of the respective instrument at the United Nations headquarters is pending. It should be noted that it obtained unanimous approval in the Senate, while in the Chamber of Deputies, it obtained 240 positive votes, 4 negative and 2 abstentions.

Bolivia signed the Escazú Agreement on November 2, 2019 and ratified it through Law No. 1182 of June 3, 2019 (Asamblea Legislativa Plurinational de Bolivia, 2019). In addition, it has been a State party since September 26, 2019. Among the justifications that the Executive gave to approve it, it appears that it is the only binding treaty that emerged from Rio+20, as well as the first environmental agreement in LAC, and the first in the world, in containing specific provisions in favor of human rights defenders in environmental matters. For its part,

the report of the Legislative Assembly highlighted that, as it is an instrument that guarantees the full and effective implementation of access rights, it is consistent with constitutional mandates.

For its part, Ecuador approved the Agreement through Legislative Resolution No. II-2019-2021-005 of the plenary session of the National Assembly. The approval in Congress on February 5, 2019 was unanimous, with 92 votes in favor. The congressmen who took part in the debate highlighted, among other positive elements, the contribution of the treaty to the achievement of the SDGs of the 2030 Agenda, and that it would provide assurances to defenders of the environment. For its part, the Constitutional Court ruled that the treaty was in conformity and compatibility with the Constitution.

Uruguay ratified the Agreement through Law No. 19,773 of July 17, 2019. It stands out, therefore, its rapid processing, the result of joint work between the Ministries of Foreign Affairs and Housing, Territorial Planning and Environment. Uruguay has been a State party since September 26, 2019.

Nicaragua and Panama have been States Parties since March 9 and 10, 2020 respectively. In the case of Nicaragua, its ratification was verified by Decree of the National Assembly No. 8629, published on November 19, 2019. And Panama approved the Agreement through Law No. 125 of February 4, 2020. According to the Ministry of the Environment of this country, thanks to the Agreement there is a valuable tool that will allow said ministry to further expand citizen participation and create more direct access to information (Ministry of the Environment of Panama, 2020).

In Mexico, the legislative period began in September, and it was on November 4, 2020, when the United Committees on Foreign Relations, Latin America and the Caribbean, Foreign Relations, and the Environment, Natural Resources, and Climate Change of the Senate voted unanimously in favor of of the Escazú Agreement. The following day, the Mexican Senate unanimously voted in favor of the Agreement.

5. CONCLUSIONS

As noted, Principle 10 of the Rio Declaration on Environment and Development constitutes a benchmark that, in addition to driving countries, was established to assess proper

environmental governance. Like the Aarhus Agreement, in the process that led to the Escazú Agreement, these advances were valued, but their shortcomings were detected, for which reason it was decided to advance decisively through standards that would specify the aforementioned principle. With this, it was intended to respect and guarantee human rights and improve environmental decision-making and its application in order to achieve sustainable development.

Likewise, having an instrument at the regional level was considered key in the process of the Escazú Agreement, since this would allow the stability that environmental policies require, especially in times of climate crisis, while remaining a versatile agreement that the States may use according to their circumstances to achieve their objective. Likewise, the fact that said instrument has also acquired the binding nature facilitates the mobilization of resources for the creation and strengthening of capacities and cooperation.

In a context of crisis of multilateralism and under the effects of an unprecedented pandemic, the fact that the Escazú Agreement is soon to enter into force is an indisputable achievement. However, certain arguments that are difficult to rationally substantiate are striking, and therefore seem to obey ideological reasons and disinformation campaigns (ÁLVAREZ, MENEZES, 2022). Undoubtedly, the fact that Chile withdrew from the instrument that it proposed and promoted gave rise to unfounded suspicions and, at times, overrepresented in the media. Certainly, a prompt ratification by Costa Rica, a country that is honored in the name of the treaty, will be particularly relevant to dispel various myths and have at least one of the two co-chairs leading the Agreement that will soon enter into force and celebrate its first Conference of the Parties.

Notwithstanding those arguments that are considered wrong as stated in the last section of this document, it is understandable that an instrument that has been valued as pioneering, visionary and transformative is the subject of questioning and even opposition from certain groups.

It has been rightly pointed out that the Escazú Agreement is both an environmental instrument and a human rights treaty. Thanks to this double dimension, the commitments that States have assumed in favor of sustainable development —as well as those derived from international human rights law— are reinforced thanks to new standards that aspire to greater prosperity, dignity and sustainability. Undoubtedly, in the most unequal region in the world and

with the greatest attacks on human rights defenders in environmental matters, the Escazú Agreement enjoys even greater justification.

Obviously, the Escazú Agreement is not the "magic" and immediate solution to all environmental challenges, any more than any instrument by itself is. But it is a benchmark with the potential to catalyze profound transformations that explains the numerous debates and attention it has generated in the region and in the world.

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Sobre os(as) autores(as):

Daniel Francisco Nagao Menezes | *E-mail:* nagao.menezes@gmail.com
Graduação em Direito (PUC-Campinas), Especializações em Direito Constitucional e Direito Processual Civil (PUC-Campinas), em Didática e Prática Pedagógica no Ensino Superior (Centro Universitário Padre Anchieta), Mestre e Doutor em Direito Político e Econômico (Universidade Presbiteriana Mackenzie), Pós-Doutor em Direito (USP). Pós-Doutor em Economia (UNESP-Araraquara). Professor do Programa de Pós-Graduação em Direito Político e Econômico da Faculdade de Direito da Universidade Presbiteriana Mackenzie.

Juan Fernando Álvarez Rodríguez | *E-mail:* juanfernandoalvarez@gmail.com
Graduação em Economia (Universidad de los Andes - Venezuela), Especialista em Evaluación Social de Proyectos (Universidad de los Andes - Colômbia), Mestrado em Economia Social (Universitat de Barcelona), Doutor em Ciências Sociais (Universidade de Lisboa). Professor da Facultad de Estudios Ambientales y Rurales da Pontificia Universidad Javeriana.

Data de submissão: 28 de outubro de 2022.

Data do aceite: 27 de janeiro de 2023.